UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc.	)	Docket No. ER10-1791-000

REQUEST FOR REHEARING OF THE INDUSTRIAL CUSTOMERS

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[1] the American Forest & Paper Association ("AF&PA"); Coalition of Midwest Transmission Customers ("CMTC"); Electricity Consumers Resource Council ("ELCON"); Illinois Industrial Energy Consumers ("IIEC"); Minnesota Large Industrial Group ("MLIG"); and the Wisconsin Industrial Energy Group ("WIEG") (collectively "Industrial Customers") hereby file this Request for Rehearing of the Commission order issued December 16, 2010 ("December 16 Order"), in the above-referenced docket.[2]

I. PROCEDURAL HISTORY

On July 15, 2010, in accordance with the Commission's October 23, 2009 order,[3] the Midwest Independent Transmission System Operator, Inc. ("MISO") and Midwest ISO Transmission Owners (collectively, "Filing Parties") filed proposed revisions to the Midwest ISO Open Access Transmission, Energy and Operating Reserve Markets Tariff ("Tariff") ("July 15 Filing"). Filing Parties proposed to establish a new category of transmission projects, designated as Multi-Value Projects ("MVP"), that are determined to enable the reliable and economic delivery of energy in support of documented energy policy mandates or laws that address,

[1] 18 C.F.R. § 385.713 (2006).
[2] *See Midwest Indep. Trans. Sys. Operator, Inc.*, 131 FERC ¶ 61,228 (2010).
[3] *Midwest Indep. Transmission Sys. Operator, Inc*., 129 FERC ¶ 61,060, at P 68-70 (2009).

through the development of a robust transmission system, multiple reliability and/or economic issues affecting multiple transmission zones. In recognizing the regional orientation of such projects, Filing Parties propose that the costs of the MVPs be allocated to all load in, and exports from, Midwest ISO on a "postage-stamp" basis.

On September 10, 2010, Industrial Consumers and numerous other parties filed comments and/or protests to the Filing Parties' MVP proposal. In the Industrial Consumers' Protest, Industrial Customers demonstrated several deficiencies in the MVP proposal and cost allocation methodologies that warrant denial of MISO's requested relief. Industrial Customers argued, *inter alia*:

- The proposed MVP cost allocation methodology is based on overly broad notions of regional benefits and socialized costs;
- Filing Parties have not met their burden of demonstrating the justness and reasonableness of their proposal with sufficient evidence;
- Available evidence proves that the proposed regional cost sharing would result in situations in which cost responsibility was not aligned with either benefits or cost-causation;
- Filing Parties' proposal fundamentally departs from established transmission planning principles and would result in wasteful capital investment;
- Some states and utilities would subsidize remote wind resources without receiving any benefit from those resources; and
- A proposed usage-based charge for the allocation and recovery of costs has not been shown to be just and reasonable, departs from well-established Commission policy with no rational basis for the departure, and is unjust and unreasonable.

On December 16, 2010, the Commission issued an Order generally accepting Filing Parties' MVP proposal. In doing so, the Commission found that the MVP methodology will identify projects that provide regional benefits and allocate the costs of those projects accordingly. The Commission also found that the proposed MVP methodology is "an important step" in facilitating investment in new transmission that can integrate large amounts of generation resources and further important policy mandates and goals on a state and regional level.[4]

II. STATEMENT OF ISSUES/SPECIFICATION OF ERRORS

Industrial Customers respectfully submit that the December 16 Order errs in the following respects:

A. The December 16 Order Errs by Approving Regional Allocation of Transmission Costs in the Absence of Evidence of Regional Benefits to Be Provided by Each Portfolio of MVP Projects. *See Illinois Commerce Commission v. FERC*, 576 F.3d 470 (7th Cir. 2009).

B. The December 16 Order Errs by Relying on Ill-Defined Criteria to Ensure that Regional Allocation Is Based on Regional Benefits. *Id.*

C. The December 16 Order Errs by Relinquishing FERC's Authority And Responsibility To Ensure that Regional Allocation Of Costs Aligns With Regional Benefits. *See* 16 U.S.C. 824d; *Southwest Power Pool, Inc.*, 131 FERC ¶ 61,252 at P 66 (2010).

D. The December 16 Order Errs By Exceeding the Bounds of the Federal Power Act and Violating Principles of Federalism. *See* 16 U.S.C. § 824d; 16 U.S.C. § 824f; 16 U.S.C. § 824s.

E. The December 16 Order Errs by Unlawfully Departing From Established Commission Precedent To Authorize a Usage-Based Charge to Recover MVP Costs. *Preventing Undue Discrimination and Preference in Transmission Service*,Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)

[4] December 16 Order at 3.

III. REQUEST FOR REHEARING

A. The December 16 Order Errs by Approving Regional Allocation of Transmission Costs in the Absence of Evidence of Regional Benefits to Be Provided by Each Portfolio of MVP Projects.

Under established Commission precedent and as interpreted by the courts, in order to approve a regional cost allocation methodology, the Commission must be presented with sufficient evidence showing a connection between the project's proposed costs and the benefits to those parties paying for those projects.[5] It is the Commission's responsibility under Sections 205 and 206 of the Federal Power Act[6] to ensure that the rates, terms, and conditions for transmission of electricity in interstate commerce are just, reasonable, and not unduly discriminatory or preferential, and the Commission and the courts have found that the costs of jurisdictional transmission facilities must be allocated in a manner that satisfies the "cost causation" principle.[7] As articulated by the Seventh Circuit in the *ICC* decision,

> All approved rates must reflect to some degree the costs actually caused by the customer who must pay them. [] To the extent that a utility benefits from the costs of new facilities, it may be said to have "caused" a part of those costs to be incurred, as without the expectation of its contributions the facilities might not have been built, or might have been delayed.[8]

In addition, the Commission has stated that a "fair assessment of costs requires not only identification of entities to which costs should be allocated, but also consideration of those entities that benefit as a result of those costs."[9] Elaborating on the cost causation principle, the Court in *Illinois Commerce Commission* stated:

> FERC 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 trivial in relation to the costs sought to be shifted to its members....If it

[5] *See IllinoisCommerce Commission v. FERC*, 576 F.3d 470 (7th Cir. 2009).
[6] 16 U.S.C. § 824.
[7] *See Southwest Power Pool, Inc.*, 131 FERC ¶ 61,252 at P 66 (2010).
[8] *Illinois Commerce Commission*, 576 F.3d at 471.
[9] *Southwest Power Pool*, 131 FERC at P 70.

> cannot quantify the benefits to the Midwestern utilities from the new 500 kV lines in the East... but it has an articulable and plausible reason to believe that the benefits are at least roughly commensurate with those utilities' share of total electricity sales in PJM's region, then fine; the Commission can approve PJM's proposed pricing scheme on that basis.[10]

The December 16 Order errs by approving the Filing Parties' regional cost allocation method without sufficient evidence demonstrating that those who pay for the specific projects will benefit from them. Filing Parties' application makes this lack of evidence manifest by proposing to "package" projects into groups and simply claiming "widespread benefits" that would result from the packages. According to Filing Parties, projects designated as MVPs will "be reviewed *holistically* on a 'portfolio' basis, taking into account the synergistic effects of individual qualifying MVPs, and approving the set of MVPs that collectively comprise an optimized regional solution."[11] Filing Parties go on to explain that:

> MVPs are multi-faceted projects that collectively comprise an optimal regional solution…This package of projects is designed (and evaluated) to provide a regional solution that globally benefits all users of the Midwest ISO transmission system. It is illogical to isolate one facet of this packaged solution.[12]

Far from the principles set forth in statutes, Commission regulations, and the *ICC* decision, the December 16 Order erroneously accepted MISO's broad-based benefits approach, finding that the portfolio approach will help MISO to prioritize its transmission expansion projects "to ensure global benefits from the projects afforded regional cost sharing and maximize the number of system users who will share in those benefits."[13] In doing so, the Commission compared the Southwest Power Pool RTO to MISO, citing an earlier SPP order and stated:

> "[w]e recognize that every utility will have different transmission needs depending on its unique load profile and resource mix. However . . . we find that the SPP zones are similarly situated in the context of transmission planning and

[10] *Illinois Commerce Commission*, 576 F.3d at 471.
[11] Filing Parties' October 18, 2010 Answer at 15.
[12] *Id.*
[13] December 16 Order at P 221.

> cost allocation because all of the zones consist of RTO participants, users, and beneficiaries of the same regionally-integrated [extra-high voltage] transmission network. As such, they accrue certain benefits common across all SPP zones."[14]

The Commission further found that "the integrated nature of the system or the potential for upgrades in one area to improve the entire system"[15] justified approving MISO's proposal, citing the Seventh Circuit's 2009 cost allocation decision.[16] These findings do not satisfy the standards of the Federal Power Act that if the Commission cannot quantify the benefits to customers the from the MVP it provide an articulable and plausible reason to believe that the benefits are at least roughly commensurate with those utilities' share of total electricity sales in the MISO region. [17]

Even if broad pronouncements of generalized futuristic "benefits" somehow suffice under the law, the December 16 Order further errs because it does not rest on sufficient evidence. In fact, far from "sufficient" evidence, the Filing Parties' presented the Commission no evidence showing a tangible connection between the costs of the specific projects or portfolio of projects that are contemplated and the benefits to parties who would be tasked with paying for them. Equally concerning is that the December 16 Order approves Filing Parties' proposal even in the absence of any studies purporting to show a cost-benefit nexus. Nor is there a demonstration that individual pricing zones or load-serving entities will see net benefits.

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[14] Id. *citing Southwest Power Pool, Inc.*, 131 FERC ¶ 61,252 (2010) at P 82.
[15] *Id*. at P 222.
[16] *Id., citing Midwest ISO Transmission Owners*, 373 F.3d at 1371 (E]ven if they are not in some sense *using* the ISO, the MISO Owners still benefit from *having* an ISO. In this sense, [Midwest ISO] is somewhat like the federal court system. It costs a considerable amount to set up and maintain a court system, and these costs – the costs of *having* a court system – are borne by the taxpayers, even though the vast majority of them will have no contact with that system (will not *use* that system) in a given year. . . . The MISO Owners' position is tantamount to saying that if they are not a litigant, they should not be made to pay for any of the costs of *having* a court system. Since the MISO Owners do, in fact, draw benefits from being part of the [Midwest ISO] regional transmission system, [the Commission] correctly determined that they should share the cost of *having* an ISO).
[17] *Illinois Commerce Commission*, 576 F.3d at 471.

The "evidence" presented by MISO actually proves the opposite of what MISO is trying to prove and what the December 16 Order finds. Filing Parties' witness John Lawhorn provided testimony that shows that customers could incur more costs than benefits (i.e., net savings could be negative), and he provides no evidence that production cost savings, load cost savings, or reduced losses will be distributed region-wide.[18] The December 16 Order also erroneously relies on the testimony of MISO witness Jennifer Curran, in which the purported reliability benefits accruing from MVPs is merely asserted, but puzzlingly not accompanied by any analysis, studies, or other "hard" evidence. Such claims, when used as a basis to authorize regional allocation of transmission system upgrades and additions, must be supported by evidence.[19]

Moreover, the December 16 Order casually ignores the fact that the load data used by MISO in its five usage pattern scenarios is out of date and therefore unreliable. MISO assumes load growth will justify massive investment in MVP projects.[20] However, other analysis and data compiled by MISO (for other purposes) reveals that load growth is projected to be minimal or virtually nil for the foreseeable future. Specifically, a study commissioned by MISO shows that nearly all peak load growth by 2030 was estimated to be mitigated by demand response and energy efficiency improvements, yielding little or no net load growth for the foreseeable future.[21] Therefore, it is unreasonable to use MISO's load growth assumptions presented in this proceeding to identify what regions may be expected to receive benefits from such unnecessary projects.[22]

[18] Industrial Customers Comments at 13-16.
[19] December 16 Order at P 141.
[20] *See, e.g*, July 15 Filing, Testimony of Claire Moeller at 12-13
[21] Global Energy Partners, LLC, *Assessment of Demand Response and Energy Efficiency Potential for Midwest ISO*, *available at* http://www.midwestmarket.org/publish/Document/ff748_12aaa1280c5_-7fe50a48324a?rev=1).
[22] At a minimum, the Commission should have convened evidentiary hearings to set the record straight.

As a final matter, the December 16 Order errs generally by ignoring the basic and well-established "beneficiary pays" principle of cost sharing. The Filing Parties' proposal, in contrast, would tend to distort the economic incentives of participants by insulating the beneficiaries from the full costs of a given project. As a consequence, the MVP proposal accepted in the December 16 Order allows the broad socialization of costs and fails to align the allocation of costs with beneficiaries, thereby dramatically shifting costs to load that are currently allocated to interconnecting generation resources. MISO's studies simply do not show that this shift would result in broad, regional benefits. Based on all of these concerns, the Commission's December 16 Order errs and rehearing should be granted.

B. The December 16 Order Errs by, Arbitrarily and Capriciously, Relying on Ill-Defined Criteria to Ensure that Regional Allocation Is Based on Regional Benefits.

The December 16 Order also errs by relying on the Filing Parties' cost allocation methodologies, which themselves rely on ill-defined criteria in their attempt to satisfy the Commission's "beneficiary pays" model and the standards set forth in the *ICC* decision. Such a decision-making process will inevitably lead to wasteful capital investment and is contrary to the Commission's siting policies of Order No. 2003.[23] However, the December 16 Order approves Filing Parties' proposed methodologies, and in doing so, is arbitrary and capricious and warrants rehearing.

As the December 16 Order rightly states, in Order No. 890, the Commission adopted "Cost Allocation for New Projects" as one of the nine transmission planning principles.[24] While Order No. 890 does not impose a particular cost allocation method, it does set out an overall policy framework to permit public utility transmission providers, customers, and other

[23] *Standardization of Generator Interconnection Agreements and Procedures*, 104 FERC ¶61,103 (2003)("Order 2003").
[24] Order No. 890,1 at P 557.

stakeholders to determine methods appropriate for their particular regions that are consistent with the cost causation principle. Importantly, Order No. 890 explains that up-front identification of how the cost of a facility will be allocated will allow transmission providers, customers, and potential investors to decide, on an informed basis, whether or not to build that facility.[25]

The Commission quickly departs from the recognized cost causation principle it espouses. Specifically, it approved Criterion 1, which ostensibly ensures regional benefits by more efficiently integrating new generation resources to meet documented energy policy mandates or laws throughout the region.[26] Criterion 1 , however, is entirely too vague and broad, and rests on a perception that "there is great need to ensure that transmission expansion projects satisfy a diverse array of documented energy policy mandates or laws or regulatory requirements from various jurisdictions."[27] Such generalized statements directly run afoul of Order No. 890's plain meaning.

Allocating the costs associated with state renewable portfolio standards ("RPS") mandates to all load-serving entities on a postage-stamp basis through MISO cannot be permitted when some load-serving entities are not subject to any renewable portfolio standard and, thus, should not be responsible for any associated costs. As the Illinois Commission noted in its Protest, a reasonable cost allocation for transmission investments related to public policy initiatives would be proportional to the costs caused by each load-serving entity to satisfy its individual renewable portfolio standard requirement.[28] The December 16 states "that Filing

[25] Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 251. The Commission also stated that neither adoption of a cost allocation method nor identification of an upgrade (whether driven by reliability or economics) in a transmission plan triggers an obligation to build. *Id*.
[26] December 16 Order at P 208.
[27] December 16 Order at P 209.
[28] For example, Illinois Commission states that each megawatt hour of load within a state with a 20-percent renewable portfolio standard causes twice as much transmission capacity as each megawatt hour of load within a state with a 10-percent standard. Illinois Commission Comments at 21. Carrying this point to its logical conclusion

Parties' showed that the proposed projects will support documented energy policy mandates or laws that presently exist in 11 out of 13 states because the MVP proposal resolves a key issue that is preventing significant new transmission from being built – who pays."[29] The Commission should not support a cost allocation approach that will, by the Commission's own recognition and acknowledgement, foist costs on ratepayers in at least two states where ratepayers are guaranteed not to receive benefits.

The Commission further errs in its approval of Criterion 2, which seeks to ensure that the projects that qualify for MVP status under its conditions generally will have broad regional benefits.[30] According to the Commission, projects that qualify for MVP status under Criterion 2 must demonstrate multiple types of economic benefits in multiple pricing zones and that the benefits of such projects exceed the associated costs of such projects. According to the December 16 Order, this system protects against projects with only localized benefits qualifying from receiving broad regionally cost sharing.[31] Nevertheless, as is evident from Filing Parties' proposal, the December 16 Order accepts a methodology that does just that, and in so doing fails to ensure that the costs of the projects match the benefits to particular parties paying for them.

Finally, the December 16 also erroneously accepts Criterion 3, which purports to require that qualifying projects address at least one transmission issue associated with a projected violation of a NERC or Regional Entity Reliability Standard and at least one economic based transmission issue that provides economic value across multiple pricing zones.[32] According to the Commission, Criterion 3 also will ensure the total financially quantifiable benefits are in

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means that load within a state with no renewable portfolio standard should incur no renewables-related transmission cost.

[29] *Id*. at P 209.

[30] *Id*. at P 213.

[31] *Id*.

[32] *Id*. at PP 214-15.

excess of the total project costs. Similar to projects qualifying for MVP status under Criterion 2, projects that qualify under Criterion 3 generally would be providing widespread regional benefits. Similar to the reasons articulated above, the December 16 Order errs by deviating from the established Commission precedent, statutory requirements, and court orders all requiring some linkage between the costs of *specific* projects and the benefits to those who pay for them.

C. The December 16 Order Errs by Relinquishing FERC's Authority to Determine that Regional Allocation Is Based on Regional Benefits.

Under the Federal Power Act and Commission precedent, it is the Commission's role to approve cost allocation methodologies for RTOs that seek to impose regional transmission costs on affected customers.[33] This critical role ensures that the Commission meets its responsibility under Sections 205 and 206 of the FPA[34] to ensure that the rates, terms, and conditions for transmission of electricity in interstate commerce are just, reasonable, and not unduly discriminatory or preferential. Based on this authority, it is the responsibility of the Commission to determine whether particular regional allocation methodologies contain and require the appropriate amount of relationship between regional benefits and regional costs. In the December 16 Order, the Commission largely delegates this critical responsibility, instead permitting regional cost allocation methodologies to be decided by MISO stakeholders, state regulatory authorities, and other interested persons. In doing so, the Commission errs.

For example, in the December 16 Order, the Commission states that the MTEP stakeholder process will provide a venue for the cost-benefit calculation of individual projects.[35] According to the Commission, the MTEP will afford stakeholders the opportunity to review and challenge specific studies that quantify the costs and benefits of each individual MVP—i.e.,

[33] *See* 16 U.S.C. § 824; *Illinois Commerce Commission*, 576 F.3d at 476-77.
[34] 16 U.S.C. § 824.
[35] December 16 Order at P 203.

regional cost allocation. The Commission declared that if there is a lack of unity as to these benefits and costs, the dispute resolution procedures of the Tariff will be available to stakeholders in addition to the resolution measures permitted at the Commission.[36]

Yet, it is the Commission that must ensure that rates, terms, and conditions of service are just and reasonable, and it is the Commission that must ensure that regional transmission projects satisfy the principles embodied in the "beneficiary pays" model. Industrial Customers do not dispute that states also have crucial roles to play in the regional transmission construction process. Also, stakeholders and others potentially affected, directly or economically, by large-scale transmission projects play a role. However, the Commission cannot abdicate its responsibilities under the Federal Power Act to a "process" that may or may not ensure that the beneficiary pays model is followed and that the boundaries outlined in the Federal Power Act are enforced. As described above, the process is simply too vague and undefined, and the alleged benefits too attenuated and unsupported, for the Commission to allow state regulators and MISO stakeholders to make such critical decisions that impact the entire RTO.

D. The December 16 Order Errs by Exceeding the Bounds of the Federal Power Act and Violating Principles of Federalism.

There is no statutory basis to enable certain rate recovery approaches "in support of" other federal or particular state public policies that a transmission planner may wish to promote for political, self-preservation, or other reasons. The MVP proposal accepted in the December 16 Order in effect subsidizes investment in transmission projects that do not provide any benefits to many of those who will be responsible for the costs of those projects. For example, Criterion 1 of the MVP proposal provides for favorable rate recovery (from the new generators' perspective) for transmission projects that are planned "in support of documented energy policy

[36] *Id.*

mandates or laws that have been enacted or adopted through state or federal legislation or regulatory requirement that directly or indirectly govern the minimum or maximum account of energy that can be generated by specific types of generation."[37] As the Commission is aware, the integration of renewable resources pursuant to RPS and similar state policies is a popular and important topic, and is subject to ongoing debate at both the federal and state levels. However, as discussed above, to the extent that the December 16 Order authorizes the approval of investments on the basis of public policy objectives—and not directly related to the provision of reliable and cost-effective jurisdictional service—the MVP proposal is inconsistent with the directives of the Federal Power Act and the Commission's implementing regulations. If Congress wants the Commission to make those calls, Congress will need to pass legislation to enable the Commission to make those calls. In the meantime, and because the December 16 Order exceeds the Commission's limited authority to promote or require transmission projects, the December 16 Order errs.

In a related sense, the December 16 Order also errs by institutionalizing a transmission cost recovery approach that will necessarily ensure that ratepayers in certain states will be picking up the tab for RPS initiatives in other states. Broadly speaking, some states have rejected RPS, some have voluntary RPS programs, and others have enacted binding programs but with dramatically different goals and limits. An approach that favors one or several states' policies over one or more other states' interests and policies—and thereby imposes costs of one state's policy on consumers in another state that has chosen not to adopt the policy—violates basic tenets of state sovereignty and federalism. The Commission is simply without statutory footing to say that one Midwestern state's policy is a winner and another Midwestern state's

[37] Tariff, as proposed, at Original Sheet No. 3451A.

policy is a loser; yet, that is what approval of the MVP proposal does. In this sense, the December 16 Order runs directly contrary to federalism principles.

1. There Is No Basis In The Federal Power Act to Allow the Commission to Promote Investments Supporting Certain States' Policies or Favoring A Certain Type of Generating Facility.

There is no question that the MVP proposal and the December 16 Order approving the MVP proposal are both designed to put a thumb on the scale in favor of renewable resources, specifically wind resources that are being constructed or may be constructed in the western reaches of the MISO region. For example, the July 15 Filing makes it clear that the MVP proposal is based, in part, on the active promotion of certain policies and certain resources. The July 15 Filing plainly states that the MVP proposal is "designed" to "(2) support Midwest ISO member and customer compliance with evolving state and federal energy policy requirements."[38] The July 15 Filing goes on, in Section IV (entitled "Justification for Proposed Tariff Revisions"), to include "renewable resource integration and other public policy objectives" as motivation for the MVP proposal.[39] The December 16 Order, in several instances, uses these "justifications" to support approval of the MVP proposal. For example, the December 16 Order states that the Commission's decision is based, in part, on the regional planning approach that "addresses new federal and state policy initiatives, such as the increasing adoption of renewable portfolio standards" and "other state policies that promote increased reliance on renewable energy resources."[40] By actively and affirmatively promoting transmission projects for particular resources and for particular states, through the distortion of well-established ratemaking principles, the December 16 Order far exceeds the narrow authority granted to the Commission by the Federal Power Act and, thus, is in error.

[38] July 15 Filing at 2.
[39] *Id*. at 11.
[40] December 16 Order at P 190 (internal quotations omitted); *see also Id*. at PP 3, 184, 208, 210.

The Federal Power Act provides the Commission with very narrowly defined tools to promote transmission investment and construction. For example, the Commission may approve certain transmission rate incentives to promote transmission infrastructure investment, subject of course to the limitation that such incentives must be directed to "the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."[41] The Commission may also order transmission construction if requested by one or more states pursuant to the filing of a formal complaint, and only upon certain showings.[42] Notably, permission to distort traditional ratemaking principles, most notably the rule that cost responsibility must align with cost-causation or benefit, is not authorized in the Federal Power Act.[43] Because the Federal Power Act provides specific direction for limited transmission inducements, but says nothing at all about creative ratemaking to promote state RPS goals, the Commission is without authority to approve the MVP proposal and the December 16 Order errs in this regard.[44]

2. Favoritism Toward Policies of a Particular State or Particular States Violates Principles of Regulatory Federalism.

In addition, the December 16 Order erroneously promotes situations in which one state's public policy agenda can, and in all likelihood will, adversely affect electricity prices in other states that do not share that agenda. Such burdens raise significant federalism concerns. In essence, the MVP proposal approved by the Commission gives MISO significant authority to

[41] 16 U.S.C. § 824s.
[42] 16 U.S.C. § 824f.
[43] Even the statutory provision requiring the Commission to issue rules providing for transmission rate incentives is subject to the following: "All rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential." *See* 16 U.S.C. § 824s(d).
[44] As the Supreme Court has recognized, in interpreting statutory requirements, applying the canon of construction "expressio unis est exclusio alterius" means that, when Congress has expressly provided some authority—but not provided other authority—such exclusions were intentional and thus limit agency authority. See, e.g., National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 678 (2007).

impose the "public policy requirements" of one state on another state – or more particularly to impose costs on consumers in the second state. Such an outcome effectively reverses the concept of regulatory federalism embodied in the Federal Power Act and subsequently reiterated with the Energy Policy Act of 2005.

This issue is particularly acute in the case of renewable resources and RPS, where there is little consistency among the states – policies run the gamut from opposition to RPS to adoption of comprehensive and stringent standards. For example, of the states that have enacted binding RPS, the percentage of or renewable resources targeted ranges from 10 percent to 40 percent.[45] Furthermore, the definition of a qualifying resource can differ dramatically between states, including for example advanced nuclear power (Ohio) and clean coal technology (West Virginia).[46] If MISO decides to construct transmission on the basis of one state's public policy, which would be permissible under the MVP cost allocation approach, all customers will be forced to adopt by proxy that state's policy agenda regardless of whether they have voted against such a policy in their home state. Ratepayers in certain states will be forced to subsidize the public policy decisions of other states just because those other states happen to be located in the MISO region. Worse, voters in the subsidizing states will be left without political recourse because they lack a vote in the RPS-enacting state.

As the Commission is aware, one of the primary virtues of federalism is that it allows for clear political accountability. In order to ensure that the lines of accountability remain clear, the Supreme Court has been vigilant in prohibiting the federal government from commandeering

[45] Pew Center on Global Climate Change, http://www.pewclimate.org. As of January 2009, 28 states had enacted RPS. Target years for meeting the portfolio percentage target also vary widely; aside from California and Massachusetts which already have initial targets in place, the earliest target year is 2013 and the latest is 2025.
[46] *Id*.

state legislatures and state executives in the name of federal interests.[47] As the Supreme Court noted in the landmark case *New York v. United States*,

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider [the policy at issue] in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular."

Under the Filing Parties' proposal, citizens in a non-RPS state whose rates increase because of the public policy of a neighboring state are left voiceless in a process that culminates in increases to their electricity rates. Moreover, the decision as to which state's public policy should prevail is left to the transmission planning function at MISO, which is not subject to control by the ratepayers that are being burdened by MISO's decisions. This regulatory sleight-of-hand permits MISO, acting by delegated authority of the federal government, to burden state taxpayers with onerous and unpopular policies without facing the political accountability that principles of federalism demand. As such, the December 16 Order errs.

E. The December 16 Order Errs by Unlawfully Departing from Established Commission Precedent by Authorizing a Usage-Based Charge to Recover MVP Costs.

As the Commission is aware, both the Pro Forma Open Access Transmission Tariff and policies enunciated in Commission Order 890 are based on general findings that the use of a monthly coincident peak ("12CP") allocation factor for transmission is an appropriate default for allocation of transmission system costs.[48] Although the Commission has not foreclosed consideration of other alternatives (and consider them on a case by case basis), the Commission's choice of the 12CP default was not arbitrary. Rather, using 12CP resulted from a reasoned

[47] *See e.g. New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).
[48] *See, e.g.*, Order No. 890, FERC Stats. & Regs. ¶ 31,736.

policy position affirmed by the courts and subject to repeated affirmation by the Commission in a variety of contexts. Specifically, the Commission found that the 12CP methodology

> is familiar to all utilities, is based on readily available data, and will quickly advance the industry on a path to non-discrimination. We are reaffirming the use of a 12 monthly coincident peak (12 CP) allocation method because we believe the majority of utilities plan their systems to meet their 12 monthly peaks.[49]

The nexus recognized by the Commission between system planning and the use of the 12CP has been repeatedly affirmed and cited. Similarly, the Commission has frequently rejected utility proposals to depart from the 12CP methodology. Citing the well-understood principles of system planning, the Commission has shown itself appropriately skeptical of attempts to move transmission cost allocation into non-peak periods on the basis of unsubstantiated claims that the laws of physics or the rules of engineering, for example, differ from region to region.[50] While the Commission has reviewed and accepted various other schemes for allocating costs on the basis of coincident peak usage (i.e., one or four peak periods, rather than 12), the general and well-recognized principle among system planners and in the Commission's own precedents, is that "systems are typically designed to meet the maximum system peak," however defined.[51]

Various parties in these proceedings have provided extensive discussion and evidence concerning the well-established connection between system planning and peak usage. But even absent any such evidence presented to reaffirm this long recognized basic premise of Commission jurisprudence, "[d]ecisions of both the courts of appeals and the Commission have

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[49] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888.

[50] *See, e.g., Tex-La Electric Cooperative of Texas,* 69 FERC ¶ 61,269, 62035 (1994).
TU's contention that it should be allowed to allocate costs on the basis of noncoincident peaks because it plans its system on this basis is without merit. TU provides no evidence to support its claim that it plans its transmission system to meet the sum of "Tex-La's noncoincident peaks rather than its lower coincident peaks. TU's purported practice would be at odds with industry practice, which, in our experience, takes into account the diversity among transmission users. Because systems typically are designed to meet the maximum system peak, each customer's contribution to that system peak (i.e., the customer's coincident peak) is the appropriate basis upon which to allocate costs.

[51] *Id.*

held that the Commission bears the burden of explaining the reasonableness of any departure from a long-standing practice, and any facts underlying its explanation must be supported by substantial evidence."[52] Neither the desire for broad socialization, nor the finding that the generation facilities to be constructed are designed to meet "policy objectives," alters the basic facts of system engineering and planning, which require that, regardless of the source of supply, facilities need to be sized to meet expected peak demands. Changing the generation mix may result in stranded generation and transmission costs, or even redundant infrastructure expansion, but there has been no evidence provided in this case to suggest that new facilities are not sized to meet the expected peak demands to be placed upon them.

Put plainly, it is error for the Commission to declare that the Filing Parties have met the burden of proving the rate is just and reasonable because "the proposed usage charge will more appropriately reflect MVP benefits by allowing costs to be allocated during all hours of the year."[53] Indeed, transmission systems always provide benefits in all hours of the year, and there is nothing unique about MVP projects, as opposed to any other project, in that respect. Nor is it sufficient to simply declare that such projects will "produce benefits by allowing load to satisfy documented energy policy mandates,"[54] for this is true of every other piece of transmission on the system that delivers power in an integrated fashion from required resources to loads. There is no evidence that RPS policy mandates are different in kind or effect from other policy mandates or planning strictures, including existing environmental regulations, air permitting, citing, or limitations on availability of fuel, that currently restrict or effect transmission planning. There is no evidence that planning for RPS resources will suddenly revolutionize the laws of engineering and cause systems to be planned without regard to peak loads to be served. Nor

[52] *Columbia Gas Transmission Corporation v. FERC*, 628 F2d. 578 at 586.
[53] December 16 Order at P 383.
[54] *Id.*

does the observation that "protesters have not demonstrated that Commission precedent prevents the use of a usage charge for the recovery of transmission costs"[55] amount to substantial evidence that enables overriding long established precedent of relying on a 12CP allocation "that is consistent with the Commission's cost causation principles."

Finally, prior Commission approval of an energy allocator for the NYISO does not relieve the Commission of its obligation here to have a rational basis for whatever finding it makes in this case.[56] The Commission's findings in the instance of the NYISO were based on case-specific circumstances including the previous existence of state sponsored energy allocation schemes and embedded software designs that would have rendered any transition to a more rational scheme for the particular charges at issue both difficult, expensive, and perhaps even futile in the absence of larger reforms.[57] The Commission is presented with the opposite situation in this case. Here a utility which has from the beginning been allocating costs in a manner consistent with Commission recognized cost causation principles, is seeking to complicate and muddle its existing cost allocation scheme in pursuit of vague, unsubstantiated and completely unquantified "policy benefits" unrelated to any system planning or engineering principle heretofore recognized by the Commission.

Even if the Commission were to conclude that speculative benefits based on as yet unarticulated and unquantified policy objectives were sufficient to render broad non-cost based allocation reasonable, FERC's responsibility under the Federal Power Act does not end with a determination that proposed rate is reasonable, for it may be unlawful on other grounds. As the Supreme Court established long ago, "rates may lie within the zone of reasonableness and yet

[55] December 16 Order at P 384.
[56] *See City of Charlottesville v. FERC*, 661 F.2d 945 ("While the effect of the Florida Gas decision may be the same as the effect of the Commission's decision in this case, the underlying rationales are distinct. Thus, the regulatory decision reached by the Commission in this case must be examined afresh.") *See also, Columbia Gas, supra.*
[57] *New York Independent System Operator, Inc.*, 125 FERC ¶ 61,068.

result in undue prejudice," unlawful under Section 205(b).[58] Further, "if the costs of providing service to one group are different from the costs of serving the other, the two groups are in one important respect quite dissimilar and, as several commentators have noted, charging the same price to two purchases where the sellers costs with respect to each differ, must…be considered discrimination."[59]

Several parties have discussed the obvious fact that an energy allocator for transmission disproportionally shifts the cost of the transmission system onto high load factor customers, despite well-established Commission precedent that recognizes the efficiency of such usage with respect to the fixed costs of both the transmission and generation system. "Properly designed rates should produce revenues from each class of customers *which match, as closely as practicable, the cost to serve each class or individual customer*"[60] In this case, "the record makes clear, that the proposed rate design results in cross subsidization, charging high load factor customers part of the cost of service to low load customers…the utilities put forth no legally sufficient reason for charging high load factor customers a rate that does not accurately reflect the cost of serving them."[61] There is no demonstration made in this docket either that high load factor customers are disproportionally to blame for RPS-related costs, or that they will disproportionately benefit from RPS mandates. Nor has it been shown that the benefit that they receive from such mandates is roughly commensurate with the discriminatory allocation of costs they receive under the proposed rate design.

A desire to socialize costs broadly does not justify discriminatory treatment of customer classes who, in the past, have been recognized by the Commission as making the most efficient

[58] *Alabama Electric Cooperative, Inc. v. Federal Energy Regulatory Commission*, 684 F.2d, 20 at 23, *citing United States v. Illinois Central Railroad*, 263 U.S. 515, 524.
[59] *Id.* at 27-28.
[60] *Alabama*, *supra*, at 27 (emphasis in original).
[61] *ELCON v. FERC*, 747 F.2d 1511 at 1515-16.

use of the system and imposing the least burden in terms of system planning. The Filing Parties' proposal represents a total reversal of the Commission's cost based reasoning, reasoning it has applied consistently across a comprehensive range of markets dealing with capital-intensive facilities, including the design of the Open Access Transmission Tariff itself, LMP pricing and Locational Marginal Capacity design. The departure here is such that the Commission is obliged to conclude that the cost causation relationship between high and low load factor customers with respect to MVP projects is not just different, but completely the opposite of cost causation relationships that have long been recognized for all other projects. There is no sufficient legal or evidentiary basis in this record to support such a complete revolution in cost allocation between classes.

Further, the Commission's Order is insufficient in that it has made no attempt whatsoever to quantify or investigate the impact the Order would actually have on ultimate customers:

> The Commission's failure to determine the impact of its Order is not as the Commission actions seem to indicate, a matter that is optional, at the Commission's discretion. From the very beginning of the Natural Gas Act, the Courts have held that it is *not the theory* of a rate Order, *but its impact* that determines its legality.[62]

Evidence in this record indicates that MVP projects will be some of the largest, most expensive and comprehensive transmission projects built in the MISO footprint. The rate burden shifted from low load factor to high load factor customers will present a substantial discrimination against those customers unjustified by any rational measure of cost causation or benefits received. Neither MISO nor the Commission have presented or relied upon any evidence that justifies this disparate and discriminatory treatment of high load factor customers with respect to these projects.

[62] *North Carolina v. FERC*, 584 F.2d, 1003 at 1014 (citing *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (emphasis in original).

IV. CONCLUSION

WHEREFORE, the Industrial Customers respectfully request the Commission to grant rehearing of and correct the errors in the December 16 Order, for the reasons specified herein.

Respectfully submitted,

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Dated: January 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Request for Rehearing of the Industrial Customers *via* electronic transmission, hand-delivery or ordinary U.S. mail, postage prepaid, upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 18th day of January, 2011.

/ s / Robert A. Weishaar, Jr.

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