

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick, Bernard L. McNamee,  
and James P. Danly.

Consumers Energy Company

Docket No. EL19-59-000

v.

Midcontinent Independent System Operator, Inc. and  
Michigan Electric Transmission Company, LLC

ORDER ON COMPLAINT

(Issued April 16, 2020)

1. On April 3, 2019, Consumers Energy Company (Consumers Energy), pursuant to sections 201 and 206 of the Federal Power Act (FPA),<sup>1</sup> filed a complaint (Complaint) challenging the inclusion of the Morenci Interconnection Project (Morenci Project) in the 2018 Midcontinent Independent System Operator, Inc. (MISO) Transmission Expansion Plan (MTEP) and alleging that the Morenci Project is a local distribution facility. In this order, we grant the Complaint in part and find that the Morenci Project is local distribution pursuant to the application of the Commission's seven-factor test, as discussed below.

**I. Background**

**A. MTEP Process**

2. MISO's MTEP is an annual, stakeholder-driven process during which MISO evaluates various types of projects to meet local and regional reliability needs, among other goals.

3. Under Attachment FF of MISO's Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff), development of the MTEP for a planning cycle with a given calendar year designation begins on June 1 of the year prior to the

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<sup>1</sup> 16 U.S.C. §§ 824, 824e (2018).

MTEP calendar year designation and ends with the approval of the final MTEP report by the MISO Board of Directors (Board) in December of the MTEP designated year.<sup>2</sup> However, Attachment FF also provides that, if “a Transmission Owner determines that system conditions warrant the urgent development of system enhancements that would be jeopardized unless [MISO] performs an expedited review of the impacts of the project,” then MISO “shall use a streamlined approval process for reviewing and approving” such projects, providing a decision to the transmission owner within 30 days of submittal to MISO, unless a longer review period is mutually agreed upon.<sup>3</sup> MISO’s Business Practices Manual (BPM) No. 20 on transmission planning provides further information on the processing of expedited project review.<sup>4</sup>

## **B. Morenci Project**

4. On September 26, 2018, Michigan Electric Transmission Company, LLC (Michigan Electric)<sup>5</sup> submitted an expedited project review request to MISO for the Morenci Project, a 138 kV facility located near the Seneca distribution station in Morenci, Michigan, to address anticipated load growth. The Morenci Project would include tap pole and line switch additions to an existing Michigan Electric transmission line, as well as a new radial line operated at 138 kV. The new radial line would terminate at a new distribution substation owned by Wolverine Power Supply Cooperative, Inc. (Wolverine)<sup>6</sup> and would transform from 138 kV to 12.47 kV for

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<sup>2</sup> MISO, FERC Electric Tariff, Attachment FF, § I.D.1 (Transmission Owners Electing to Integrate their Local Planning Processes into the Transmission Provider’s Processes).

<sup>3</sup> MISO Tariff, FERC Electric Tariff, Attachment FF § I.D.1.c (Out-of-Cycle Review of Transmission Owner Plans).

<sup>4</sup> MISO BPM No. 20 § 4.1.4 (Expedited Project Review).

<sup>5</sup> Michigan Electric, a Michigan corporation, is a wholly-owned subsidiary of ITC Holdings Corporation, which is majority-owned by Fortis, Inc. and minority-owned by GIC Private Limited. Michigan Electric is a transmission-only entity that owns and operates approximately 5,600 miles of electric transmission facilities in Michigan.

<sup>6</sup> Wolverine is a Michigan-based not-for-profit generation and transmission electric cooperative that provides wholesale service to its seven members and is subject to the Commission’s jurisdiction under the FPA.

distribution to Midwest Energy & Communications (Midwest Energy).<sup>7</sup> MISO categorized the Morenci Project under “Other Projects” in its planning process,<sup>8</sup> and as such, the costs of the Morenci Project would be allocated to the Michigan Joint Zone<sup>9</sup> where it would be constructed. MISO accepted the Morenci Project for review through its expedited project review process and included the facility as a transmission project in the 2018 MTEP, which the MISO Board approved on December 6, 2018.

5. Consumers Energy objected to the inclusion of the Morenci Project in the 2018 MTEP and filed the instant Complaint, alleging that the Morenci Project should be classified as a local distribution facility under the Commission’s seven-factor test.

6. On March 29, 2019, Michigan Electric, Wolverine, and Midwest Energy filed an application with the Michigan Public Service Commission (Michigan Commission) for a determination regarding the proper classification of the Morenci Project under the Commission’s seven-factor test.

### **C. Seven-Factor Test**

7. In Order No. 888, the Commission articulated a seven-factor test to determine those facilities subject to the Commission’s jurisdiction. The Commission stated that the following seven factors indicate that a facility is a local distribution facility, rather than a transmission facility: (1) local distribution facilities are normally in close proximity to retail customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems; it rarely, if ever, flows out; (4) when power enters a local distribution system, it is not reconsigned or transported

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<sup>7</sup> Midwest Energy is a rural electric cooperative that provides local electric distribution service to 35,000 customers in southern Michigan and parts of Ohio and Indiana. Midwest Energy is a member of Wolverine.

<sup>8</sup> See MISO, FERC Electric Tariff, Attachment FF, § III.A.2.k (“Other Projects: Unless otherwise agreed upon pursuant to Section III.A.2.a. of this Attachment FF, the costs of Network Upgrades that are included in the MTEP, but do not qualify as Baseline Reliability Projects, New Transmission Access Projects, Targeted Market Efficiency Projects, Market Efficiency Projects, or Multi-Value Projects shall be eligible for recovery pursuant to Attachment O of this Tariff by the Transmission Owner(s) and/or [independent transmission companies] paying the costs of such project, subject to the requirements of the [MISO Transmission Owners Agreement].”).

<sup>9</sup> The Michigan Joint Zone rates include the Attachment O revenue requirements of Michigan Electric, Michigan Public Power Agency and certain of its members, Wolverine, and Consumers Energy. See MISO, FERC Electric Tariff, Schedule 7–Schedule 9; MISO, FERC Electric Tariff, Schedule 7 - Michigan–Schedule 9 - Michigan.

on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted geographical area; (6) meters are based at the transmission/local interface to measure flows into the local distribution system; and (7) local distribution systems will be of reduced voltage.<sup>10</sup>

8. The Commission further stated that it would defer to state commission recommendations in determining the Commission's jurisdiction and the cost allocation for such facilities, provided that state regulators specifically evaluate the seven factors and any other relevant facts and ultimately make recommendations consistent with "the essential elements" of Order No. 888.<sup>11</sup> The Commission has also made clear that such deference to state regulators is limited to the identification of the facilities used in the local distribution component of unbundled retail service, not those facilities' use in the provision of Commission-jurisdictional wholesale transmission service.<sup>12</sup>

#### **D. Michigan Joint Zone**

9. The Michigan Joint Zone was created following a Commission directive to MISO, Michigan Electric, Wolverine, and the MISO transmission owners to establish a joint pricing zone to accommodate Wolverine's membership in MISO as a transmission owner.<sup>13</sup> The Commission determined that "Wolverine's transmission facilities must meet the requirements of the seven-factor test, as interpreted by the Michigan Commission, in order to ensure that Wolverine receives compensation for its transmission facilities on a basis comparable to the compensation received by Michigan [Electric]."<sup>14</sup> On July 11, 2003, MISO, Michigan Electric, Wolverine, and the Michigan

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<sup>10</sup> *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, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, at 31,771 (1996) (cross-reference at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997) (cross-reference at 76 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>11</sup> Order No. 888, FERC Stats. & Regs. ¶ 31,036 at n.548.

<sup>12</sup> *See Northeast Utils. Serv. Co.*, 107 FERC ¶ 61,246, at P 23 (2004).

<sup>13</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 101 FERC ¶ 61,004 at P 21.

<sup>14</sup> *Id.*

Public Power Agency developed and filed a settlement agreement establishing the Michigan Joint Zone (Joint Zone Agreement).<sup>15</sup> The Commission accepted the Joint Zone Agreement and found that it was “important that Wolverine and . . . participants in the [Michigan Joint Zone] be compensated for their transmission facilities on a basis comparable to the compensation received by [Michigan Electric]” and that “[t]his comparability requires that all of the facilities in the [Michigan] Joint Zone be classified as transmission facilities with similar application of the seven[-]factor test.”<sup>16</sup> The Commission also determined that it was reasonable to require other facilities in the Michigan Joint Zone to “meet the requirements of the seven[-]factor test as applied by the Michigan Commission to classify the facilities now owned by [Michigan Electric]” and that the combined nature of the Michigan Joint Zone justified giving considerable weight to the Michigan Commission’s application of the seven-factor test.<sup>17</sup>

10. The Commission relied on this precedent of comparability and deference to the Michigan Commission’s application of the seven-factor test for facilities within the Michigan Joint Zone in subsequent classification proceedings.<sup>18</sup> In *MISO III*, the Commission accepted amendments to the Joint Zone Agreement, including an amendment approved by the Michigan Commission termed the Revised Administrative Determination, that amended the list of Wolverine transmission facilities to be included in rates applicable to the Michigan Joint Zone.<sup>19</sup> The Michigan Commission had previously classified certain Wolverine facilities as distribution, but after reviewing additional evidence, the Michigan Commission determined that several of these facilities performed a transmission function and were properly classified as transmission facilities.<sup>20</sup> The Commission confirmed that, as it had stated in the past, “Wolverine’s facilities should meet the requirements of the seven[-]factor test as applied by the

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<sup>15</sup> See Offer of Settlement, Docket No. ER02-2458-000 (filed July 11, 2003).

<sup>16</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,219, at P 53 (2004) (*MISO I*).

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., *Wolverine Power Supply Coop., Inc.*, 151 FERC ¶ 61,034 (2015) (approving the reclassification of certain Wolverine facilities pursuant to a seven-factor test adopted by the Michigan Commission); *Consumers Energy Co.*, 151 FERC ¶ 61,033 (2015) (approving the reclassification of certain Consumers Energy facilities pursuant to a seven-factor test adopted by the Michigan Commission).

<sup>19</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 112 FERC ¶ 61,351 (2005) (*MISO III*).

<sup>20</sup> *Id.* P 20.

Michigan Commission in order to be included in the [Michigan Joint Zone] rate.”<sup>21</sup> The Commission explained that the amendment to the Joint Zone Agreement complied with this directive “because it revises the list of Wolverine transmission facilities to be included in the [Michigan Joint Zone] rate in a manner consistent with the Michigan Commission’s classification of Wolverine’s facilities set out in the Revised Administrative Determination.”<sup>22</sup>

11. Similarly, in 2015, the Commission accepted the reclassification of certain Consumers Energy and Wolverine facilities following the Michigan Commission’s reclassification of those facilities based on a settlement agreement among Michigan Commission staff, Michigan Electric, Wolverine, and Consumers Energy.<sup>23</sup> In the settlement agreement, the parties agreed to the reclassification of the facilities based on the Commission’s seven-factor test and agreed that the reclassification was consistent with the Commission’s comparability requirement for the Michigan Joint Zone. Reclassified facilities included facilities termed the Group B Assets, which included: (1) 65 138 kV line segments and six substations, owned by Consumers Energy, that connected 138 kV transmission lines to Consumers Energy’s bulk power 138/46 kV substations; and (2) 68 69 kV line segments and five substations, owned by Wolverine, that connected Wolverine’s 69 kV looped transmission system to its bulk power 138/12.47 kV and 138/25 kV substations.

## II. Complaint

12. On April 3, 2019, Consumers Energy filed a Complaint against MISO and Michigan Electric alleging that MISO improperly approved the Morenci Project for inclusion in the 2018 MTEP. Consumers Energy contends that the Morenci Project is a local distribution facility and requests that the Commission: (1) determine that MISO has neither the obligation nor the authority to review and approve local distribution projects as part of its transmission planning process; (2) determine the Morenci Project is a local distribution project under the seven-factor test established in Order No. 888; and (3) order MISO to remove the Morenci Project from the 2018 MTEP. Alternatively, if the Commission declines to conduct a seven-factor test, Consumers Energy requests that the Commission: (1) order MISO to evaluate the project under the seven-factor test;

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<sup>21</sup> *Id.* P 28.

<sup>22</sup> *Id.*

<sup>23</sup> See *Consumers Energy Co.*, MPSC Case No. U-17598 (reclassifying the Consumers Energy facilities) and *Consumers Energy Co.*, 151 FERC ¶ 61,033 (affirming the classification); *Wolverine Power Supply Coop., Inc.*, MPSC Case No. U-17742 (reclassifying the Wolverine facilities) and *Wolverine Power Supply Coop., Inc.*, 151 FERC ¶ 61,034 (affirming the reclassification).

(2) require MISO to consider non-transmission alternatives to the project; (3) require MISO to explain how and why it reached its conclusions; and (4) reverse or stay MISO's approval of the Morenci Project on an interim basis. Additionally, Consumers Energy asserts that the Tariff requires MISO to determine whether proposed projects are transmission or distribution facilities before inclusion in the MTEP, and, if the Tariff does not require this with sufficient clarity, Consumers Energy requests that the Commission open a proceeding to investigate if it should change the Tariff.<sup>24</sup>

13. Consumers Energy argues that the Morenci Project should be classified as a local distribution facility and not a transmission facility under the Commission's seven-factor test. According to Consumers Energy, MISO recognizes the seven-factor test's role in determining whether a facility should be classified as transmission or local distribution, and, by extension, whether a facility is within the scope of MISO's planning and operational authority.<sup>25</sup> Consumers Energy explains that, under MISO's Transmission Owners Agreement (TOA), an entity may only be a transmission-owning MISO member if it owns, operates, or controls facilities used for the transmission of electricity in interstate commerce as determined by MISO by applying the seven-factor test.<sup>26</sup> Additionally, Consumers Energy contends that MISO's BPM No. 28 requires the use of the seven-factor test in classifying existing or prospective unregulated transmission owners' facilities.<sup>27</sup> Consumers Energy argues that, although BPM No. 28 does not apply to Michigan Electric's facilities, it provides insight into how MISO interprets the seven-factor test.<sup>28</sup> However, Consumers Energy claims that neither MISO nor any other stakeholder, including Michigan Electric, performed a seven-factor test analysis of the Morenci Project prior to MISO's approval of the 2018 MTEP.<sup>29</sup> Consumers Energy claims that MISO's public position that the Commission and the Michigan Commission should determine the asset's classification means that MISO does not believe it has

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<sup>24</sup> Complaint at 1-3, 47.

<sup>25</sup> *Id.* at 15-16.

<sup>26</sup> *Id.* at 17 (citing MISO, TOA).

<sup>27</sup> *Id.* (citing MISO BPM No. 28).

<sup>28</sup> *Id.* at 18-19.

<sup>29</sup> *Id.* at 24.

an obligation to make a determination as to whether it should classify the project as transmission.<sup>30</sup>

14. Consumers Energy claims that the Michigan Commission previously conducted a seven-factor analysis for facilities in the Michigan Joint Zone, and, under that framework, the Michigan Commission would classify the Morenci Project as a local distribution project. Consumers Energy states that it owns and operates facilities similar to the Morenci Project in the Michigan Joint Zone that the Michigan Commission and the Commission classified as distribution assets under the seven-factor test.<sup>31</sup>

15. Alternatively, if the Commission does not use the Michigan Commission's established seven-factor analysis framework for the Michigan Joint Zone, Consumers Energy requests that the Commission adopt the stand-alone, seven-factor test analysis that it submitted with the Complaint that, it claims, demonstrates that the Morenci Project is a local distribution facility.<sup>32</sup> Consumers Energy asserts that its seven-factor analysis finds that: (1) the Morenci Project's terminus is close to retail customers; (2) the Morenci Project is a radial 138 kV line; (3) all electricity will flow from a single transmission tap into a confined geographic area to serve a single distribution provider's load, from which point it cannot flow out; (4) the Morenci Project facilitates the power delivery from the MISO wholesale market to Midwest Energy's retail customers; (5) the Morenci Project serves anticipated load growth in and around an area of approximately two square miles; (6) any metering on the Morenci Project will measure flows into Midwest Energy's local distribution system; and (7) the Morenci Project serves Midwest Energy's primary distribution system in the Morenci area, and ultimately Midwest Energy's secondary distribution system.<sup>33</sup>

16. Consumers Energy alleges that MISO violated its Tariff and its authority from the Commission when it included a distribution project in the 2018 MTEP because the Commission did not grant MISO the authority to approve or mandate construction of

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<sup>30</sup> Consumers Energy notes that, in response to a January 2019 Letter, MISO indicated that, under the TOA, it did not have the authority to call into question asset classifications for the facilities of regulated MISO transmission owners, which is properly a matter between the owner and the regulator. *Id.* at 15.

<sup>31</sup> *Id.* at 17-18.

<sup>32</sup> Consumers Energy submits Mr. Donald A. Lynd's prepared testimony with the Complaint, which includes his seven-factor analysis. Complaint at 20 and Testimony of Donald A. Lynd on Behalf of Consumers Energy.

<sup>33</sup> *Id.* at 20-24.



local distribution facilities as part of its transmission planning process.<sup>34</sup> Consumers Energy asserts that based on the Tariff<sup>35</sup> and TOA,<sup>36</sup> MISO defines its transmission system in terms of facilities that the Commission can classify as transmission under the seven-factor test and facilities that are consistent with MISO's authority and obligations as a regional transmission organization/independent system operator (RTO/ISO) that engages in regional transmission planning. Consumers Energy contends that, as an RTO/ISO, MISO derives its authority from the Commission, and the Commission, through various rules and regulations, requires MISO to provide fair and non-discriminatory access to, as well as be responsible for the planning and expansion of, transmission facilities within its footprint.<sup>37</sup> Consumers Energy claims that these orders provide MISO with the primary responsibility for planning and expansion of transmission facilities within the footprint; however, no corresponding regulations authorize MISO to approve local distribution projects as part of its transmission planning process.<sup>38</sup>

17. Further, Consumers Energy alleges that MISO exceeded the Commission's authority under the FPA, which grants the Commission jurisdiction over the transmission of electric energy in interstate commerce and all related facilities while prohibiting the Commission from exercising jurisdiction over facilities used in distribution.<sup>39</sup> Consumers Energy asserts that, although the courts have found that the FPA gives the

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<sup>34</sup> *Id.* at 29 (citing 16 U.S.C. § 824(b)(1)).

<sup>35</sup> Consumers Energy emphasizes that the Tariff defines "Transmission System" as "transmission facilities owned or controlled by Transmission Owners that have conveyed functional control to [MISO]" and "other transmission facilities owned or controlled by the Transmission Owner that are booked to transmission accounts and are not controlled or operated by the Transmission Provider but are facilities that the Transmission Owners, by way of the Agency Agreement, have allowed the Transmission Provider to use in providing service under this Tariff," while "Transmission Owner" is defined in a circular fashion as "each member of the [independent system operator] whose transmission facilities (in whole or in part) make up the [MISO] Transmission System." Complaint at 25 and n.76.

<sup>36</sup> Consumers Energy states that the TOA defines an "Owner" or a transmission-owning member of MISO in terms of owning, operating, or controlling transmission facilities, as defined according to the Commission's seven-factor test. Complaint at 25 and n.77.

<sup>37</sup> Complaint at 26-28.

<sup>38</sup> *Id.* at 27-28.

<sup>39</sup> *Id.* at 29 and n.95.

Commission jurisdiction over certain wholesale transactions made using local distribution facilities, and, while the Commission and MISO may have authority to regulate the Morenci Project through wholesale sales or an interconnection agreement, MISO does not have jurisdiction to make determinations regarding the facility's siting or to require construction of the facility.<sup>40</sup>

18. Consumers Energy asserts that MISO failed to uphold a fundamental obligation of its transmission planning role by declining to perform the seven-factor analysis and thus abdicated its responsibility to ensure compliance with the Tariff. Consumers Energy believes that because the TOA explicitly requires MISO to determine an entity's assets when deciding whether to accept the entity as a MISO transmission-owning member, MISO's authority to determine the classification of a facility extends to assets proposed for inclusion in the MTEP process.<sup>41</sup> Consumers Energy further argues that Attachment FF of the Tariff requires MISO to ensure that the projects in the MTEP process are transmission projects.<sup>42</sup> According to Consumers Energy, Attachment FF requires MISO to solicit and consider feedback from stakeholders, especially when stakeholders raise substantiated concerns about the classification of a specific project.<sup>43</sup> Additionally, Consumers Energy notes that MISO's BPM No. 20 requires MISO to consider "non-transmission alternatives" in the MTEP process. Consumers Energy contends that MISO cannot claim that it must compare transmission solutions with non-transmission alternatives while also claiming it has no authority to distinguish between transmission and distribution facilities.<sup>44</sup>

19. Consumers Energy disagrees that the lack of specific Tariff language obligating MISO to classify proposed projects means that MISO has no implied authority to do so. Consumers Energy argues that, if this implied authority is not sufficient, then the Commission should open a separate docket to investigate whether it should change the MISO Tariff to include an affirmation obligation.<sup>45</sup>

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<sup>40</sup> *Id.* at 28-30 (citing 16 U.S.C. § 824(b)(1); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1279-80, 81-82 (D.C. Cir. 2007)).

<sup>41</sup> *Id.* at 31 and n.98.

<sup>42</sup> *Id.* at 31 (citing MISO, FERC Electric Tariff, Attachment FF (Transmission Expansion Planning Protocol)).

<sup>43</sup> *Id.* at 30-31.

<sup>44</sup> *Id.* at 31 and n.101 (citing MISO BPM No. 20 § 4.3.1.2 and 4.3.2.2).

<sup>45</sup> *Id.* at 31-34.

20. Consumers Energy alleges that, throughout the 2018 MTEP process, MISO failed to meet the coordination and transparency obligations pursuant to Order No. 890's<sup>46</sup> transmission planning principles, which MISO incorporated into BPM No. 20.

Consumers Energy notes that BPM No. 20 states that the "transmission owner will be expected to present to MISO and stakeholders the reasons why the needs driving the project are urgent and why the project was not identified early enough to be reviewed in the full MTEP review cycle."<sup>47</sup> However, Consumers Energy claims that neither MISO nor Michigan Electric properly identified the need. Additionally, Consumers Energy claims that MISO never responded to, nor requested that, Michigan Electric or any other stakeholder respond to the merits of Consumers Energy's seven-factor analysis of the Morenci Project that it submitted in the expedited review process. Consumers Energy argues that, despite its repeated objections, MISO provided no meaningful explanation of its rationale for approving the Morenci Project on an expedited basis. Consumers Energy states that BPM No. 20 stipulates that MISO post valid expedited project review requests for stakeholders to review within two weeks of receiving them. However, despite Consumers Energy first learning of Michigan Electric's expedited review project request in August 2018, MISO did not post the request until October 2018. According to Consumers Energy, MISO indicated that concerns caused the delay but never explained the concerns nor how it resolved them.<sup>48</sup> Consumers Energy also questions why Michigan Electric had not identified a need for the Morenci Project at an earlier date.<sup>49</sup>

21. Consumers Energy also contends that it will suffer three concrete harms as a result of MISO's approval of the Morenci Project in the 2018 MTEP: (1) under the pricing and revenue allocation agreements for the Michigan Joint Zone, Consumers Energy will pay approximately 80 percent of costs associated with the Morenci Project and Michigan Electric folds the costs into its transmission rates under Attachment O of the MISO Tariff; (2) MISO's acceptance of the Morenci Project as a transmission project likely prevents Consumers Energy from constructing an alternative distribution project to serve Midwest Energy's anticipated load growth; and (3) the approval and inclusion of a

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<sup>46</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (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).

<sup>47</sup> *Id.* at 35-37 (citing MISO BPM No. 20 § 4.1.4.5).

<sup>48</sup> *Id.* at 7-8, 36.

<sup>49</sup> *Id.* at 37.

distribution project in the 2018 MTEP undermines the integrity and certainty of MISO's transmission planning process of which Consumers Energy is a direct beneficiary.<sup>50</sup>

### **III. Notice of Filing and Responsive Pleadings**

22. Notice of the Complaint was published in the *Federal Register*, 84 Fed. Reg. 14,928 (2019), with answers, interventions, and protests due on or before May 3, 2019.

23. Alliant Energy Corporate Services, Inc.; Wolverine; Exelon Corporation; DTE Electric Company; Association of Businesses Advocating Tariff Equity (ABATE); East Texas Electric Cooperative, Inc.; Cooperative Energy; Dairyland Power Cooperative; MISO Transmission Owners;<sup>51</sup> Michigan South Central Power Agency; Michigan Public Power Agency; Great Lakes Utilities; Madison Gas and Electric Company; WPPI Energy; and American Municipal Power, Inc. each filed timely motions to intervene. The Michigan Commission filed a notice of intervention.

24. On April 16, 2019, Michigan Electric filed a motion requesting that the Complaint proceeding be held in abeyance until the Michigan Commission rendered a decision regarding the classification of the Morenci Project (Abeyance Motion). Wolverine,

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<sup>50</sup> *Id.* at 39-40.

<sup>51</sup> For the purposes of this proceeding, MISO Transmission Owners consist of: Ameren Services Company, as agent for Union Electric Company and Ameren Illinois Company; American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Cooperative Energy; Dairyland Power Cooperative; Duke Energy Business Services, LLC for Duke Energy Indiana, LLC; East Texas Electric Cooperative; Entergy Arkansas, LLC; Entergy Louisiana, LLC; Entergy Mississippi, LLC; Entergy New Orleans, LLC; Entergy Texas, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; Lafayette Utilities System; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company LLC; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power Inc.; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

MISO, Consumers Energy, and the Michigan Commission filed answers in response to the motion.<sup>52</sup>

25. On May 3, 2019, MISO filed an answer to the Complaint, and Michigan Electric filed a motion for summary disposition and answer to the Complaint. On May 20, 2019, Consumers Energy filed an answer in response to Michigan Electric's motion and answer. MISO Transmission Owners filed an answer in support of MISO's answer and in response to the other answers.

26. Wolverine and ABATE each filed comments.

27. Following the issuance of the Abeyance Order, as discussed below, on November 15, 2019, the Michigan Commission filed a statement applying the seven-factor test to the Morenci Project and attached its November 14, 2019 order in MPSC Case No. U-20497 (Michigan Commission Order) to its filing. The Michigan Commission found that the Morenci Project should be classified as distribution. Michigan Electric also filed the Michigan Commission Order, as directed by the Commission in the Abeyance Order. On December 2, 2019, Wolverine, MISO, and Consumers Energy filed answers, and Michigan Electric filed an answer and amendment to its May 3 answer. On December 17, 2019, the Michigan Commission filed an answer in response to Wolverine's December 2 answer and Michigan Electric's December 2 amendment and answer. On December 17, 2019, Consumers Energy filed two answers in response to (1) MISO's December 2 answer and (2) Wolverine's December 2 answer and Michigan Electric's December 2 amendment and answer. On December 26, 2019, Wolverine filed an answer in response to Consumer Energy's and the Michigan Commission's December 17 answers. On January 7, 2020, Consumers Energy filed an answer in response to Wolverine's December 26 Answer.

#### **IV. Abeyance Order**

28. In its Abeyance Motion, Michigan Electric asserted that the Commission should defer to the Michigan Commission's classification of facilities so long as such classifications utilized the seven-factor test and were applied consistently to ensure comparability. Michigan Electric emphasized that, in Order No. 888, the Commission noted that it was important to develop mechanisms to avoid regulatory conflict and to help provide certainty to utilities as to which regulator has jurisdiction over which

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<sup>52</sup> As discussed below, the Commission granted Michigan Electric's motion in an order issued on June 7, 2019. *Consumers Energy Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,212 (2019) (Abeyance Order).

facilities.<sup>53</sup> Additionally, Michigan Electric noted that the Commission, in accordance with this precedent, had deferred to the Michigan Commission and its expertise when Michigan public utilities and cooperative transmission owners requested Commission approval of facility classifications, including the proceeding that led to the creation of the Michigan Joint Zone.<sup>54</sup>

29. On June 7, 2019, the Commission issued an order granting the Abeyance Motion and noted that, “[a]lthough the Commission is not bound by the Michigan Commission’s determination, delaying a final decision on the Complaint will help prevent regulatory conflict and provide consistency and certainty to the interested parties.”<sup>55</sup>

## **V. Comments and Answers**

### **A. MISO May 3 Answer to Complaint**

30. MISO argues that it correctly declined to perform the seven-factor test for the Morenci Project.<sup>56</sup> MISO contends that, under the TOA, MISO may perform seven-factor determinations in two specific circumstances, which are not applicable in the present case: (1) for unregulated owners and (2) for applicants for owner status.<sup>57</sup> Therefore, MISO argues, no legal basis or need exists for MISO’s involvement in determining the seven-factor test status of the Morenci Project. MISO explains that BPM No. 28 deals with seven-factor test determinations for unregulated owners and notes that Consumers Energy concedes in the Complaint that BPM No. 28 does not apply to Michigan Electric facilities, which MISO contends contradicts Consumers Energy’s position that MISO was obligated to perform a seven-factor analysis on the Morenci Project prior to its inclusion in the 2018 MTEP. MISO states that Michigan Electric has taken proper steps to obtain a seven-factor test classification by seeking a determination

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<sup>53</sup> Michigan Electric Motion Filing at 3 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 21,619-20, 21,626-27).

<sup>54</sup> *Id.* at 6-8. The responsive pleadings to Michigan Electric’s motion were fully considered and detailed in the Commission’s Abeyance Order and are not repeated here. Abeyance Order, 167 FERC ¶ 61,212 at PP 5-10.

<sup>55</sup> *Id.* P 12.

<sup>56</sup> MISO May 3 Answer at 14-22.

<sup>57</sup> *Id.* at 14 (citing MISO, TOA, Appendix C, § II.C.2; MISO, TOA, Article Two, § V.A.2 (Owner Status); MISO, TOA, Article One, § I.P (Owner)).

from the Michigan Commission, consistent with the TOA.<sup>58</sup> MISO asserts that Michigan Electric's request to the Michigan Commission is also consistent with the principles of Order No. 888, which attempt to "avoid regulatory conflict" with respect to jurisdictional determinations, including by deferring "to recommendations by state regulatory authorities concerning where to draw the jurisdictional line under the Commission's [seven-factor test] for local distribution facilities."<sup>59</sup> MISO states that, if the appropriate regulatory authorities determine that the Morenci Project is a distribution facility, then MISO will make necessary revisions based on those determinations. Additionally, MISO argues that Consumers Energy is incorrect to claim that MISO did not properly follow Attachment FF, and nothing in Attachment FF permits MISO to ignore the express requirements set forth in the TOA.

31. MISO contends that its position is consistent with the Commission's precedent governing the Michigan Joint Zone and the Joint Zone Agreement.<sup>60</sup> MISO states that, in accordance with the process outlined in Order No. 888, various Michigan Joint Zone members on multiple occasions applied to the Michigan Commission and the Commission to obtain seven-factor test determinations for their facilities. MISO contends that the only time the Commission required MISO to perform a seven-factor test on facilities to be included in the Michigan Joint Zone was a situation where the owner was an unregulated public power agency over which neither the Commission nor the Michigan Commission had jurisdiction. MISO argues that the Michigan Joint Zone and Joint Zone Agreement precedent demonstrates that regulated members of the Michigan Joint Zone obtain their seven-factor test determinations from the Michigan Commission, which the Commission reviews under its Order No. 888 framework, and that MISO is not the proper party to conduct the seven-factor test in this scenario.<sup>61</sup>

32. Further, MISO argues that the inclusion of the Morenci Project in the 2018 MTEP was proper and consistent with the Tariff, TOA, and BPM.<sup>62</sup> MISO contends that Wolverine is a MISO network customer and is entitled to use Tariff mechanisms,

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<sup>58</sup> *Id.* at 15-16 (citing MISO, TOA, Appendix C, § II.C.2).

<sup>59</sup> *Id.* at 16 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,784 and n.548).

<sup>60</sup> *Id.* at 19-22.

<sup>61</sup> *Id.* at 20 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 101 FERC ¶ 61,004 at P 21; Offer of Settlement, Docket No. ER02-2458-000 (filed July 11, 2003); *MISO I*, 106 FERC ¶ 61,219 at P 53; *Wolverine Power Supply Coop., Inc.*, 151 FERC ¶ 61,034; *Consumers Energy Co.*, 151 FERC ¶ 61,033).

<sup>62</sup> *Id.* at 22-30.

such as the transmission service request process and the appropriate mechanisms set forth in Attachment FF, to obtain open access transmission service to serve its members' increasing load requirements. MISO states that MISO's Network Integration Transmission Service (NITS) permits network customers "to efficiently and economically utilize their Network Resources . . . to serve their Network Load and any additional Load that may be designated pursuant to [the Tariff]," which MISO states may require construction of new transmission facilities to interconnect such additional loads to the MISO transmission system.<sup>63</sup> MISO states that network customers are also permitted "to add a new Delivery Point or interconnection point between the Transmission System and a Network Load," and that MISO is required to "plan . . . the Transmission System in accordance with . . . its planning obligations in Attachment FF in order to provide the Network Customer with [NITS] over the Transmission System" and must "endeavor to cause to be constructed and placed in service sufficient transfer capability to deliver the Network Customer's Network resources to serve its Network Load."<sup>64</sup> MISO states that these obligations are incorporated and further detailed in MISO's planning process, as reflected in Appendix B of the TOA and Attachment FF of the Tariff, and that the contractual arrangements that govern the Michigan Joint Zone also reflect and incorporate these principles. MISO argues that, consistent with these requirements, Wolverine seeks to obtain a new delivery point for its growing network load, as permitted by the Tariff, and the MTEP process is the means by which network customers' existing forecast and new load points are evaluated for reliability and for the upgrades necessary to serve them. MISO contends that it followed this procedure with respect to the Morenci Project. MISO argues that, as the transmission provider, it has no authority to decide for Wolverine whether its members' loads should be served through Michigan Electric's transmission line or Consumers Energy's distribution facilities. MISO contends that the Complaint fails to indicate that these Tariff requirements and Commission-filed arrangements are unjust and unreasonable.

33. MISO argues that Consumers Energy's characterization of the timing and handling of the expedited project review for the Morenci Project as troubling is baseless. MISO contends that it processed Michigan Electric's expedited project review in accordance with the Tariff and gave stakeholders the proper amount of time to review the Morenci Project.<sup>65</sup> MISO argues that it also followed the Tariff and BPM with respect to non-transmission alternatives. MISO states that the two non-transmission alternatives proposed by Consumers Energy were not valid alternatives for MISO to pursue.<sup>66</sup> MISO

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<sup>63</sup> *Id.* at 23 (citing MISO, FERC Electric Tariff, Module B, §§ 28.1, 31.2).

<sup>64</sup> *Id.* (citing MISO, FERC Electric Tariff, Module B, §§ 31.4, 28.2).

<sup>65</sup> *Id.* at 25-28.

<sup>66</sup> *Id.* at 28-30.



explains that, in deciding whether a proposed non-transmission alternative can be reasonably assured to defer the otherwise needed transmission upgrade proposals, MISO considers whether there are comparable arrangements in place that will provide that assurance, and that Wolverine's request for a new delivery point did not present the transmission system with a reliability issue to be resolved but instead a means of connecting the new load point to the transmission system as requested by the existing network customer. MISO states that Consumers Energy proposed two alternatives: a 46 kV line (Option 1) or a 138 kV line (Option 2).<sup>67</sup> MISO argues that Option 1 is not a valid alternative since it would require MISO to direct Wolverine to seek an alternative to the requested transmission connection for the new delivery point. MISO contends that Option 2 is also not a valid alternative because it is merely a design variation on the 138 kV transmission connection proposed by Michigan Electric that is inconsistent with Michigan Electric's standard system design.<sup>68</sup>

34. Moreover, MISO argues that the Complaint does not establish a basis for any investigation or revisions to the TOA or the Tariff.<sup>69</sup> MISO notes that, while the Complaint does not identify a specific Tariff or TOA provision that must be modified, the Complaint asserts that the Commission should consider opening a proceeding to investigate whether the Tariff should be modified to require MISO to administer the seven-factor test with respect to all projects included in the MTEP. MISO argues that any such requirement would be contrary to the seven-factor test provisions set forth in the TOA and that the Complaint does not meet the burden of proof required by FPA section 206 to demonstrate that these long-standing provisions are no longer just and reasonable. MISO contends that the seven-factor test is an essential regulatory function and that MISO is not a regulatory agency and has no business in making jurisdictional determinations. MISO also asserts that its administration of the seven-factor test for proposed MTEP projects is unlikely to solve a dispute because a petition could always be filed with the Commission or state commission to override MISO's determination. In addition, MISO argues that there are existing mechanisms to police jurisdictional determinations that are more effective than a universal seven-factor test at the outset of the MTEP process, such as the ability of affected parties to challenge a transmission owner's inputs to their Attachment O templates, which may only include transmission facilities. MISO also notes that Michigan Joint Zone members have the right to protest or comment on the rate filings of other members and the inputs and application of the Attachment O formula. Further, MISO argues that Consumers Energy's proposal would impose substantial administrative and logistical burdens on MISO.

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<sup>67</sup> *Id.* at 29-30 (citing Complaint at Ex. No. CE-2).

<sup>68</sup> *Id.* at 30.

<sup>69</sup> *Id.* at 30-32.

35. Additionally, MISO contends that the Complaint fails to meet the requirements set forth in Rule 206 of the Commission's Rules of Practice and Procedure.<sup>70</sup> Specifically, MISO argues that the Complaint fails to identify and explain any action or inaction by MISO that allegedly violates any applicable statutory or regulatory requirement, contrary to Rules 206(b)(1) and (2). MISO contends that the Complaint is based on future impacts and that Consumers Energy failed to quantify the financial impact or burden as a result of action or inaction, as required by Rule 206(b)(4).

**B. Michigan Electric May 3 Motion and Answer to Complaint**

36. Michigan Electric asserts that Wolverine requires the prompt installation of the Morenci Project to supply wholesale loads to Midwest Energy. Michigan Electric contends that granting the Complaint will harm wholesale transmission access for Midwest Energy's load, delay the in-service date of the project, incorrectly apply section 206 of the FPA to Consumers Energy's transmission payments, and assist Consumers Energy in attracting retail load in Wolverine's service area.<sup>71</sup> Michigan Electric submits that: (1) the Commission should reject or dismiss the Complaint in full;<sup>72</sup> (2) if the Commission does not dismiss the Complaint, the Commission should find that the Morenci Project is a transmission facility, regardless of Michigan Commission's finding; and (3) any further hearings should be about disputed material facts and held as an expedited paper hearing.<sup>73</sup>

37. Michigan Electric argues that the Complaint's requested relief would impede Wolverine's timely receipt of MISO transmission services approved as part of the 2018 MTEP. Michigan Electric explains that it planned the Morenci Project in accordance with applicable Commission-approved tariffs, contracts, and rate schedules. Michigan Electric states that the Joint Zone Agreement obligates transmission owners to provide consistent and reliable delivery of energy from new and existing generating facilities within the Michigan Joint Zone.<sup>74</sup> Michigan Electric also claims that, as a NITS customer, Wolverine is relying on the increased transmission capacity from the Morenci Project to accommodate its expanding network load growth. Michigan Electric states

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<sup>70</sup> *Id.* at 32-34.

<sup>71</sup> Michigan Electric May 3 Motion and Answer at 4.

<sup>72</sup> Michigan Electric makes a motion for summary disposition seeking rejection or dismissal of the Complaint pursuant to 18 C.F.R. § 385.217(c)(1). Michigan Electric May 3 Motion and Answer at n.1, 1, 12-29.

<sup>73</sup> *Id.* at 6.

<sup>74</sup> *Id.* at 12-14.

that Consumers Energy does not dispute that Midwest Energy is experiencing load growth and that Consumers Energy proposed a wholesale distribution solution, which Wolverine/Midwest Energy rejected, to meet that load growth.<sup>75</sup> Michigan Electric further argues that granting the Complaint would force Wolverine and Midwest Energy to obtain Commission-regulated transmission services through Consumers Energy's distribution system, which is not comparable to MISO's transmission service because: (1) MISO lacks operational control of Consumers Energy's distribution system; (2) Schedule 11 of the Tariff does not mandate that transmission customers take wholesale distribution services; (3) Consumers Energy has not provided an unexecuted wholesale distribution service agreement to Wolverine for this service; and (4) Consumers Energy would consider Midwest Energy's load growth together with its native load growth for planning purposes, which Michigan Electric contends is not comparable planning as required in the Joint Zone Agreement and Commission orders.<sup>76</sup>

38. Michigan Electric contends that the Complaint fails to identify that any existing rates, charges, or terms and conditions of service are unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful under FPA section 206. Michigan Electric asserts that Consumers Energy's apparent future rate impacts are unspecified and speculative. Michigan Electric claims that the Complaint does not assert that rates are unreasonable but rather tries to pre-litigate the Morenci Project's costs before Consumers Energy receives the transmission rates. Michigan Electric states that the Supreme Court clarified that Commission-approved cost allocations "preempt a parties' actions aimed at trapping those costs or trying to change a [Commission]-approved allocation to benefit retail customers."<sup>77</sup>

39. Michigan Electric claims that the Complaint impermissibly seeks retroactive relief by asking the Commission to direct MISO to remove the Morenci Project from the 2018 MTEP and seeking changes to the MISO Tariff on a retroactive basis that would import new planning standards without stakeholder review and approval. Michigan Electric argues that the Commission has found that complaints seeking retroactively to substitute new project designations post-MTEP are impermissible because they create uncertainty

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<sup>75</sup> *Id.* at 15.

<sup>76</sup> *Id.* at 16-18.

<sup>77</sup> *Id.* at 19-20 (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986); *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 372 (1988)).

and undercut the annual MTEP's finality,<sup>78</sup> and that section 206 of the FPA bars retroactive remedies to tariff terms and conditions. Michigan Electric also asserts that Consumers Energy is seeking a remedy that would effect a retroactive change to the terms and conditions of the MISO Tariff by requesting: (1) MISO conduct the seven-factor test for jurisdictional public utilities; (2) MISO consider distribution solutions as substitutes for MTEP-approved transmission facilities; and (3) the Commission order MISO to engage in a reexamination of the 2018 MTEP, which was agreed upon by stakeholders and must be final to reasonably begin the next planning year. Michigan Electric contends that Consumers Energy should have filed the Complaint earlier to obtain relief under section 206 of the FPA because Consumers Energy first learned of the Morenci Project in August 2018.<sup>79</sup> Additionally, Michigan Electric argues that the Commission should dismiss the case because it requires the Commission to issue a declaratory order on a number of issues aside from the classification of the Morenci Project.<sup>80</sup>

40. Michigan Electric contests Consumers Energy's argument that MISO had an obligation to conduct a seven-factor test before approving a facility as transmission in the MTEP. Michigan Electric asserts that MISO's only obligation to conduct a facility classification is in the BPM and applies to non-public utility applicants for transmission owner status under the TOA, which is not the case here. Michigan Electric also argues that since the BPM is not part of the Tariff, MISO was never required to conduct a seven-factor test analysis for jurisdictional public utilities.<sup>81</sup>

41. Michigan Electric avers that, if the Commission does not reject the Complaint, the Commission should find that the Morenci Project is a transmission facility, even if the Michigan Commission determines the facility to be local distribution. Michigan Electric claims that court and Commission precedent, contract commitments, and policy considerations support a finding that the Morenci Project is a transmission facility. Specifically, Michigan Electric argues that the following policy considerations and

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<sup>78</sup> *Id.* at 23 (citing *Am. Transmission Co. LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,090, at P 55 (2013) ("To foster successful project development, MISO plans transmission projects on an incremental basis. Transmission owners must be allowed to rely on the planning provisions in previous MTEPs. In order to plan future projects, MISO's planning cycles necessarily assume that previously-approved projects in its models will be in operation even if they have not yet been placed in service.")).

<sup>79</sup> *Id.* at 24-26.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 29.

contractual obligations require the Commission to classify the facility as a transmission facility: (1) the Commission retains the right to review the Michigan Commission's findings to ensure open transmission access; (2) transmission service to Wolverine was granted in accordance with applicable tariffs and contracts; (3) the Commission should continue to provide oversight in the Michigan Joint Zone to ensure comparability of facilities and service for wholesale power customers; (4) the classification of the Morenci Project should be consistent with Michigan Commission precedent regarding facilities for service to Wolverine in the Michigan Joint Zone; and (5) Wolverine's need for transmission capacity in the region is actual rather than hypothetical.<sup>82</sup>

42. Michigan Electric asserts that the Commission should deny the Complaint because the Commission has exclusive jurisdiction over transmission services, including all facilities used for transmission, regardless of their classification, and that court precedent supports this argument. Michigan Electric argues that in *New York v. FERC*, the Supreme Court held that the Commission has exclusive jurisdiction to regulate transmission services, not transmission facilities.<sup>83</sup> Michigan Electric notes that similarly in *Detroit Edison Co. v. FERC*, the court restrained the Commission from exercising jurisdiction over unbundled retail distribution services while finding that the Commission is vested with jurisdiction over the use of a local distribution facility used in a wholesale transaction.<sup>84</sup> Additionally, Michigan Electric asserts that, although Consumers Energy cites to *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*,<sup>85</sup> the case supports the claim that transmission and distribution services wholesale rates are Commission-jurisdictional and that the Commission may set the terms of jurisdictional service, regardless of whether the facilities are classified as transmission or distribution.<sup>86</sup> Michigan Electric claims that these cases support the proposition that the Commission has jurisdiction and a legal basis upon which to determine that a facility is a transmission facility.<sup>87</sup>

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<sup>82</sup> *Id.* at 30-32.

<sup>83</sup> *Id.* at 33 (citing *New York v. FERC*, 535 U.S. 1 (2002)).

<sup>84</sup> *Id.* (citing *Detroit Edison Co. v. FERC*, 344 F.3d 48 (D.C. Cir. 2003)).

<sup>85</sup> *See supra* text accompanying note 40.

<sup>86</sup> Michigan Electric May 3 Motion and Answer at 33 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1281-82 (D.C. Cir. 2007)).

<sup>87</sup> *Id.* at 34.

**C. Wolverine May 3 Comments**

43. Wolverine urges the Commission to deny the Complaint, arguing that Michigan Electric properly classified the Morenci Project as transmission and that MISO properly approved it as part of the 2018 MTEP in accordance with its Tariff.<sup>88</sup> Wolverine contends that the Morenci Project should be classified as transmission under the seven-factor test.<sup>89</sup> Wolverine emphasizes that the Commission has repeatedly deferred to the Michigan Commission's application of the seven-factor test for classifying facilities in the Michigan Joint Zone to maintain comparability of service and rate treatment for all customers.<sup>90</sup> Wolverine argues that under Commission precedent, if the Commission believes that the state regulator's classification is consistent with Order No. 888, the Commission will defer to the state regulator.<sup>91</sup> Wolverine claims Consumers Energy offers no rational basis for the Commission to depart from its practice of deferring to the Michigan Commission's determination.<sup>92</sup>

44. Wolverine asserts that the Morenci Project is functionally indistinguishable from Consumers Energy's and Wolverine's facilities in the Michigan Joint Zone that the Michigan Commission reclassified as transmission, a reclassification that the Commission accepted. Wolverine contends that Consumers Energy is applying a seven-factor test analysis to the Morenci Project from the 1998 classification of Consumers Energy's facilities, which determined the demarcation between federal and state jurisdiction of those facilities and predated the Michigan Joint Zone. Wolverine argues that the Michigan Commission's 1998 seven-factor test should not be applied to the Morenci Project because the analysis was used to establish jurisdiction and not to ensure comparable rate treatment for similarly-situated facilities in the Michigan Joint Zone, which, Wolverine asserts, is the case here. Additionally, Wolverine believes that fundamental distinctions require a facility-specific application of the seven-factor test, noting that the Morenci Project will be used exclusively to transmit wholesale power to Wolverine for resale to Midwest Energy. Therefore, Wolverine asserts that the

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<sup>88</sup> Wolverine May 3 Comments at 3-4.

<sup>89</sup> *Id.* at 13-14.

<sup>90</sup> *Id.* at 8, 14 (citing *Consumers Energy Co.*, 151 FERC ¶ 61,033; *Wolverine Power Supply Coop., Inc.*, 151 FERC ¶ 61,034).

<sup>91</sup> *Id.* at 9.

<sup>92</sup> *Id.* at 10-12.

Commission and Michigan Commission must apply the seven-factor test consistent with the applicable regulatory and jurisdictional context of the Morenci Project.<sup>93</sup>

45. Wolverine claims that the Complaint's requested relief would frustrate fundamental principles of open transmission access. Wolverine states that MISO is responsible for accommodating a transmission customer's request for service and that the Morenci Project will be used to provide transmission service regardless of the ultimate classification of the facility. According to Wolverine, Consumers Energy is arguing that MISO should treat Midwest Energy as a captive distribution customer locked into distribution services from Consumers Energy and that Consumers Energy's Complaint is a pretext to retain total power over providing delivery service to Wolverine and Midwest Energy. Wolverine contends that, if the Commission grants the Complaint, the Commission will foreclose the ability of independent transmission companies to expand, upgrade, and update transmission systems to meet their growing power needs, thus denying Wolverine direct access to transmission.<sup>94</sup>

46. Wolverine argues that MISO is not the appropriate regulatory authority to determine a Michigan Joint Zone facility's classification and that, if MISO had applied the seven-factor test to the Morenci Project as a precondition to its inclusion in the 2018 MTEP, it would have been an inappropriate expansion of MISO's authority. Moreover, Wolverine claims that MISO's BPM No. 28 limits MISO's authority to conduct seven-factor analyses to situations involving unregulated transmission owners.<sup>95</sup>

47. Additionally, Wolverine claims that the Commission cannot grant the Complaint's request to direct MISO to remove the project from the 2018 MTEP or to reverse or stay MISO's approval of the Morenci Project as part of the 2018 MTEP without violating section 206 of the FPA, as it would require a change to MISO's Tariff procedures for approving transmission expansion plans and would constitute a form of unavailable retroactive relief. Therefore, Wolverine claims a stay is not viable because it would jeopardize the timely expansion of transmission systems needed to meet growing load.<sup>96</sup>

#### **D. ABATE Comments**

48. ABATE argues that its members have facilities in the Michigan Joint Zone and that a misclassification of a distribution facility as transmission would result in improper

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<sup>93</sup> *Id.* at 14-16.

<sup>94</sup> *Id.* at 16-17.

<sup>95</sup> *Id.* at 21.

<sup>96</sup> *Id.* at 21-23.

subsidization of costs. In the event the Michigan Commission determines that the Morenci Project is a local distribution facility, ABATE argues that the Commission should dismiss the Complaint as moot, assuming MISO and Michigan Electric agree that local distribution projects may not be included in the transmission revenue requirement for the Michigan Joint Zone. In the event that the Michigan Commission determines that the Morenci Project is a transmission facility, ABATE argues that the Commission should carefully consider whether that determination is consistent with the classification of Consumers Energy's radial 138 kV facilities that serve 25 kV and lower voltage facilities as local distribution and either reject the Michigan Commission's determination or require that Consumers Energy's facilities referenced above also be classified as transmission.<sup>97</sup>

**E. Consumers Energy May 20 Answer**

49. Consumers Energy argues that the Commission should deny Michigan Electric's motion for summary disposition because it fails to show an absence of material factual disputes and that, in fact, there are a number of disputes at issue in the proceeding.<sup>98</sup> Consumers Energy also argues that Michigan Electric's legal positions are grounded both on untested factual assertions and on mischaracterizations of the Complaint.<sup>99</sup> Further, Consumers Energy argues that Michigan Electric is incorrect to claim that the Complaint does not meet the requirements under FPA section 206. Consumers Energy argues that, contrary to Michigan Electric's claims, the alleged harm outlined in the Complaint is based on statements made by Michigan Electric itself and are not unspecified or speculative. Consumers Energy also contends that Michigan Electric is incorrect in claiming that Consumers Energy is seeking illegal retroactive relief and an impermissible order in its request for a remedy. Further, Consumers Energy argues that, whether the obligation to obtain a seven-factor test determination falls solely on Michigan Electric or MISO, the proper classification of the Morenci Project was clearly in dispute prior to MISO's approval of the project in the 2018 MTEP, and MISO did not require Michigan Electric to obtain a seven-factor test determination. Consumers Energy contends that neither MISO nor Michigan Electric sought a seven-factor test determination prior to MISO's approval of the Morenci Project in the 2018 MTEP, and Michigan Electric now argues that the resulting de facto transmission classification cannot be undone.

50. In response to Michigan Electric's May 3 Answer to the Complaint, Consumers Energy argues that Michigan Electric does not admit or deny each allegation of the Complaint, as required by the Commission's rules, but instead provides only a blanket

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<sup>97</sup> ABATE Comments at 1-4.

<sup>98</sup> Consumers Energy May 20 Answer at 3, 5-13.

<sup>99</sup> *Id.* at 14-19.



denial to the arguments in the Complaint that support a determination that the Morenci Project is local distribution. Consumers Energy contends that Michigan Electric does not deny that the Morenci Project is designed as a radial, 138 kV line that will terminate at a 138 kV substation with a secondary voltage of 12.47 kV, or that power will flow out of the substation and into Midwest Energy's distribution system for delivery to retail customers. Consumers Energy argues that these facts are sufficient to determine that the Morenci Project is distribution under the Michigan Commission's seven-factor test framework. Consumers Energy asserts that Michigan Electric has asked the Commission to classify the Morenci Project as a transmission facility regardless of any determination made by the Michigan Commission in its separate proceeding because it has already been approved in the 2018 MTEP. Consumers Energy argues that this demonstrates that the MTEP process will become a back door through which MISO transmission owners can self-classify facilities as transmission and avoid regulatory oversight. Further, Consumers Energy argues that Michigan Electric mischaracterizes and oversimplifies the Complaint as it pertains to the Commission's jurisdiction and MISO's corresponding authority as an RTO/ISO. Consumers Energy argues that the Complaint does not say that the Commission lacks jurisdiction over all distribution facilities in all circumstances; instead, Consumers Energy states that its Complaint draws a distinction between the Commission's jurisdiction over transactions that use distribution facilities and the construction or siting of distribution facilities themselves.<sup>100</sup>

**F. MISO Transmission Owners May 20 Answer**

51. MISO Transmission Owners support the positions taken by MISO, Michigan Electric, and Wolverine that the Commission should reject the Complaint's request to require MISO to undertake a seven-factor test analysis before including a transmission facility in the MTEP. MISO Transmission Owners believe that the Commission should give deference to state commission determinations classifying facilities as transmission or distribution under the seven-factor framework, provided that the states apply the seven criteria as required by Order No. 888. MISO Transmission Owners note that this framework is reflected in the TOA.<sup>101</sup>

52. MISO Transmission Owners argue that it would be inappropriate to expand MISO's authority to apply the seven-factor test to a regulated transmission owner's facility as a precondition to inclusion in the MTEP, and they argue that MISO is not the appropriate entity to make a seven-factor determination for a regulated transmission owner's facility. MISO Transmission Owners claim that the Complaint fails to show that

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<sup>100</sup> *Id.* at 21-22.

<sup>101</sup> MISO Transmission Owners May 20 Answer at 11-12 (citing MISO, TOA, Appendix C, § II.C.2; *see also* MISO, FERC Electric Tariff, Module A, § 1.T, Definitions – T; MISO BPM No. 28 at 5).

the provision of the TOA limiting MISO's authority to make seven-factor determinations to unregulated entities is unjust, unreasonable, or unduly discriminatory or preferential.<sup>102</sup> MISO Transmission Owners note that the TOA provision follows the same process and offers the same deference as Order No. 888, and the fact that the Michigan Commission is evaluating the proper classification of the Morenci Project demonstrates that inserting MISO into this dispute is inappropriate and contrary to the TOA.<sup>103</sup>

53. MISO Transmission Owners aver that the Complaint ignores that these procedures have worked well for years, and the Complaint offers no evidence that the inclusion of local distribution facilities in the MTEP is a systematic or recurring problem. According to MISO Transmission Owners, this Complaint is a one-time situation where MISO followed the TOA and, although Consumers Energy was unhappy with the outcome of the 2018 MTEP, it has a remedy in this Complaint. MISO Transmission Owners assert that, since MISO has committed to removing the Morenci Project from the 2018 MTEP if directed by the Commission, there is no need for the Commission to impose an across-the-board "affirmative obligation" to verify that any and all facilities included in the MTEP qualify as transmission under the seven-factor test.<sup>104</sup>

54. MISO Transmission Owners support MISO's position that it would be extremely burdensome for MISO to conduct a seven-factor test on all regulated transmission owners' facilities included in the MTEP, as well as unnecessary because there are other available mechanisms, such as complaints and the stakeholder process. MISO Transmission Owners also agree with MISO that, if MISO were to make seven-factor determinations, that would not resolve disputes because the party in disagreement would likely file a complaint with the Commission.<sup>105</sup> Finally, MISO Transmission Owners disagree with requiring state entities with jurisdiction to apply the seven-factor test before a project is included in the MTEP because this could result in delays and because parties have recourse available if they disagree.<sup>106</sup>

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<sup>102</sup> *Id.* at 13 (citing to MISO May 3 Answer at 3-4, 30-32; *see also* Michigan Electric May 3 Motion and Answer at 19-20).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 13-14.

<sup>105</sup> *Id.* at 14-15.

<sup>106</sup> *Id.* at 15-16.

**G. Michigan Commission November 15 Motion and the Michigan Commission Order**

55. On November 14, 2019, the Michigan Commission issued an order finding that the Morenci Project should be classified as a distribution facility.<sup>107</sup> The Michigan Commission stated that it based its findings on the hearing evidence and arguments, an evaluation of each factor in the seven-factor test, the functional use of the Morenci Project, and consideration of other issues. With regard to the seven-factor test, the Michigan Commission concluded that the Morenci Project is a distribution facility under each factor, finding that: (1) the Morenci Project is close to the retail customers being served, with ninety-three percent of the project's consumers being in the same industrial park where the Morenci substation will be located; (2) the Morenci Project is radial in nature, and the applicants failed to demonstrate that, as currently designed, the Morenci Project is looped; (3) power can only flow through the Morenci Project to Midwest Energy's distribution system for consumption by retail end users; (4) power entering the Morenci Project is not transported to another market but is consumed by end users on Midwest Energy's distribution system; (5) most of the power entering Midwest Energy's distribution system will be consumed in a relatively restricted geographic area; (6) although the meter for the Morenci Project is located on the high-voltage side of the Wolverine substation, the function of the meter is to measure flows into the local distribution system; and (7) the 138 kV radial lines that are part of the Morenci Project are comparable to 209 miles of 138 kV lines on Consumers Energy's system that serve distribution systems with secondary voltage of 25 kV or below and that are classified as distribution.<sup>108</sup>

56. The Michigan Commission states that it also considered other factors based on Order No. 888's finding that the seven technical factors may not be fully dispositive and that states may find other technical factors relevant. Even with these further considerations, the Michigan Commission states that it still found the Morenci Project to be a distribution facility. The Michigan Commission concludes that, even though wholesale transactions will occur over the Morenci Project, a functional-use review of the Morenci Project's technical characteristics reveals that its function is to deliver the power leaving Michigan Electric's looped transmission system to Midwest Energy's distribution system for exclusive consumption by Midwest Energy's retail end users. Therefore, the Michigan Commission finds that pursuant to the functional-approach, the Morenci

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<sup>107</sup> On November 15, 2019, the Michigan Commission filed a motion with the Commission including a statement on its application of the seven-factor test to the Morenci Project, along with the Michigan Commission Order.

<sup>108</sup> Michigan Commission November 15 Motion at 4-5.

Project is a distribution facility, and the Michigan Commission requests that the Commission classify the Morenci Project as a distribution facility.<sup>109</sup>

57. The Michigan Commission also requests that the Commission provide clarification regarding the process for transmission and distribution facility determinations, asserting that clarification would assist the Michigan Commission and owners and operators of transmission and distribution systems. Specifically, the Michigan Commission states that the Commission did not describe the RTO's role in the process when it provided the framework for classifying facilities as transmission or local distribution in Order No. 888.<sup>110</sup>

#### **H. MISO December 2 Answer**

58. MISO argues that its current procedures, as set forth in the TOA and Attachment FF of the Tariff, are both sufficient and clear to address the situation presented in this case and that no revisions to these procedures are necessary. MISO states that these procedures properly implement the guiding principles of Order No. 888 and require transmission owners to seek classification of their facilities with the appropriate regulatory authority, in accordance with the seven-factor test, and that interested parties can challenge the proposed classification in the classification proceedings or may file a complaint under section 206 of the FPA.<sup>111</sup> MISO states that the Tariff also provides that MTEP disputes may be resolved by the Commission or state regulatory authorities.<sup>112</sup> MISO argues that this process worked as intended in the instant case. MISO also contends that an automatic seven-factor test for each proposed project is not necessary or required as part of the MTEP review. MISO argues that performing a seven-factor analysis as part of the MTEP process would be unwieldly, as MISO reviews several hundred proposed transmission projects and alternatives each year, nor is this practice justified because disputes regarding classification are rare. MISO also notes that such a review would not be binding and therefore would have limited practical value. Further, MISO argues that there are more effective ways to ensure the proper classification of facilities, such as MISO's Attachment O process. MISO also argues that owners should

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<sup>109</sup> *Id.* at 5-7.

<sup>110</sup> *Id.* at 6.

<sup>111</sup> MISO December 2 Answer at 4-6 (citing MISO, TOA, Appendix C, § II.C.2.).

<sup>112</sup> *Id.* at n.18 (citing MISO, TOA, Appendix B, § VI).

be given flexibility to determine when and how to initiate a classification process instead of requiring such a process during MTEP review.<sup>113</sup>

**I. Wolverine December 2 Answer**

59. Wolverine argues that the Commission should disregard the Michigan Commission Order because the Michigan Commission misinterpreted Commission precedent and applied the seven-factor test in a manner inconsistent with the applicable comparability standard. Accordingly, Wolverine asserts that the Commission should deny the Complaint because the Morenci Project is properly classified as transmission and was approved as part of the 2018 MTEP in accordance with the Tariff.<sup>114</sup>

60. Wolverine contends that, in the Michigan Joint Zone, the seven-factor test has been used solely to ensure comparable rate treatment for similarly-situated facilities, not to delineate the boundary between federal and state jurisdiction over facilities. According to Wolverine, Commission precedent regarding the role of the seven-factor test in the context of the Michigan Joint Zone holds that the seven factors must be interpreted or applied in a manner to ensure that all transmission owners are treated comparably, and Wolverine asserts that the Michigan Commission Order fails this comparability standard. Wolverine contends that the Michigan Commission, in the Michigan Commission Order, defers to its original seven-factor test framework from 1998 (that Wolverine states was applied to draw jurisdictional lines), predates the creation of the Michigan Joint Zone, and ignores all subsequent Commission precedent refining the application of the seven-factor test and classification of transmission facilities in the context of the Michigan Joint Zone.<sup>115</sup> Wolverine states that the Commission's finding in *MISO I* acknowledges that application of the seven-factor test to facilities included in the Michigan Joint Zone is distinctly different from how the seven-factor test previously has been applied to demark boundaries between state and federal jurisdiction and that the Commission's initial deference to the Michigan Commission's seven-factor test analysis in *MISO I* was replaced by its reliance on the Michigan Commission's revised seven-factor test in *MISO III*.<sup>116</sup> Wolverine asserts that the reassessment of the seven-factors signaled the Commission's abandonment of the Michigan Commission's original "framework" used to classify Consumers Energy's

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<sup>113</sup> *Id.* at 6-8.

<sup>114</sup> Wolverine December 2 Answer at 2.

<sup>115</sup> *Id.* at 6-8.

<sup>116</sup> *Id.* at 10 (citing *MISO I*, 106 FERC ¶ 61,219; *MISO III*, 112 FERC ¶ 61,351).

150 line segments and became part of the settlement that established the Michigan Joint Zone.<sup>117</sup>

61. Wolverine contends that the Michigan Commission, in the Michigan Commission Order, does not treat all transmission owners within the Michigan Joint Zone comparably, contrary to Commission precedent, and should therefore be rejected by the Commission.<sup>118</sup> Wolverine notes that the Commission retains the sole authority to ensure that all Michigan Joint Zone participants are treated comparably and that the Commission has emphasized that deference to a state regulator's application of the seven-factor test is only appropriate when the state regulator has correctly applied the seven-factor test. Wolverine states that the seven-factor test has never been applied to classify new facilities approved for the MTEP or otherwise identified in response to a request for transmission service under the Tariff. Wolverine argues that the Morenci Project is functionally indistinguishable from other transmission facilities in the Michigan Joint Zone, and Wolverine provides an analysis of the Morenci Project compared to Consumers Energy's and Wolverine's Group B transmission assets in the Michigan Joint Zone as well as a summary of its seven-factor analysis presented in the Michigan Commission proceeding in its December 2 answer.<sup>119</sup> Wolverine explains that the electrical design and facility configuration of the Morenci Project operates in the same way as certain Wolverine 138 kV and 69 kV radials to looped 25 kV and 12.47 kV systems, which the Michigan Commission previously approved as transmission facilities for integration in the Michigan Joint Zone.<sup>120</sup> Wolverine also alleges that the Michigan Commission mistakenly found that Wolverine and Michigan Electric had failed to demonstrate that the Morenci Project was looped in nature.<sup>121</sup> Wolverine states that in this answer it provides a clearer one-line diagram that demonstrates conclusively that the Morenci Project will operate as part of a looped system to manage load loss, which is similar in design to Consumers Energy's Vernon Assets (a portion of Consumers

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 10-11 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 101 FERC ¶ 61,006 (2002); *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,053 (2006)).

<sup>119</sup> *Id.* at 13-21, and n.36 (citing *Consumers Energy Co.*, MPSC Case No. U-17598 (reclassifying the Consumers Energy facilities) and *Consumers Energy Co.*, 151 FERC ¶ 61,033 (affirming the classification); *Wolverine Power Supply Coop., Inc.*, MPSC Case No. U-17742 (reclassifying the Wolverine facilities) and *Wolverine Power Supply Coop., Inc.*, 151 FERC ¶ 61,034 (affirming the reclassification)).

<sup>120</sup> *Id.* at 13 & n.38.

<sup>121</sup> *Id.* at 14-15 (citing Michigan Commission Order at 41).

Energy's Group B Assets) and Wolverine's Group B Assets, and therefore should have been classified as transmission.<sup>122</sup>

62. Wolverine also notes that portions of the Michigan Commission Order improperly focus on the potential cost savings to Consumers Energy ratepayers, which Wolverine contends is irrelevant to facility classification.<sup>123</sup>

**J. Michigan Electric December 2 Answer**

63. Michigan Electric argues that the Commission should reject the Complaint and the Michigan Commission Order, to the extent that they request that the Commission classify the Morenci Project as a local distribution facility. Michigan Electric asserts that the Michigan Commission Order examines the classification of the Morenci Project from a technical perspective instead of considering either the Commission-jurisdictional transmission service at issue or the parties' rights and obligations under existing contracts and tariffs that the Commission enforces. Michigan Electric contends that Wolverine's request for expanded NITS transmission service is central to this case. Michigan Electric asserts that the Commission has exclusive jurisdiction over Wolverine's requested transmission service because the Commission has oversight of all facilities used for transmission service, regardless of the facilities' classification.<sup>124</sup> Therefore, Michigan Electric contends that the Commission should not defer to the Michigan Commission Order because the Michigan Commission did not properly account for Commission-jurisdictional transmission service in its conclusions.

64. Michigan Electric also states that the Michigan Commission misinterpreted the nature of Commission-jurisdictional transmission service and misfocused its analysis on the facility's functionality and the retail/wholesale nature of the electricity services at issue. Michigan Electric objects to the Michigan Commission's conclusion that, while wholesale transactions occur over the Morenci Project, that does not mean that its function is a transmission facility. Michigan Electric argues that this conclusion conflicts with the Commission's legal analysis underpinning Order No. 888, as affirmed by the Supreme Court in *New York v. FERC*.<sup>125</sup> Michigan Electric stresses that the courts have found that the primary function of a facility is dispositive of its classification, as well as

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<sup>122</sup> *Id.* at 15 and Attachment B.

<sup>123</sup> *Id.* at 21-23 (citing *Mansfield Mun. Elec. Dep't v. New Eng. Power Co.*, 97 FERC ¶ 61,134 (2001) (*Mansfield*), *reh'g denied*, 98 FERC ¶ 61,115 (2002)).

<sup>124</sup> Michigan Electric December 2 Answer at 10-12 and n.33.

<sup>125</sup> *Id.* at 12-13 (citing to Michigan Commission November 15 Motion at 5).

state or federal jurisdiction over that facility.<sup>126</sup> Michigan Electric concludes that all facilities for Commission-jurisdictional transmission service are subject to the Commission's exclusive jurisdiction, and because the Morenci Project is intended to provide Commission-jurisdictional, MISO-approved transmission service, any local distribution classification is inconsistent with such service.<sup>127</sup>

65. Michigan Electric argues that the Michigan Commission Order conflicts with the Commission's open access transmission policies. According to Michigan Electric, classifying the Morenci Project as a local distribution facility would subject Wolverine and Midwest Energy to service that does not directly permit access to the MISO market.<sup>128</sup> Michigan Electric contends that classifying the Morenci Project as local distribution creates an unduly discriminatory transmission service impact on Wolverine because the service is not comparable to MISO transmission service, and any delays to the receipt of MISO transmission service negatively impacts Wolverine and Midwest Energy's ability to serve customers. Additionally, Michigan Electric claims that Wolverine would be required to pay an additional charge for wholesale distribution service, and the wholesale distribution service agreement between Consumers Energy and Wolverine to effectuate the needed service would require the parties' mutual agreement, and Consumers Energy has no obligation to provide such service.<sup>129</sup>

#### **K. Consumers Energy December 2 Answer**

66. Consumers Energy argues that the Commission should grant the Michigan Commission's November 29 motion and accept its statement, as well as the findings in the Michigan Commission Order. Consumers Energy argues that the Michigan Commission conducted a thorough review of the Morenci Project and that the Commission should consider the motion consistent with its practice of deferring to state regulatory commissions on matters involving asset classification under the seven-factor test. Consumers Energy also supports the Michigan Commission's

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<sup>126</sup> *Id.* at 13 (citing to *DTE Energy Co. v. FERC*, 394 F.3d 954, 964 (D.C. Cir. (2005))) (stating that a facility's primary function is critical to classification)).

<sup>127</sup> *Id.* (citing *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d at 696; *Ne. Utils. Serv. Co.*, 107 FERC ¶ 61,246, at P 23 (2004)).

<sup>128</sup> *Id.* at 14-15.

<sup>129</sup> *Id.* at 15-17.



request that the Commission provide guidance regarding MISO's role in the asset classification process.<sup>130</sup>

**L. Michigan Commission December 17 Answer**

67. The Michigan Commission asserts that the Morenci Project will not be used exclusively to provide wholesale transmission service, contrary to Michigan Electric's and Wolverine's arguments. Further, the Michigan Commission contends that the Morenci Project's classification should not turn on whether it has a wholesale component. The Michigan Commission asserts that the seven-factor test, as confirmed through a functional-use review, shows that the Morenci Project will be used to serve the load of a single distribution provider and that the project's function is to deliver power from Michigan Electric's looped transmission system to Midwest Energy's distribution system for exclusive consumption by Midwest Energy's retail end users. The Michigan Commission contends that, besides the project's functional use, each factor of the seven-factor test trends towards distribution rather than transmission.<sup>131</sup> The Michigan Commission argues that, even limiting the review of the project's use without considering the technical details the seven-factor test is intended to highlight, the Morenci Project should still be classified as distribution because the project does not transport or reassign power to another market.<sup>132</sup>

68. The Michigan Commission disagrees with Wolverine's argument that the Commission's initial deference to the Michigan Commission's seven-factor analysis of Wolverine's facilities in *MISO I* was replaced by its reliance on the Michigan Commission's Revised Administrative Determination based on a reassessment of the seven-factor test in *MISO III*. The Michigan Commission argues that the Revised Administrative Determination was not a shift away from the seven-factor test and was consistent with the Michigan Commission's previous orders applying the seven-factor test. The Michigan Commission argues that its decision to classify the Morenci Project as distribution is consistent with the Revised Administrative Determination and that, although the Morenci Project does not fit perfectly into any category, it has more in common with the projects that have been designated as distribution. The Michigan Commission contends that, unlike the projects that were designated as transmission in the Revised Administrative Determination, the Morenci Project is not looped and is instead a radial line like the projects that fall into the distribution category. The Michigan Commission also states that the low-voltage distribution substation that the Morenci Project serves shows that the Morenci Project is comparable to Consumers Energy's

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<sup>130</sup> Consumers Energy December 2 Answer at 1-4.

<sup>131</sup> Michigan Commission December 17 Answer at 1-2.

<sup>132</sup> *Id.* at 3-8 (citing Michigan Commission Order at 49).

radial 138 kV lines that serve distribution systems with secondary voltage of 25 kV or below that are classified as distribution.<sup>133</sup>

**M. Consumers Energy December 17 Answers**

**1. In Response to MISO's December 2 Answer**

69. Consumers Energy argues that MISO's statement that it will "follow the Commission's decision" regarding the classification of the Morenci Project undercuts the statements made by Michigan Electric and Wolverine that the inclusion of the Morenci Project in the 2018 MTEP itself justifies a transmission classification.<sup>134</sup> Consumers Energy contends that this claim from Michigan Electric and Wolverine demonstrates that MISO's purported neutrality in the matter of asset classification can and will be exploited by proponents of supposed transmission projects who stand to gain from a project's inclusion in the MTEP. Accordingly, Consumers Energy asserts that the Commission should take appropriate steps to ensure that MISO's neutrality cannot be exploited. Consumers Energy disagrees with MISO that the process worked in the instant case and instead believes that MISO can and should assume a role in such disputes to prevent inefficiencies.<sup>135</sup>

**2. In Response to Michigan Electric's and Wolverine's December 2 Answers**

70. Consumers Energy argues that the Commission should defer to the Michigan Commission's findings in the Michigan Commission Order and classify the Morenci Project as a local distribution facility.<sup>136</sup> Consumers Energy contends that the Michigan Commission Order is based on a detailed evidentiary record and thorough analysis of the Morenci Project under the seven-factor test and is consistent with the Michigan Commission's longstanding framework for applying the seven-factor test to assets in the Michigan Joint Zone.

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<sup>133</sup> *Id.* at 9-12.

<sup>134</sup> Consumers Energy December 17 Answer in Response to MISO at 1-2 (citing MISO December 2 Answer at 3-4; Michigan Electric December 2 Answer at 11, 14; Wolverine December 2 Answer at 2).

<sup>135</sup> *Id.* at 2-5.

<sup>136</sup> *Id.* at 6-11.

71. Consumers Energy argues that Michigan Electric's December 2 Answer relies on irrelevant and meritless arguments that Michigan Electric views as superseding the seven-factor test.<sup>137</sup> Consumers Energy argues that the Michigan Commission made all the necessary factual findings to support a local distribution classification and that Michigan Electric's attempt to characterize the primary function of the Morenci Project as transmission service is at odds with the actual design and function of the facility as proposed.

72. Consumers Energy contends that classifying the Morenci Project as local distribution does not block access to the MISO transmission system or discriminate against anyone seeking such access, as Michigan Electric and Wolverine argue. Consumers Energy contends that Michigan Electric, Wolverine, and Midwest Energy remain free to pursue an alternative project that can be classified as transmission under the seven-factor test.<sup>138</sup> Consumers Energy contends that Michigan Electric's and Wolverine's suggestion that the Morenci Project is the only option for providing Wolverine and Midwest Energy with access to the MISO market is both unfounded and irrelevant to how that project should be classified. Consumers Energy argues that Michigan Electric conflates the Commission's jurisdiction over the terms of wholesale transactions with a mandate to classify all facilities used for such purposes as transmission facilities. Consumers Energy contends that, while the Commission may have jurisdiction over the terms of wholesale transactions made across distribution facilities like the Morenci Project, that jurisdiction does not convert distribution facilities into transmission facilities.<sup>139</sup>

73. Consumers Energy argues that Wolverine's December 2 Answer attempts to relitigate the Michigan Commission Order by relying on evidence that the Michigan Commission rejected in a robust litigated proceeding.<sup>140</sup> Consumers Energy contends that Wolverine offers no new evidence or arguments that would undermine the Michigan Commission's findings or justify a departure from the Commission's policy of deferring to state regulatory determinations regarding asset classification. Consumers Energy argues that Wolverine's claim that the Morenci Project is not in close proximity to retail customers (relevant to factor one of the seven-factor test) is incorrect because Wolverine misapplies both the geographic and electrical proximity components of its analysis. Consumers Energy contends that the Morenci Project should be classified as local distribution under factor one because ninety-three percent of the power entering the

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<sup>137</sup> *See id.* at 1-4, 11-22.

<sup>138</sup> *Id.* at 1-4, 19-20, 33-34.

<sup>139</sup> *Id.* at 16-19.

<sup>140</sup> *Id.* at 4, 22-34.

project would be consumed by end-use customers in the same industrial park where the new Wolverine distribution substation would be located and that the remaining seven percent entering the project would be consumed by end users within a six-mile radius of that new distribution substation.<sup>141</sup> Consumers Energy also argues that Wolverine's claim that the Morenci Project should be considered looped because it can be looped by closing the line is based on a hypothetical, future configuration of the project.<sup>142</sup>

74. Consumers Energy also disagrees with Wolverine's claim that the Michigan Commission misapplied its own framework for classifying assets in the Michigan Joint Zone.<sup>143</sup> Consumers Energy argues that both the FPA and Order No. 888 require local distribution facilities to be distinguished from transmission facilities and that it was appropriate for the Michigan Commission to compare the Morenci Project to both existing transmission and local distribution facilities in the Michigan Joint Zone. Further, Consumers Energy contends that the Michigan Commission applied the same framework used in prior classifications when it determined that the Morenci Project should not be classified as transmission. For example, Consumers Energy highlights that the Michigan Commission rejected arguments that the Morenci Project is comparable to existing looped assets in the Michigan Joint Zone because there is no evidence that the Morenci Project or the underlying system it would serve are looped systems.<sup>144</sup> Consumers Energy also argues that the analysis included in Wolverine's December 2 Answer that purports to show that the Morenci Project is comparable to existing transmission assets in the Michigan Joint Zone rests on arguments rejected by the Michigan Commission in the Michigan Commission Order.<sup>145</sup> Consumers Energy contends that accepting Wolverine's position that certain facilities should be ignored, such as Consumers Energy's existing local distribution assets, in the classification analysis would limit the ability of the Commission and state regulators to perform a proper comparability assessment and determine how to best classify a facility.

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<sup>141</sup> *Id.* at 24-25 (citing Michigan Commission Order at 23, 38-40).

<sup>142</sup> *Id.* (citing Wolverine December 2 Answer at 14; Michigan Commission Order at 41 (finding that parties failed to demonstrate that the Morenci Project, as currently designed, is actually looped)).

<sup>143</sup> *Id.* at 26-30.

<sup>144</sup> *Id.* at 27-28 (citing Wolverine December 2 Answer at 13; Michigan Commission Order at 41).

<sup>145</sup> *Id.* at 29 (citing Michigan Commission Order at 37).

75. Additionally, Consumers Energy argues that there is no evidence that the Michigan Commission was unduly influenced by cost allocation concerns, as Wolverine asserts.<sup>146</sup> Consumers Energy acknowledges that the Michigan Joint Zone cost allocation framework does provide an incentive to pursue a transmission project rather than a local distribution project, but Consumers Energy states that that concern is not evidence of a flaw in the Michigan Commission's analysis.

**N. Wolverine December 26 Answer**

76. Wolverine refutes Consumers Energy's contention that Wolverine is seeking to relitigate the Michigan Commission Order.<sup>147</sup> Wolverine notes that it included its seven-factor test analysis from the Michigan Commission proceeding as part of its December 2 Answer to provide a factual record and basis for the Commission to formulate its own conclusion that the Michigan Commission misapplied the seven-factor test and violated the comparability standard.<sup>148</sup>

77. Wolverine asserts that, although the Michigan Joint Zone contains transmission assets that are configured exactly like the Morenci Project, the evidentiary record is devoid of any actual comparisons made by the Michigan Commission. Specifically, Wolverine finds that neither the Michigan Commission Order nor the Michigan Commission's December 17 Answer contain an explanation as to why the Morenci Project is not comparable to Wolverine's Group B Assets or Consumers Energy's Vernon Assets, which are the most relevant assets for purposes of comparison. Wolverine also disputes the Michigan Commission's conclusion under the seventh factor of the seven-factor test that the Morenci Project is comparable to Consumers Energy's 138 kV lines that serve distribution systems because the low-side voltage is less than 46 kV. Wolverine counters that having low-side voltage less than 46 kV is not determinative, as evidenced by existing Michigan Joint Zone facilities exhibiting similar configurations.<sup>149</sup> Wolverine asserts that in applying the seven-factor test, the Morenci Project should be compared to facilities owned by Consumers Energy and Wolverine that were previously

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<sup>146</sup> *Id.* at 30-33.

<sup>147</sup> *Id.* at 3 (citing Wolverine May 3 Comments at 12; Wolverine December 2 Answer at 11).

<sup>148</sup> *Id.* at 4.

<sup>149</sup> *Id.* at 4-6 (citing Michigan Commission December 17 Answer at 11-12; *Wolverine Power Supply Coop., Inc.*, 151 FERC ¶ 61,034 at P 6 and n.14).

classified and reclassified as transmission, not Consumers Energy's facilities that share superficial similarities but are used to directly serve retail load.<sup>150</sup>

78. Wolverine claims that it has 68 line segments and Consumers Energy has two line segments, classified as transmission, configured exactly like the Morenci Project in which the line segments connect to 46 kV, 25 kV, or 12.4 kV systems that are radial until a normally open switch on the systems is closed. Wolverine argues that Consumers Energy and the Michigan Commission ignore these similar facilities and claims that the facilities operate in the same way as the Morenci Project, normally open. Wolverine contends that the proper distinction is whether a facility "can" or "cannot" be looped, as a "looped" facility can be a line that is either normally open or normally closed, since a normally open line becomes looped when closed. Wolverine argues that the Morenci Project can be closed and therefore is "looped" within the meaning of this factor.<sup>151</sup>

**O. Consumers Energy January 7 Answer**

79. Consumers Energy argues that this proceeding is about the proper classification of a single proposed facility under the Commission's seven-factor test, not jurisdictional overreach, as Wolverine contends.<sup>152</sup> Consumers Energy argues that its Group B Assets, to which Wolverine refers, are not comparable to the proposed Morenci Project and that the Michigan Commission rejected this argument from Wolverine in the Michigan Commission Order. Consumers Energy contends that, among other reasons, the Group B Assets are not comparable because they are looped facilities serving 46 kV bulk power substations, whereas the proposed Morenci Project would be a radial facility serving a distribution substation with a secondary voltage of 12.47 kV.<sup>153</sup> Additionally, Consumers Energy argues that the Morenci Project is not comparable to its Group B Assets because (1) Consumers Energy's Group B Assets provide power to both Consumers Energy retail customers and other municipal electric systems and electric cooperatives; (2) Consumers Energy demonstrated changing power flows over the Group B Assets in the state proceeding, whereas Wolverine and Michigan Electric merely expect to see changing power flows on the proposed Morenci Project; and (3) Wolverine

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<sup>150</sup> *Id.* at 6-7.

<sup>151</sup> *Id.* at 7-9.

<sup>152</sup> Consumers Energy January 7 Answer at 1-2.

<sup>153</sup> *Id.*

misapplied the relevant electrical and geographic proximity tests, as the Michigan Commission found in the Michigan Commission Order.<sup>154</sup>

## **VI. Discussion**

### **A. Procedural Matters**

80. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

81. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept the answers to answers because they have provided information that assisted us in our decision-making process.

### **B. Substantive Matters**

82. As an initial matter, we deny Michigan Electric's motion for summary rejection of the Complaint. Contrary to Michigan Electric's contention, the Complaint raises an issue of material fact, which we address in this order. Specifically, we find that the question of the Morenci Project's classification as transmission or local distribution is a genuine issue of material fact and that it was properly raised in the Complaint.

83. With regard to the merits of the Complaint, we grant the Complaint in part and find that the Morenci Project is a local distribution facility under the Commission's seven-factor test. We deny the Complaint to the extent that it requests that the Commission initiate an investigation of MISO's Tariff under section 206 of the FPA. Additionally, because we grant the Complaint with regard to Consumers Energy's preferred remedy, it is unnecessary for us to address its proposed alternative remedy of the Commission directing MISO to conduct a seven-factor test of the Morenci Project and reversing or staying MISO's approval of the Morenci Project on an interim basis.<sup>155</sup>

84. The Commission has jurisdiction over the "transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce."<sup>156</sup> The Commission does not, however, have jurisdiction over facilities

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<sup>154</sup> *Id.* at 3-4.

<sup>155</sup> *See* Complaint at 41-42, 47.

<sup>156</sup> 16 U.S.C. § 824(b)(1).

used in local distribution.<sup>157</sup> In Order No. 888, the Commission articulated a seven-factor test to determine what facilities would be subject to the Commission's jurisdiction.

85. As explained above, the Commission has stated that seven factors indicate that a facility is a local distribution facility, rather than a transmission facility:

(1) local distribution facilities are normally in close proximity to retail customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems; it rarely, if ever, flows out; (4) when power enters a local distribution system, it is not reconsigned or transported on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted geographical area; (6) meters are based at the transmission/local interface to measure flows into the local distribution system; and (7) local distribution systems will be of reduced voltage.<sup>158</sup>

86. The Commission has previously acknowledged that, where an owner of facilities seeks to include its facilities within a joint pricing zone containing other facilities that have been classified as transmission facilities using the seven-factor test, the owner's facilities must also be classified as transmission facilities under the seven-factor test. In particular, the Commission has stated that the company's facilities must be "classified as transmission facilities with [a] similar application of the seven-factor test" in order to be included within the joint pricing zone.<sup>159</sup> In this case, Consumers Energy challenges the classification of the Morenci Project located in the Michigan Joint Zone, which MISO included in the 2018 MTEP as a transmission facility. MISO did not perform a seven-factor test prior to its inclusion in the 2018 MTEP. We find that, in light of Consumers Energy's challenge to the Morenci Project's classification and the Commission's precedent regarding comparability of facilities within a joint pricing zone, the classification of the Morenci Project should be determined using the seven-factor test described in Order No. 888.

87. As described above, the Commission granted Michigan Electric's request to hold this proceeding in abeyance until the Michigan Commission reached a decision in Michigan Commission Case No. U-20497, a state proceeding initiated by Michigan Electric, Wolverine, and Midwest Energy seeking a classification of the Morenci Project under the seven-factor test. In granting the request, the Commission explained that "the Commission has taken into consideration state commissions' recommendations, when appropriate, with regard to certain transmission/local distribution matters" and that this

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<sup>157</sup> *Id.*

<sup>158</sup> Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,771.

<sup>159</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 101 FERC ¶ 61,004 at 21; *MISO I*, 106 FERC ¶ 61,219 at P 53.



proceeding “will benefit from the Michigan Commission’s expertise and familiarity with its [s]even[-][f]actor [t]est framework as applied to the Michigan Joint [] Zone.”<sup>160</sup> On November 14, 2019, the Michigan Commission issued the Michigan Commission Order and, concluding that the Morenci Project is a local distribution facility under each factor of the seven-factor test: (1) the Morenci Project is close to the retail customers being served, with 93 percent of the project’s consumers being in the same industrial park where the Morenci substation will be located; (2) the Morenci Project is radial in nature, and the applicants failed to demonstrate that, as currently designed, the Morenci Project is looped; (3) power can only flow through the Morenci Project to Midwest Energy’s distribution system for consumption by retail end users; (4) power entering the Morenci Project is not transported to another market but is consumed by end users on Midwest Energy’s distribution system; (5) most of the power entering Midwest Energy’s distribution system will be consumed in a relatively restricted geographic area; (6) although the meter for the Morenci Project is located on the high-voltage side of the Wolverine substation, the function of the meter is to measure flows into the local distribution system; and (7) the 138 kV radial lines that are part of the Morenci Project are comparable to 209 miles of 138 kV lines on Consumers Energy’s system that serve distribution systems with secondary voltage of 25 kV or below and that are classified as distribution.<sup>161</sup> We have reviewed the Michigan Commission’s seven-factor analysis and, based upon the record developed in this proceeding, we find that the Morenci Project is a local distribution facility.

88. We disagree with Wolverine’s argument that the Michigan Commission applied the seven-factor test in a manner inconsistent with the applicable comparability standard and that it reverted to an older version of the seven-factor test. Wolverine’s description of the previous classifications conducted by the Michigan Commission in the Michigan Joint Zone is inaccurate, and Wolverine is incorrect to suggest that the Commission’s reliance on the Michigan Commission’s seven-factor test in *MISO III* signaled the Commission’s abandonment of a previous framework used by the Michigan Commission. We agree with the Michigan Commission that it has applied the seven-factor test in a manner consistent with its classification of facilities in the Michigan Joint Zone and that the classification of the Morenci Project is consistent with prior classifications, including the Revised Administrative Determination. Although *MISO III* involved a settlement agreement and a reclassification of facilities based on the Revised Administrative Determination, the Michigan Commission applied the same seven-factor test, and the Commission found that the revisions to the list of Wolverine transmission facilities met the prior directive that “Wolverine’s facilities should meet the requirements of the

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<sup>160</sup> *Consumers Energy Co.*, 167 FERC ¶ 61,212 at PP 12-13.

<sup>161</sup> See Michigan Commission November 15 Motion at 4-5; Michigan Commission Order at 37-53.

seven[-]factor test as applied by the Michigan Commission.”<sup>162</sup> We also disagree with Wolverine’s assertion that that the Morenci Project should only be compared to certain facilities owned by Consumers Energy and Wolverine that were previously classified as local distribution and reclassified as transmission, not certain Consumers Energy’s facilities that are used to directly serve retail load. Nor do we agree with Wolverine’s assertion that it is not appropriate to apply the seven-factor test in this case because the facilities in this case were approved through the MTEP process. A seven-factor test is not always necessary to determine the appropriate classification of a facility; for instance, a project’s configuration may make clear whether the facility is local distribution or transmission. However, we find that it is appropriate to use the seven-factor test in this case, where the classification of the facilities is disputed in a joint pricing zone where facilities have previously been classified using the seven-factor test to ensure comparability.

89. We do not find that the comparability standard requires the Michigan Commission to only consider the specific facilities cited by Wolverine to ensure comparability in its application of the seven-factor test. The seven-factor test is used to determine the proper classification of any facility in the Michigan Joint Zone regardless of whether the facility had a prior classification or if it never received a formal classification. We do not find that it is appropriate to limit the comparable facilities that a regulator may consider when attempting to best classify a proposed facility. Further, we note that the Michigan Commission found that “even if [it] were to only consider previously-classified transmission facilities . . . the final determination [of the Morenci Project] would still be the same.”<sup>163</sup> Additionally, the inclusion of a local distribution facility in the MTEP does not shield the facility from being subjected to a seven-factor test under a complaint under section 206 of the FPA.<sup>164</sup>

90. Wolverine argues that the Morenci Project is functionally indistinguishable from certain Wolverine and Consumers Energy Group B Assets that were recently reclassified as transmission. We agree with the Michigan Commission and find that the Group B Assets are not comparable to the Morenci Project. Wolverine’s Group B Assets consist of 68 69 kV line segments and five substations that connect Wolverine’s 69 kV looped transmission system to its bulk power 138/12.47 kV and 138/25 kV substations. However, the underlying 12.47 kV and 25 kV systems are looped.<sup>165</sup> Likewise, Consumers Energy’s Group B Assets consist of sixty-five 138 kV

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<sup>162</sup> *MISO III*, 112 FERC ¶ 61,351 at P 28.

<sup>163</sup> Michigan Commission Order at 37.

<sup>164</sup> *See City of Pella, Iowa*, 134 FERC ¶ 61,081, at P 68 (2011).

<sup>165</sup> Michigan Commission Order at 9, 41.

line segments and six substations connecting 138 kV transmission lines to Consumers Energy's bulk power 138/46 kV substations. The underlying 46 kV system is looped.<sup>166</sup> In contrast, the Morenci Project consists of one radial 138 kV line and one 138/12.47 kV substation, and the underlying 12.47 kV distribution system owned by Michigan Electric is not looped. As the Michigan Commission found in the Michigan Commission Order, although the applicants provided diagrams that attempted to show that the underlying distribution/sub-transmission network can be looped, the applicants failed to demonstrate that the Morenci Project, as currently designed, is actually looped.<sup>167</sup> We find that it was proper for the Michigan Commission to analyze the Morenci Project as designed and not pursuant to hypothetical configurations.

91. Regarding the comparability of the Vernon Assets, the Michigan Commission accepted the reclassification of Consumers Energy's Group B Assets as transmission facilities in a settlement agreement, to which Wolverine was a party, and found the settlement agreement to be evidence of the parties' agreement that Consumers Energy's Group B Assets should be classified as transmission under the seven-factor test.<sup>168</sup> As such, Wolverine agreed with Consumers Energy's seven-factor analysis that found the Vernon Assets to be transmission based on five of the seven factors; that is, despite the facilities being radial in character and there being a lack of change in power flows.<sup>169</sup> Additionally, in accepting the reclassification request, the Commission found the Michigan Commission's implementation of the seven-factor test sufficient and, accordingly, deferred to its findings.<sup>170</sup> In the instant case, the Michigan Commission similarly found that the Morenci Project is radial in nature. However, the Michigan Commission determined that Wolverine, Michigan Electric, and Midwest Energy failed to provide evidence to refute Consumers Energy's testimony that the Vernon Assets are unlike the Morenci Project because the Vernon Assets are a substation served by a 138 kV line that first transforms to 46 kV before further transforming to distribution voltages of less than 25 kV, whereas the Morenci Project is a 138 kV radial line that will serve a distribution substation that directly transforms from 138 kV to less than 25 kV. We find

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<sup>166</sup> *Id.* Wolverine claims that one set of Consumers Energy's Group B Assets, the Vernon Assets, supplies a normally-open 46 kV looped system whereas all other assets supply a normally-closed 46 kV looped system. See Wolverine May 3 Comments at 17-18.

<sup>167</sup> Michigan Commission Order at 41-42.

<sup>168</sup> *Consumers Energy Co.*, MPSC Case No. U-17598, at 2 (Oct. 16, 2014).

<sup>169</sup> Consumers Energy, Application, Docket No. ER15-910-000, at n.37 and Exhibit III, at 20 (filed Jan. 23, 2015).

<sup>170</sup> *Consumers Energy Co.*, 151 FERC ¶ 61,033 at P 18.

that the Michigan Commission gave proper consideration to the comparability of the Vernon Assets to the Morenci Project in the Michigan Commission Order, and we see no reason to depart from the Commission's precedent of deferring to the Michigan Commission's recommendation in these classification cases.

92. We disagree with Michigan Electric's argument that the Commission-jurisdictional transmission service at issue and the parties' rights and obligations under existing contracts and tariffs that the Commission enforces requires a transmission classification for the Morenci Project. The Michigan Commission found that although wholesale transactions occur over the Morenci Project, that does not mean that its function is a transmission facility; rather, the function of the Morenci Project is to deliver power leaving Michigan Electric's looped transmission system to Midwest Energy's distribution system for exclusive consumption by Midwest Energy's retail end users.<sup>171</sup> Under the FPA, the Commission has jurisdiction over wholesale electricity sales, even if it does not have jurisdiction over the facilities through which the sales occur, which is relevant here.<sup>172</sup> In MISO, a local distribution facility owner can enter into a wholesale distribution service agreement to make its facility available for the wholesale service outlined in the agreement, which is filed with the Commission.<sup>173</sup> The Commission has jurisdiction over any wholesale electricity sales on that facility, even if the facility is a local distribution facility. Therefore, the presence of wholesale transactions or contracts for wholesale transactions are not dispositive with regard to whether to classify a facility as transmission or distribution.

93. Because we determine that the Morenci Project is a local distribution facility, we find that it was inappropriate for MISO to include the Morenci Project in the 2018 MTEP because a local distribution project is not eligible for inclusion under the local transmission planning process under the MTEP. Section I.D.1.a of Attachment FF of the Tariff provides for transmission owners engaged in local system planning to "develop and propose plans involving modifications to any of the transmission facilities which are part of the Transmission System."<sup>174</sup> Further, the Tariff, in defining the term "Transmission System," clearly delineates that, "[w]hile not part of the Transmission System, service over Distribution Facilities is available through the execution of a

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<sup>171</sup> Michigan Commission Order at 49.

<sup>172</sup> See 16 U.S.C. § 824(a); see also *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (2007) (upholding the Commission's authority to regulate all aspects of wholesale energy sales).

<sup>173</sup> See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,146 (2016) (accepting a wholesale distribution agreement).

<sup>174</sup> MISO Tariff, Attachment FF, § I.D.1.a.

Service Agreement pursuant to Schedule 11 of this Tariff.”<sup>175</sup> Therefore, we find that the Morenci Project, which is appropriately classified as a distribution facility, was not eligible for inclusion in the 2018 MTEP under the “Other Projects” category.<sup>176</sup>

94. We also disagree with Michigan Electric’s argument that granting the Complaint would result in impermissible retroactive relief contrary to FPA section 206. As explained above, a local distribution project is not eligible for inclusion in the MTEP under the local transmission planning process. Accordingly, the Morenci Project should not have been included in the 2018 MTEP. Further, Michigan Electric’s reliance on *Am. Transmission Co. LLC* is misplaced because that proceeding concerned investment and ownership rights in *transmission* projects in the MTEP, and is not applicable in the instant case where a local distribution project was included in the MTEP, contrary to the Tariff.<sup>177</sup>

95. We find that MISO followed its Tariff and the MTEP procedures when approving the Morenci Project. Although Consumers Energy raised its concerns to MISO about the classification of the Morenci Project, under the TOA, MISO only has authority to classify facilities for transmission owners that are not subject to regulation by a regulatory authority. Specifically, Appendix C, section II.C.2 of the TOA requires a regulated

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<sup>175</sup> “Transmission System” is defined as “transmission facilities owned or controlled by Transmission Owners that have conveyed functional control to the Transmission Provider, and are used to provide Transmission Service under Module B of this Tariff. The Transmission System includes transmission facilities owned or controlled by Transmission Owners, the functional control of which has been transferred to the Transmission Provider subject to Commission approval under Section 203 of the FPA. In addition, the Transmission System includes other transmission facilities owned or controlled by the Transmission Owner that are booked to transmission accounts and are not controlled or operated by the Transmission Provider but are facilities that the Transmission Owners, by way of the Agency Agreement, have allowed the Transmission Provider to use in providing service under this Tariff. While not part of the Transmission System, service over Distribution Facilities is available through the execution of a Service Agreement pursuant to Schedule 11 of this Tariff. The term Transmission System shall include the Transmission System (Michigan).” MISO, FERC Electric Tariff, § I (Definitions).

<sup>176</sup> MISO states that the “Commission has the final authority” in the transmission/distribution classification process and that it “will await the Commission’s decision in this docket on the jurisdictional status of the Morenci [Project] and follow the Commission’s decision.” MISO December 2 Answer at 3-4.

<sup>177</sup> See *Am. Transmission Co. LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,090 at P 55.

transmission owner to request a classification from the appropriate regulatory authority or authorities for a determination on which of its facilities are transmission facilities and which are distribution, in accordance with the seven-factor test set forth in Order No. 888. As such, we find that MISO was correct to suggest that the parties request classification by an appropriate regulatory authority in order to address the concerns regarding the Morenci Project. As to the Michigan Commission's request for the Commission to clarify the state commission and RTO roles in the process, we continue to support the states' role in facility classification, and we will continue to defer to recommendations by relevant state regulatory authorities concerning where to draw the jurisdictional line under the Commission's seven-factor test for local distribution facilities, where appropriate and where such recommendations are consistent with the essential elements of the seven-factor test. Further, as evidenced by its pleadings, MISO recognizes the role of the Commission and state regulatory authorities in determining the proper classification of facilities, and MISO asserted that it was appropriate for Michigan Electric to seek a seven-factor test determination from the Michigan Commission in this case.

96. We reject Consumers Energy's request that the Commission initiate an investigation under section 206 of the FPA of MISO's Tariff to develop additional procedures. We agree with MISO that the classification of assets of a regulated entity is a regulatory function that should be performed by the Commission and state commissions and that requiring MISO to perform a seven-factor test for projects proposed during the MTEP process would be overly burdensome without providing significant benefit.

The Commission orders:

The Complaint is hereby granted in part, and denied in part, as discussed in the body of the order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.