169 FERC ¶ 61,233
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc.	Docket Nos. EL15-68-003 EL15-68-004
Otter Tail Power Co. v. Midcontinent Independent System Operator, Inc.	EL15-36-003 EL15-36-004
Midcontinent Independent System Operator, Inc.	ER16-696-004 ER16-696-005 ER18-2513-000

ORDER ON BRIEFING, COMPLIANCE, AND REHEARING

(Issued December 20, 2019)

1. On August 31, 2018, the Commission issued an order on remand[1] addressing an opinion issued by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).[2] The D.C. Circuit had vacated and remanded to the Commission several orders concerning generator interconnection financing procedures in the Midcontinent Independent System Operator, Inc. (MISO) region. In the Ameren Remand Order, the Commission reversed its prior determination in the vacated orders (effective June 24, 2015) that transmission owners and affected system operators should not be allowed the unilateral right to elect to provide initial funding for network upgrades.[3] The

[1] *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158 (2018) (Ameren Remand Order).

[2] *Ameren Servs. Co. v. FERC*, 880 F.3d 571 (D.C. Cir. 2018) (*Ameren*).

[3] Ameren Remand Order, 164 FERC ¶ 61,158 at P 28.

Commission directed MISO to submit a compliance filing making corresponding changes to its *pro forma* Generator Interconnection Agreement (GIA), *pro forma* Facilities Construction Agreement (FCA), and *pro forma* Multi-Party Facilities Construction Agreement (MPFCA) within 30 days of the date of the order (August 31, 2018), with such changes to be effective prospectively from that date.[4] The Commission also requested further briefing limited to the treatment of the GIAs, FCAs, and MPFCAs that were entered into during the time period between June 24, 2015 and August 31, 2018.[5] In this order, after consideration of the briefs filed with the Commission, we find that GIAs, FCAs, and MPFCAs entered into between June 24, 2015 and August 31, 2018 should be revised to allow transmission owners and affected system operators to unilaterally elect to provide initial funding for network upgrades, if they so choose. We also accept MISO's filing made in compliance with the Ameren Remand Order. Finally, we deny a request for rehearing of the Ameren Remand Order.

I. Background

A. MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff

2. MISO's *pro forma* GIA in Attachment X of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) and Attachment FF of the Tariff govern the network upgrades constructed for the interconnection customer by the transmission owner with which it directly interconnects.[6] In MISO, an interconnection customer is responsible for 100 percent of network upgrade costs, with a possible 10 percent reimbursement for network upgrades that are 345 kV and above.[7] MISO's Tariff initially provided three alternatives for funding the costs of network upgrades for generator interconnections. Under Option 1: (1) the interconnection customer provided up-front funding for network upgrades; (2) the transmission owner provided a 100 percent refund of the cost of network upgrades to the interconnection customer upon completion of the network upgrades; and (3) the transmission owner assessed the

[4] *Id.* P 33.

[5] *Id.* P 36.

[6] Attachment FF (Transmission Planning Expansion Protocol) of the MISO Tariff describes the process to be used by MISO to develop the MISO Transmission Expansion Plan, which facilitates the expansion of and/or modification to MISO's transmission system.

[7] *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 8 (2009).

interconnection customer a monthly network upgrade charge to recover the cost of the non-reimbursable portion[8] of the network upgrade costs. The Commission later found Option 1 to be unjust and unreasonable and ordered MISO to remove this funding option from its Tariff, effective March 22, 2011.[9]

3. Under Option 2: (1) the interconnection customer provides up-front funding for network upgrades and (2) the transmission owner refunds the reimbursable portion[10] of the payment, as applicable, to the interconnection customer in the form of a credit to reduce the transmission service charges incurred by the transmission customer with no further financial obligations on the interconnection customer for the cost of network upgrades (the "Generator Up-Front Funding" option, or "Generator Up-Front Funded" network upgrades).

4. Under a third alternative set forth in Article 11.3 of MISO's *pro forma* GIA, the transmission owner could unilaterally elect to provide the up-front funding for the capital cost of the network upgrades (the "Transmission Owner Initial Funding" option). A MISO transmission owner electing this option would assign the non-reimbursable portion of the costs of the network upgrades directly to the interconnection customer through a network upgrade charge that recovers a return on and of the transmission owner's cost of capital.

5. In addition to MISO's *pro forma* GIA, the Commission has also accepted a *pro forma* FCA and *pro forma* MPFCA for use in the MISO region.[11] The *pro forma* FCA is an agreement for network upgrades on affected systems, i.e., network upgrades constructed for an interconnection customer by a transmission owner other than the transmission owner with which the interconnection customer directly interconnects. This indirectly-connected transmission owner is known as the affected system operator.[12] The

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[8] The non-reimbursable portion would be 100 percent of the cost of network upgrades less than 345 kV and 90 percent of the cost of network upgrades 345 kV and above.

[9] *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076, at P 43 (2011) (*E.ON*), *order on reh'g*, 142 FERC ¶ 61,048, at P 39 (2013), *order on reh'g*, 151 FERC ¶ 61,264 (2015).

[10] The reimbursable portion would be 10 percent of the cost of network upgrades 345 kV and above and 0 percent of the cost of network upgrades less than 345 kV.

[11] *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,301, at P 5 (2009).

[12] An affected system operator is the entity that operates an electric transmission or

pro forma MPFCA is used when multiple interconnection requests cause the need for construction of common network upgrades (network upgrades that are constructed by a transmission owner for more than one interconnection customer) on a directly-connected transmission system or the transmission system of an affected system operator. The *pro forma* FCA and the *pro forma* MPFCA did not originally include the Transmission Owner Initial Funding option that was contained in Article 11.3 of MISO's *pro forma* GIA.

B. Orders on Review

6. On January 12, 2015, in Docket No. EL15-36-000, Otter Tail Power Company (Otter Tail) filed a complaint alleging that MISO's Tariff was unjust and unreasonable to the extent that the *pro forma* FCA contained therein did not permit an affected system operator to elect Transmission Owner Initial Funding for network upgrades, a right which was provided to directly-connected transmission owners under MISO's *pro forma* GIA.[13] On June 18, 2015, the Commission granted the complaint in part, finding that the same network upgrade funding options should be available to all interconnection customers whether in a GIA, FCA, or MPFCA.[14] The Commission denied, however, Otter Tail's preferred remedy. Instead, the Commission found that the interconnection customers—not the transmission owners—should be allowed to select the financing mechanism because the interconnection customer was directly assigned the costs. Thus, the Commission determined that Article 11.3 of the *pro forma* GIA may be unjust, unreasonable, and unduly discriminatory because allowing transmission owners to unilaterally elect Transmission Owner Initial Funding and recover a return on and of the capital costs of the network upgrades, without reimbursing interconnection customers' costs through credits "may deprive the interconnection customer of other options to finance the cost of the network upgrades that provide more favorable terms and rates,"[15]

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distribution system or the electric system associated with either an existing generating facility or a higher queued generating facility, which is an electric system other than the transmission owner's transmission system that is affected by the interconnection request. *See* MISO Tariff, Attach. X, § 1 (109.0.0).

[13] Otter Tail Complaint and Request for Fast-Track Processing, Docket No. EL15-36-000, at 1 (filed Jan. 12, 2015).

[14] *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,220, at P 47 (2015) (June 2015 Order).

[15] *Id*. P 48.

and also subjects the customer to a more onerous security requirement.[16] Further, the Commission argued that this practice could result in discriminatory treatment by the transmission owner of different interconnection customers.[17] The Commission instituted a proceeding pursuant to section 206 of the FPA[18] to examine MISO's *pro forma* GIA, *pro forma* FCA, and *pro forma* MPFCA and required MISO to make a filing either to report whether it would (1) propose Tariff changes providing that the transmission owner or affected system operator may only elect the Transmission Owner Initial Funding option for network upgrades if the interconnection customer agrees to such election, or (2) explain why such changes are not necessary to address the potential that MISO transmission owners may exercise their discretion to increase the network upgrade costs that are directly assigned to interconnection customers.[19]

7. On rehearing, the Commission affirmed its finding that the Transmission Owner Initial Funding option is unjust, unreasonable, unduly discriminatory or preferential in light of the opportunities for undue discrimination and for increasing costs to interconnection customers where there is no increase in service, given that interconnection customers are held responsible for network upgrade costs and do not receive credits that reimburse them for those costs.[20] The Commission directed MISO to make a compliance filing revising its *pro forma* GIA, *pro forma* FCA, and *pro forma* MPFCA to provide that the transmission owner or affected system operator may elect the Transmission Owner Initial Funding option to fund network upgrades only upon the mutual agreement of the interconnection customer, with such Tariff changes to be effective on June 24, 2015.[21]

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[16] *Id*. P 49.

[17] *Id.* P 48.

[18] 16 U.S.C. § 824e (2012).

[19] June 2015 Order, 151 FERC ¶ 61,220 P 53 at ordering para. (E).

[20] *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,352, at PP 29-30 (2015) (December 2015 Rehearing Order).

[21] *Id.* P 65.

8. On August 9, 2016, the Commission accepted, subject to condition, MISO's compliance filings pursuant to the Commission's December 2015 Rehearing Order, effective June 24, 2015.[22] MISO's compliance filings revised MISO's *pro forma* GIA, *pro forma* FCA, and *pro forma* MPFCA so that a transmission owner or affected system operator may elect the Transmission Owner Initial Funding option to fund network upgrades upon the mutual agreement of both the transmission owner and the interconnection customer. The Commission required MISO to submit a further compliance filing revising the *pro forma* MPFCA to allow each interconnection customer who is a party to the MPFCA to independently agree with the transmission owner's election of the Transmission Owner Initial Funding option for network upgrade costs.[23] Also, on August 9, 2016, the Commission denied rehearing of the December 2015 Rehearing Order.[24] In response to transmission owner concerns that Generator Up-Front Funding results in confiscatory rates, the Commission found that the owners had not presented evidence of particular risks that would not be compensated, and invited the transmission owners to return with more evidence if such risks materialized.[25]

9. MISO's filing in compliance with the August 2016 Compliance Order was accepted on December 2, 2016, effective June 24, 2015.[26] On October 7, 2016, the Commission denied rehearing of the August 2016 Compliance Order.[27]

C. ***Ameren***

10. On appeal, the D.C. Circuit vacated and remanded the Commission's orders in these proceedings.[28] The Court first took issue with the Commission's argument that giving transmission owners the option to fund the network upgrades provides them with the power to discriminate amongst interconnecting generators. The Court referenced the

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[22] *Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,098 (2016) (August 2016 Compliance Order).

[23] *Id.* P 18.

[24] *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,099 (2016).

[25] *Id.* PP 12, 21.

[26] *Midcontinent Indep. Sys. Operator, Inc.*, 157 FERC ¶ 61,168 (2016).

[27] *Midcontinent Indep. Sys. Operator, Inc.*, 157 FERC ¶ 61,013 (2016).

[28] *Ameren*, 880 F.3d at 585.

transmission owners' arguments that there is no evidence of discrimination nor any economic incentive on the part of the transmission owners to discriminate (as there would be if transmission owners still owned integrated generation facilities).[29] Although the Court noted that the Commission is not obliged to show actual evidence to support a determination of potential discrimination, it stated that the Commission must at least rest on economic theory and logic, which was lacking in the Commission's opinions.[30]

11. The Court also questioned the adequacy of the Commission's finding that allowing transmission owners to insist on transmission owner funding would be unjust and unreasonable because it imposes increased costs without any corresponding increase in service.[31] While the Commission noted that a more onerous security requirement applies under Transmission Owner Initial Funding, the Court found it likely that the interconnection customer would have to provide the same kind of security to a third-party financing source. In any event, while the Court agreed with the Commission that interconnection customers have an incentive to find lowest cost funding solutions, the Court stated that it does not necessarily follow from any incentive differences that the Commission may compel transmission owners to operate the network upgrades without an opportunity to earn a return.

12. The Court noted that transmission owners raised two arguments against the "unjust and unreasonable" theory, and stated that the Commission did not adequately address them. First, the Court stated that the Commission improperly dismissed the argument that, under compelled Generator Up-Front Funding, transmission owners will bear uncompensated liability for insurance deductibles and litigation (including environmental and reliability claims).[32] The Court referenced the Commission's determination that transmission owners will recover their cost of service beyond capital costs through their rates, but the Court noted that the Commission never acknowledged that these separate risks exist, nor did it attempt to assess all of the various risks and benefits to the transmission owner caused by the addition of the network upgrades. The Court was not swayed by the Commission's suggestion that network upgrades might actually reduce reliability risk, as the Commission made no assertion that any such reduction of reliability risk would reduce the overall risk borne by the transmission owner. The Court concluded that the Commission inadequately considered the transmission owners' arguments that all costs and risks are not baked into the existing

[29] *Id*. at 578.

[30] *Id*.

[31] *Id*. at 579.

[32] *Id*. at 580.

compensation structure, and that shareholders are forced to accept incremental exposure to loss without corresponding benefit.[33]

13. Second, the Court stated that the Commission inappropriately dismissed the argument that the Commission's orders modified the transmission owners' entire enterprise and thus created a risk that new capital investment will be deterred, requiring transmission owners to act in part as a non-profit business.[34] The Court referenced Supreme Court precedent requiring that a regulated industry is entitled to returns sufficient to ensure that new capital can be attracted.[35] The Court stated that the Commission must explain how investors could be expected to underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return. The Court was concerned that, if more and more of a transmission owner's business is to be owned and operated on a non-profit basis (through the addition of more Generator Up-Front Funded network upgrades), these additions may deter investors and diminish the ability of the transmission grid to attract capital for future maintenance and expansion.[36] The Court required the Commission, on remand, to provide reasoned consideration of the transmission owners' arguments by explaining whether all risks are truly "baked in," responding to transmission owners' "entire enterprise" argument, and addressing the effect of these orders on the ability of transmission businesses to attract future capital.

14. The Court noted that, when remanding orders to the Commission, two factors inform the decision whether to vacate: the gravity of the orders' flaws, and the disruptive consequences that may result.[37] The Court noted that the August 2016 Compliance Order "opens the floodgates" to compelled Generator Up-Front Funding while the Commission is responding to the transmission owners' argument, and expressed concern over what will happen to the projects "that have commenced in the interim[.]"[38] The Court opined that it is at least uncertain whether the Commission can reach the same result after addressing the deficiencies identified by the Court.[39] But the Court found that the

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[33] *Id*. at 580-81.

[34] *Id*. at 581.

[35] *Id*. (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (*Hope*)).

[36] *Id*. at 582.

[37] *Id*. at 584.

[38] *Id*. at 584-85.

[39] *Id*. at 585.

prospect of disruptive consequences cuts against the premature approval of construction projects under a tariff of questionable legality. The Court therefore vacated the orders and remanded for further proceedings consistent with the opinion.

D. Order on Remand

15. In the Ameren Remand Order, the Commission reversed its earlier findings in the vacated orders that: (1) Article 11.3 of MISO's *pro forma* GIA is unjust, unreasonable, unduly discriminatory or preferential in light of the opportunities for undue discrimination and for increasing costs where there is no increase in service; and (2) it is potentially unjust, unreasonable and unduly discriminatory to deprive the interconnection customer of the ability to provide its own capital funding.[40] The Commission stated that it erred in failing to: (1) adequately address transmission owners' contention that the Commission's vacated orders would force them to construct and operate Generator Up-Front Funded network upgrades on a non-profit basis; (2) adequately address transmission owners' concerns that their investors would be forced to accept risk-bearing additions to their network with zero return; (3) offer sufficient evidence or economic theory to support the Commission's finding of discrimination by transmission owners among their customers; and (4) address the effect of the Commission's orders on the ability of transmission businesses to attract future capital. Upon further review of the record, the Commission found that there was not enough evidence in the record to sustain the Commission's findings in the vacated orders.

16. The Commission directed MISO to file Tariff sheets, to be effective prospectively from the date of the order (August 31, 2018), that (1) restore the right of the transmission owner to unilaterally elect the Transmission Owner Initial Funding option for the capital cost of the network upgrades under Article 11.3 of the *pro forma* GIA, and (2) allow the affected system operator under the *pro forma* FCA and the affected system operator or transmission owner under the *pro forma* MPFCA to unilaterally elect the Transmission Owner Initial Funding option for the capital cost of network upgrades.[41] The Commission stated that, given its restoration of the unilateral right of the transmission owner to elect the Transmission Owner Initial Funding option in Article 11.3 of the *pro forma* GIA, it reversed its prior determination in the June 2015 Order partially granting the Otter Tail complaint, and granted the complaint in full, as it found that MISO's Tariff is unjust and unreasonable to the extent that the *pro forma* FCA and *pro forma* MPFCA

[40] Ameren Remand Order, 164 FERC ¶ 61,158 at P 28.

[41] *Id.* PP 33-34. MISO's compliance filing with proposed Tariff revisions, filed in Docket No. ER18-2513-000, is addressed in this order.

contained therein do not permit a transmission owner or an affected system operator to unilaterally elect the Transmission Owner Initial Funding option for network upgrades.[42]

17. The Commission also determined that it would not address any agreements entered into between June 24, 2015 (the original effective date of the directed changes to MISO's *pro forma* GIA, *pro forma* FCA, and *pro forma* MPFCA) and August 31, 2018, the date of the Ameren Remand Order, until after further briefing because of the potential harm it could cause to interconnection customers that have already obtained financing and paid for the network upgrade capital costs that were directly assigned to them.[43] The Commission found that harm to interconnection customers in that instance could include increased transaction costs related to renegotiating the financing arrangements entered into to pay for the network upgrade capital costs, in addition to any increased costs from the transmission owner's potentially higher cost of capital and costs related to posting security.

18. The Commission requested further briefing limited to determining how to address GIAs, FCAs, and MPFCAs that were entered into during the time period between June 24, 2015 and August 31, 2018 (i.e., the "interim period" between the date the tariff modifications imposed by the vacated orders became effective and the date the Ameren Remand Order was issued) where the interconnection customer provided Generator Up-Front Funding and the transmission owner or affected system operator that was party to the agreement would have elected the Transmission Owner Initial Funding option instead.[44]

II. Requests for Rehearing

19. American Wind Energy Association (AWEA) filed a request for rehearing of the Ameren Remand Order.

20. Apex Clean Energy Management, LLC (Apex) filed a motion to intervene out-of-time and a request for rehearing of the Ameren Remand Order. Apex represents that it is developing several wind energy projects that are in the process of obtaining GIAs with MISO transmission owners.[45] Apex represents that it initially filed timely motions to intervene on behalf of its wholly-owned and indirect subsidiary, Hoopeston Wind, LLC

[42] *Id.* P 34.

[43] *Id.* P 35.

[44] *Id.* P 36.

[45] Apex Request for Rehearing at 2-3.

(Hoopeston) and that the D.C. Circuit had granted Apex party status when this proceeding was pending appeal. Apex states that, while it is no longer the upstream owner of Hoopeston, Apex has participated in these proceedings and moved to intervene in the proceeding in which the Commission denied MISO's filing attempting to implement the D.C. Circuit's vacatur.[46] Ameren Services Company (Ameren), on behalf of its transmission-owning public utility affiliates Ameren Illinois Company, Union Electric Company, and Ameren Transmission Company of Illinois, together with International Transmission Company, ITC Midwest LLC, and Michigan Electric Transmission Company, LLC (together, Ameren and ITC Companies) filed an answer to AWEA's request for rehearing and Apex's request for rehearing and motion to intervene out-of-time.

III. Briefs

21. Initial briefs were filed in response to the Ameren Remand Order by: AWEA; MISO; Xcel Energy Services, Inc. (Xcel), on behalf of its affiliates Northern States Power Company, a Minnesota corporation and Northern States Power Company, a Wisconsin Corporation (the NSP Companies); MISO Transmission Owners;[47] Ameren

[46] *Id.* (citing Hoopeston Motion to Intervene, Docket No. EL15-68-000 (filed July 9, 2015); Hoopeston Motion to Intervene, Docket No. ER16-696-000 (filed Jan. 13, 2016); *Ameren Servs. Co. v. FERC*, Case No. 16-1075 (D.C. Cir. Dec. 6, 2016) (order granting motions to intervene); Apex Motion to Intervene, Docket No. ER18-1964-000 (filed July 20, 2018); Apex Motion to Intervene, Docket No. ER18-1965-000 (filed July 11, 2018)).

[47] MISO Transmission Owners for this filing consist of: Ameren, as agent for Ameren Missouri, Ameren Illinois, and Ameren Transmission Company of Illinois; 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, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; 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; Michigan Electric Transmission Company, LLC; 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; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power Inc.; Southern Illinois Power

and ITC Companies; and Alliant Corporate Services, Inc. (Alliant).[48] Reply briefs were filed by: AWEA; MISO; MISO Transmission Owners; Ameren and ITC Companies; and Alliant. Invenergy Renewables LLC (Invenergy) filed a motion to intervene out-of-time and reply brief on October 31, 2018.

IV. Compliance Filing

22. On September 28, 2018, MISO submitted revisions to its Tariff in compliance with the Ameren Remand Order. MISO proposes to restore the right of the transmission owner to unilaterally elect the Transmission Owner Initial Funding option under the *pro forma* GIA for the capital cost of interconnection related network upgrades, as well as extend the unilateral right of the transmission owner or affected system operator to elect the Transmission Owner Initial Funding option under the *pro forma* FCA and the *pro forma* MPFCA for interconnection related network upgrades.[49] MISO requests an August 31, 2018 effective date.[50]

A. Notice and Responsive Pleadings

23. Notice of MISO's compliance filing in Docket No. ER18-2513-000 was published in the *Federal Register*, 83 Fed. Reg. 50,357 (2018), with interventions and protests due on or before October 19, 2018.

24. Timely motions to intervene were filed by: American Transmission Company LLC; NRG Power Marketing LLC; Alliant; Avangrid, Inc.; Ameren; MISO Transmission Owners;[51] GridLiance Heartland LLC; EDF Renewables, Inc.; NextEra Energy Resources, LLC; American Municipal Power, Inc.; E.ON Climate & Renewables North America LLC; Apex; EDP Renewables North America LLC; Renewable Energy Systems

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Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

[48] Alliant submitted its initial brief on behalf of Interstate Power and Light Company (IPL) and Wisconsin Power and Light Company (WPL).

[49] MISO Compliance Filing, Transmittal Letter at 2-3, Docket No. ER18-2513-000 (filed Sept. 28, 2018).

[50] *Id.* at 4.

[51] MISO Transmission Owners here are the same MISO Transmission Owners that submitted briefs in response to the Ameren Remand Order. *See supra* note 47.

Americas, Inc.; Enel Green Power North America, Inc.; and Consumers Energy Company.

25. Invenergy filed an out-of-time motion to intervene. AWEA filed a timely motion to intervene and protest. MISO and MISO Transmission Owners filed answers to AWEA's protest.

V. Discussion

A. Procedural Matters

26. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Apex has not met this higher burden of justifying its late intervention.[52] We therefore deny Apex's late-filed request to intervene in Docket Nos. EL15-68-003, EL15-36-003, and ER16-696-004 because: (1) Apex has not demonstrated good cause for failing to move to intervene in a timely manner;[53] (2) Apex, in seeking intervention at this time, is not taking the record of this proceeding as it finds it;[54] (3) the Commission has issued a dispositive order in the

[52] *See*, *e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

[53] We are not persuaded by Apex's attempted reliance on the intervention of its formerly wholly-owned and indirect subsidiary Hoopeston. Apex does not state when it sold Hoopeston, but Commission records indicate the sale occurred prior to Hoopeston's filing of its timely motion to intervene in the relevant proceedings. Hoopeston gave notice to the Commission that Apex in March 2015 had transferred 100 percent of its membership interests in Hoopeston to IKEA Energy US, LLC. *See* Notice of Consummation, Hoopeston Wind, LLC, Docket No. EC15-15-000 (filed Mar. 23, 2015). Hoopeston intervened in Docket No. EL15-68-000 in July 2015 and in Docket No. ER16-696-000 in January 2016 (but never moved to intervene in Docket No. EL15-36-000). *See* Hoopeston Motion to Intervene, Docket No. ER16-696-000 (Jan. 13, 2015); Hoopeston Motion to Intervene, Docket No. EL15-68-000 (July 9, 2015). We are likewise not persuaded by the D.C. Circuit's granting Apex party status when these proceedings were pending appeal, as this is not dispositive as to whether late intervention should be granted in Commission proceedings.

[54] *See* 18 C.F.R. § 385.214(d)(3)(ii) (2019) ("Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to

Ameren Remand Order; and (4) the Commission generally does not grant late-filed requests to intervene at the rehearing stage.[55]

27. In light of our decision to deny Apex's late motion to intervene, we dismiss Apex's request for rehearing in Docket Nos. EL15-68-003, EL15-36-003, and ER16-696-004. Because Apex is not a party to this proceeding, it lacks standing to seek rehearing of the Ameren Remand Order under the FPA and the Commission's regulations.[56]

28. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), we grant Invenergy's late-filed motion to intervene in Docket No. EL15-68-003, EL15-36-003, and ER16-696-004 given that: (1) the Commission until now has not issued a dispositive order on the supplemental briefing; and (2) Invenergy has accepted the record to date in this proceeding.

29. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2019), prohibits an answer to a request for rehearing. Accordingly, we reject Ameren and ITC Companies' answer to the rehearing requests filed in Docket Nos. EL15-68-003, EL15-36-003, and ER16-696-004.

30. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene in Docket No. ER18-2513-000 serve to make the entities that filed them parties to this proceeding.

31. 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 unless otherwise ordered by the decisional authority. We accept the answers filed by MISO and MISO Transmission Owners in Docket No. ER18-2513-000 because they have provided information that assisted us in our decision-making process.

32. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), the Commission will grant Invenergy's late-filed motion

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the late intervention.").

[55] *See PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,265, at P 21 (2010) ("[A] late intervenor is not entitled to seek rehearing of any order issued prior to its intervention (unless the Commission specifically grants such a right, which we do not find appropriate here)." (footnotes omitted)).

[56] *See* 16 U.S.C. § 825*l*(a) (2012); 18 C.F.R. § 385.713(b) (2019); *Southern Co. Servs., Inc.*, 92 FERC ¶ 61,167 (2000).

to intervene in Docket No. ER18-2513-000 given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

B. Substantive Matters

1. Rehearing

a. AWEA's Rehearing Request

33. AWEA argues that in the Ameren Remand Order, the Commission failed to consider fully the issues remanded by the D.C. Circuit, thereby perpetuating rates, terms, and conditions for interconnection service that are unjust, unreasonable, and unduly discriminatory.[57] AWEA describes the D.C. Circuit as finding that the Commission had not supported its earlier finding of undue discrimination by transmission owners and remanding this issue for further consideration. AWEA states that the D.C. Circuit asserted incorrectly that only one transmission owner in MISO owned generation, and ignored Commission precedent holding that transmission owners have clear incentives to discriminate in the context of generator interconnection procedures and costs.[58] AWEA states that the D.C. Circuit left open the possibility that the Commission on remand could reach a conclusion on remand as to undue discrimination if the Court's understanding of the facts were different from the Commission's. AWEA also states that the D.C. Circuit left open the possibility that the Commission on remand could have supported its earlier conclusions with evidence of the opportunity to discriminate rather than having to provide evidence of actual discrimination. AWEA contends that the Commission failed: (1) to take briefing on this issue; (2) to reconcile its changed position with its finding in Order No. 2003 that transmission owners have opportunities to discriminate in generator interconnection procedures and costs; and (3) to support its statement that its earlier orders lacked support to find undue discrimination by transmission owners.

34. AWEA argues that the D.C. Circuit required the Commission to provide reasoned consideration of whether all risks to transmission owners' entire enterprise are truly "baked in" and whether the vacated orders affect the ability of transmission owners' businesses to attract future capital.[59] AWEA asserts that rather than gathering evidence to address these questions, the Commission relied on "theoretical and unsupported

[57] AWEA Rehearing Request at 3.

[58] *Id.* at 4.

[59] *Id.* at 6-7.

conjecture."[60] AWEA states that no transmission owner since the issuance of the vacated orders has presented any evidence to the Commission or to the Securities and Exchange Commission "that its company has been adversely affected by the lack of ability to attract capital because of the inability to unilaterally apply Transmission Owner Initial Funding."[61] Instead, AWEA represents that to its knowledge all MISO transmission owners "have consistently reported healthy financial situations, ability to attract capital and ability to continue their business of service to customers."[62] AWEA states that, before Transmission Owner Initial Funding was available, going back at least 13 years, no transmission owner asserted risks to their enterprise or to serve their customers due to an inability to earn a rate of return. AWEA describes MISO transmission owners as affirmatively eliminating their ability to earn a rate of return when they advocated for MISO's interconnection customer funding policy, which no longer reimbursed interconnection customers for funded network upgrades below 345 kV but continued to permit transmission owners to earn a rate of return on the reimbursable portion of network upgrades above 345 kV. AWEA asserts that the Commission, in the Ameren Remand Order, erred in failing to order briefing on and to consider this information.[63]

35. As to the application of the Commission's directives in the Ameren Remand Order, AWEA argues that the Commission erred in applying Transmission Owner Initial Funding to projects that are in Phase III of MISO's generator interconnection queue.[64] AWEA describes Phase III projects as nearing GIA, FCA, or MPFCA execution. AWEA states that these projects have already put significant milestone payments at risk of forfeiture, as well as made other commitments to develop their projects, based on costs listed in studies and policy that existed until the Ameren Remand Order. AWEA states that these project owners might now cancel these projects and withdraw from the generator interconnection queue due to actions beyond their control.[65]

36. Given the difficulties facing projects in Phase III of MISO's generator interconnection queue and prior instances where the Commission has excluded projects in similar circumstances when generator interconnection and network upgrade cost policy

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[60] *Id.* at 7.

[61] *Id.* at 7-8.

[62] *Id*. at 8.

[63] *Id.* at 8-10.

[64] *Id.* at 11.

[65] *Id.*

has changed, AWEA requests that the Commission exclude these projects from any application of unilateral Transmission Owner Initial Funding.[66]

b. Commission Determination

37. As discussed further below, we deny AWEA's request for rehearing of the Ameren Remand Order. In the Ameren Remand Order, the Commission appropriately relied on the Court's opinion in *Ameren* and the totality of the record in reinstating the ability of transmission owners to unilaterally elect Transmission Owner Initial Funding. The information AWEA has provided on rehearing does not persuade us to reconsider the Commission's decision not to take additional briefing. Specifically, the information provided by AWEA does not adequately support the Commission's earlier conclusions that providing transmission owners the right to unilaterally elect Transmission Owner Initial Funding is unduly discriminatory, or overcome the Court's finding in *Ameren* that the Commission failed to carry its burden of proof in the vacated orders to justify providing interconnection customers the right to elect Generator Up-Front Funding.[67]

38. On the issue of undue discrimination, contrary to AWEA's assertions, we find that the fact that a majority of transmission owners in MISO also own generation is not adequate by itself to demonstrate that there is undue discrimination, nor does it justify requiring all transmission owners in MISO to bear the risks of Generator Up-Front Funding.[68] AWEA has also provided no evidence of actual discrimination on rehearing, nor does it show why the ability of interconnection customers to challenge costs before

[66] *Id.* at 13 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183, at P 90 (2008); *Sw. Power Pool, Inc.*, 128 FERC ¶ 61,114, at P 98 (2009)).

[67] *Cf. Emera Me. v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017) (*Emera*) ("The proponent of a rate change under section 206 . . . bears 'the burden of proving that the existing rate is *unlawful*. . . .' Therefore, unlike section 205, section 206 mandates a two-step procedure that requires FERC to make an explicit finding that the existing rate is unlawful before setting a new rate.") (internal citations omitted).

[68] *See* Ameren Remand Order, 164 FERC ¶ 61,158 at P 29 & n.65; *see also Ameren*, 880 F.3d at 578 ("Here, only one of the petitioning transmission owners—in Missouri—still owns a generator; none of the rest do. And FERC did not pay any attention to that small exception among Petitioners; it did not limit its order to that generator. Moreover, as we know from our other cases, the broader trend following Orders No. 888 and 2000 has been toward divestiture by transmission owners of generation assets.").

the Commission, a point on which the Court relied,[69] is inadequate to address any concerns with potential undue discrimination.

39. As to AWEA's argument that allowing transmission owners to unilaterally elect Transmission Owner Initial Funding is not required to assure transmission owners do not face uncompensated risks, or to satisfy the capital attraction standard,[70] AWEA has not overcome the Court's findings in *Ameren*. The Court in *Ameren* was skeptical of the idea that a transmission owner need not earn a profit on all parts of its business.[71] AWEA has not demonstrated that the risks that interconnecting customers using Generator Up-Front Funding in the aggregate or in other specific instances impose on each transmission owner or on all transmission owners in MISO would likewise be negligible. The Court also found that the Commission had not sufficiently accounted for risks to the transmission owners' enterprise that Generator Up-Front Funding would impose,[72] and AWEA has not provided any new arguments that would address that question.

40. AWEA represents that permitting Generator Up-Front Funding would not harm transmission owners given that, before Transmission Owner Initial Funding became available in 2013, no transmission owner asserted that it would be harmed financially due

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[69] *Ameren*, 880 F.3d at 579 ("[S]ince they bear a greater share of cost responsibility, the generators also have a sharper incentive than Petitioners to reduce the costs of raw materials, or construction labor, or design fees. This is why the generators can challenge inclusion of any such costs that deviate unreasonably from a fair market price before the Commission.").

[70] AWEA Rehearing Request at 7-8.

[71] *Ameren*, 880 F.3d at 581 ("[I]t seems undisputable that when portions of a business are unprofitable, it detracts from the attractiveness to investors of the business as a whole—and that *is* a concern that the Commission must at least address under *Hope*'s capital-attraction standard.").

[72] *Id.* at 580-81 ("We therefore think that FERC inadequately considered Petitioners' argument that all costs, and risks, are *not* baked in—that, in fact, shareholders are forced to accept incremental exposure to loss with no corresponding benefit. Without analysis, the Commission casts doubt on the likelihood that these risks exist. But if Petitioners are conceptually correct that they bear these risks as

owners of the transmission lines, it supports their basic contention that they are entitled to be compensated *now* as owners for operating the upgrades." (footnote omitted)).

to Generator Up-Front Funding.[73] However, before 2013, transmission owners could elect Option 1, which required an interconnection customer to provide up-front funding for network upgrades and then permitted the transmission owner to repay that amount to the interconnection customer and then charge the interconnection customer for the transmission owner's capital costs, operation and maintenance expense, and income tax allowance over time.[74] Thus, a transmission owner could earn a return to cover its risk of financial harm by electing Option 1 prior to its removal from MISO's Tariff and the first use of Transmission Owner Initial Funding in 2013. Even though a transmission owner has not cited actual harm to its enterprise from Generator Up-Front Funding, there may still have been a negative effect on a transmission owner's relative ability to attract capital. Moreover, granting rehearing per AWEA's request without addressing the potential harm to transmission owners from the vacated orders would improperly shift to transmission owners the Commission's burden under FPA section 206 to show that eliminating the unilateral election of Transmission Owner Initial Funding is just and reasonable by requiring them to provide proof that they have been harmed.[75]

41. Given that we are permitting transmission owners or affected system operators to elect Transmission Owner Initial Funding for GIAs, FCAs, and MPFCAs entered into in the interim period (i.e., June 24, 2015 through August 31, 2018), as discussed below, we reject AWEA's request that we exclude projects in Phase III of MISO's interconnection queue from the Tariff changes the Commission directed in the Ameren Remand Order. It would be inconsistent to exempt projects in Phase III of MISO's interconnection queue from modification when projects that have completed MISO's interconnection process with GIAs, FCAs, and MPFCAs are now subject to modification.

2. Supplemental Briefing

42. In the Ameren Remand Order, the Commission requested further briefing limited to determining how to address GIAs, FCAs, and MPFCAs that were entered into during the time period between June 24, 2015 and the date of the Ameren Remand Order (i.e., August 31, 2018), where the interconnection customer provided Generator Up-Front Funding and the transmission owner or affected system operator that was party to the agreement would have elected the Transmission Owner Initial Funding option

[73] *See* AWEA Rehearing Request at 8-9.

[74] *E.ON*, 137 FERC ¶ 61,076 at PP 34, 37, *order on reh'g*, 142 FERC ¶ 61,048 at P 34; *see also supra* P 2 (describing Option 1).

[75] *See Emera*, 854 F.3d 9 at 25 ("[A] finding that an existing rate is unjust and unreasonable is the 'condition precedent' to FERC's exercise of its section 206 authority to change that rate.").

instead. The Commission asked that respondents brief the Commission on eight specific questions.[76]

a. Initial Briefs and Reply Briefs

i. How many of the agreements that became effective between June 24, 2015 and the date of the Ameren Remand Order were GIAs? How many were FCAs? How many were MPFCAs?

43. MISO states that its records indicate that 90 GIAs, 14 FCAs, and one MPFCA became effective between June 24, 2015 and August 31, 2018.[77] MISO states that these numbers include both original agreements and agreements amended to the then-current *pro forma* during the period in question. In its reply brief, MISO states that it has no updates to these numbers.[78] MISO provides a list of specific agreements and project numbers as Attachment A to its reply brief.

44. Xcel states that the NSP Companies have executed nine agreements (six GIAs, two FCAs, and one MPFCA) between June 24, 2015 and August 31, 2018 as the transmission owner or affected system operator which may qualify for Transmission Owner Initial Funding.[79] Xcel further states that, during this time period, the NSP Companies have also executed nine agreements (five GIAs, one FCA, and three MPFCAs) as the interconnection customer with third-party transmission owners.

45. Alliant lists three agreements that IPL was a party to (as the interconnection customer, with ITC Midwest as the transmission owner) between the dates in question; one GIA, one MPFCA, and one FCA (IPL Agreements).[80]

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[76] Ameren Remand Order, 164 FERC ¶ 61,158 at P 36.

[77] MISO Initial Brief at 7.

[78] MISO Reply Brief at 3.

[79] Xcel Initial Brief at 10.

[80] Alliant Initial Brief at 5.

46. Ameren and ITC Companies state that they have identified six agreements within their companies, including four GIAs and two FCAs, that became effective between June 24, 2015 and August 31, 2018.[81]

47. AWEA states that the number of agreements should not be the Commission's deciding factor.[82] AWEA argues that even if there was only one agreement, the detrimental effect on the project under that agreement should be enough to sway the Commission's decision. AWEA further explains that the Commission's focus needs to be on the number of projects that are in Phase III of MISO's cycles and for which a GIA, FCA, and/or MPFCA is being negotiated, all of which are being negatively impacted by the Ameren Remand Order.[83]

ii. Under how many of each type of agreement that became effective between June 24, 2015 and the date of the Ameren Remand Order would the transmission owners or affected system operators seek to elect at this time to use the Transmission Owner Initial Funding option for the associated network upgrades applied retroactively? What are the total construction costs of all such network upgrades under each category of agreement (i.e., GIAs, FCAs and MPFCAs) and taken together for all three categories of agreements?

48. MISO states that, to the best of its knowledge, 12 agreements are at issue with an estimated $41,931,107 in network upgrades: (1) eight GIAs totaling $36,639,054 in network upgrades; (2) four FCAs totaling $5,285,553 in network upgrades; and (3) one MPFCA totaling $6,500 in network upgrades.[84]

49. Xcel contends that it cannot predict how many GIAs, FCAs or MPFCAs executed by the NSP Companies as the interconnection customer may be reopened by the third-party transmission owner(s) or affected system operator(s), but Xcel lists nine total agreements executed by the NSP Companies between June 24, 2015 and August 31, 2018 which may qualify for Transmission Owner Initial Funding where one of the

[81] Ameren and ITC Companies Initial Brief at 10.

[82] AWEA Initial Brief at 3.

[83] *Id.* at 4.

[84] MISO Initial Brief at 7.

NSP Companies is the transmission owner or both the transmission owner and the interconnection customer.[85] Xcel also lists nine total agreements executed by the NSP Companies between June 24, 2015 and August 31, 2018 which may qualify for Transmission Owner Initial Funding where one of the NSP Companies is the interconnection customer. Xcel states that the total cost of network upgrades identified in these agreements is $65 million.

50. Alliant states that it believes that ITC Midwest would elect Transmission Owner Initial Funding for each network upgrade in each of the three IPL Agreements.[86] Alliant states that the approximate construction cost of the network upgrades are $10 million for the GIA, $8 million for the FCA, and $12 million for the MPFCA.

51. MISO Transmission Owners state that they have incomplete information to provide a thorough response, but that they are aware of at least eight GIAs, three FCAs, and one MPFCA that were entered into between June 24, 2015 and August 31, 2018 that transmission owners and affected system operators may seek to revise to invoke the Transmission Owner Initial Funding option.[87]

52. Ameren and ITC Companies state that they would seek modification to use the Transmission Owner Initial Funding option in each of the six agreements it identified, and that the total construction cost of network upgrades is approximately $26.7 million for the GIAs and $2.53 million for the FCAs.[88]

[85] Xcel Initial Brief at 11-12. Xcel notes that there are additional agreements executed between August 31, 2018 and the date of its initial brief that may also be affected. *Id.* at 12.

[86] Alliant Initial Brief at 6.

[87] MISO Transmission Owners Initial Brief at 12-13.

[88] Ameren and ITC Companies Initial Brief at 10-11.

iii. Should the Commission revise GIAs entered into between June 24, 2015 and the date of the Ameren Remand Order to allow the transmission owner to elect at this time the Transmission Owner Initial Funding option for the associated network upgrades that are included in the already effective agreements to be applied retroactively?

53. Xcel takes no position on whether the Commission should allow transmission owners to revise such GIAs to allow the transmission owner to elect the Transmission Owner Initial Funding option for the associated network upgrades that are included in already effective agreements.[89] Xcel states, however, that if transmission owners are allowed to apply Transmission Owner Initial Funding, such application should be consistent through the MISO footprint.

54. Xcel asks the Commission to confirm that individual MISO transmission owners would be allowed to exercise the Transmission Owner Initial Funding option for interconnection agreements with third parties (if the Commission so allows) but would not be required to reopen executed agreements where the MISO transmission owner is both the transmission owner (or affected system operator) and the interconnection customer, and the costs of the network upgrades were "direct assigned" and not included in network transmission rates.[90] In those situations, Xcel asserts that facilities "funded" by the NSP energy supply function are not recovered in NSP system wholesale transmission rates under the MISO Tariff, because they are included as zero dollar assets in the transmission formula rate calculations.[91] Xcel states that the costs of transmission facilities "funded" by the NSP energy supply function are included in developing retail sales rates, and are shared between the NSP Companies as a production cost. If the NSP transmission function were to now elect Transmission Owner Initial Funding for the costs, Xcel argues, the costs would continue to be direct assigned to NSP energy supply, which would result in no net impact. Xcel contends that, if NSP applied the Transmission Owner Initial Funding option in such circumstances, the change from interconnection customer funding would essentially be an internal accounting exercise with no impact on wholesale rates. Additionally, Xcel states that the NSP Companies are authorized to earn a return on these investments through retail rates related to investments by the NSP energy supply function, and so avoid the concerns raised in *Ameren* that transmission owners not be saddled with uncompensated risks and required to operate at

[89] Xcel Initial Brief at 12.

[90] *Id.* at 15.

[91] *Id.* at 14.

least in part, on a non-profit basis. Moreover, Xcel notes that NSP recently received approval from the Minnesota Public Utilities Commission (Minnesota Commission) to acquire wind generation, which in some instances includes an estimate of the capital and return required for network upgrades required to deliver the additional wind generation.[92] Xcel states that these network upgrades are considered a capital expense whether they are funded by NSP the transmission owner or NSP the interconnection customer; thus, allowing the NSP Companies the option to not reopen executed agreements where an NSP Company is both the transmission owner and the interconnection customer allows treatment of network upgrades costs as contemplated by the Minnesota Commission.

55. AWEA asks the Commission to reject Xcel's request that transmission owners be allowed to reopen agreements with third parties, but not be required to reopen agreements where the transmission owner is also the interconnection customer under the same agreement.[93] AWEA contends that this would be unduly discriminatory because the transmission owner would be allowed to charge unaffiliated interconnection customers more for network upgrades, but not have to pay that higher amount when it is the interconnection customer.

56. Alliant states that it has already provided funding for the construction of the network upgrades associated with the IPL Agreements, and any Commission order that allows ITC Midwest to elect the Transmission Owner Initial Funding option could require IPL to revise those existing funding arrangements and may cause IPL and its customers to incur increased costs; therefore, any proposal for the Commission to order modifications to existing agreements would be unreasonable and should be rejected.[94] Alliant points to two Commission orders finding two GIAs executed before August 31, 2018 to be unjust and unreasonable because they included the Transmission Owner Initial Funding language, where such language was not included in the MISO *pro forma* GIA as of the effective date of the GIAs; Alliant argues that it would be inconsistent with those orders for the Commission to order retroactive revisions to the IPL Agreements.[95]

57. Alliant recognizes that the Court in *Ameren* was concerned that Generator Up-Front Funding could cause transmission owners to incur costs of operating and maintaining such transmission upgrades for which they could not be compensated;

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[92] *Id.* at 14-15.

[93] AWEA Reply Brief at 15.

[94] Alliant Initial Brief at 6-7.

[95] *Id.* at 7 (citing *Midcontinent Indep. Sys. Operator, Inc.,* 164 FERC ¶ 61,188 (2018) and *Midcontinent Indep. Sys. Operator, Inc.,* 164 FERC ¶ 61,183 (2018)).

however, Alliant argues that there is no evidence on record to suggest that IPL's election to fund certain network upgrades has caused ITC Midwest to incur transmission service costs for which it cannot seek compensation.[96] Alliant states that ITC Midwest can recover its transmission service costs through its transmission formula rate. Alliant contends that, because no party sought rehearing or appellate review pursuant to section 313 of the FPA of any Commission actions pursuant to which the IPL Agreements became effective, those agreements are now final and are not subject to retroactive modification.[97] Alliant contends that the IPL Agreements may only be modified prospectively pursuant to section 206 of the FPA.

58. AWEA also opposes the retroactive application of Transmission Owner Initial Funding to any GIA entered into from June 24, 2015 to August 31, 2018.[98] AWEA explains that similarly-situated customers must be afforded equal treatment for similar services, and if a transmission owner never selected Transmission Owner Initial Funding prior to June 24, 2015, it would be discriminatory for the transmission owner to do so at this point.[99] AWEA states that, prior to 2015, Transmission Owner Initial Funding was rarely used, and thus expects that very few transmission owners will be able to retroactively apply Transmission Owner Initial Funding under a GIA.[100]

59. Ameren and ITC Companies reject AWEA's undue discrimination argument, stating that the Tariff grants the transmission owner the discretion to use Transmission Owner Initial Funding.[101] MISO Transmission Owners also reject AWEA's argument, stating that returning the parties to the *status quo ante* requires a return to the Transmission Owner Initial Funding provision as it existed prior to the Commission's now vacated orders, and the ability to exercise initial funding was never limited only to transmission owners who previously invoked it.[102] Ameren and ITC Companies acknowledge that there are likely few instances of Transmission Owner Initial Funding being used prior to the June 24, 2015, but argues that it is because many transmission

[96] *Id.* at 7-8.

[97] *Id.* at 8.

[98] AWEA Initial Brief at 8.

[99] *Id.* at 5-6.

[100] *Id.* at 7-8.

[101] Ameren and ITC Companies Reply Brief at 9.

[102] MISO Transmission Owners Reply Brief at 11.

owners were using Option 1 funding during that time.[103] AWEA responds that very few transmission owners used Option 1 pricing – thus, the Commission should reject Ameren and ITC Companies' attempt to use Option 1 as a means to overcome the no undue discrimination clause of the FPA.[104]

60. AWEA also opposes the retroactive application for any GIAs that might qualify (where the transmission owner did apply Transmission Owner Initial Funding before June 24, 2015) because it believes retroactive application will cause significant financial disruption, which also extends to projects in the final Phase III of MISO's queue.[105] AWEA argues further that if network upgrade costs are allowed to be re-priced pursuant to unilateral Transmission Owner Initial Funding, it will increase costs, which in turn will cause cascading impacts on multiple fronts that could lead to project termination.[106] AWEA believes that buyers and sellers under Power Purchase Agreements and Asset Purchase Agreements as well as financial lenders, tax equity, and third-party vendors will be impacted.

61. AWEA explains that Power Purchase Agreements have been executed with rates for power and the sharing of risks all predicated on the network upgrade costs listed in the executed GIAs, costs that will increase significantly if Transmission Owner Initial Funding is selected.[107] AWEA argues that Transmission Owner Initial Funding was not a factor upon which the rates and sharing of risks under Power Purchase Agreements was negotiated and that generation developers will have no means to recoup the additional network upgrade costs under an executed Power Purchase Agreement. AWEA explains that developers are beholden to the Commission to establish stable policy so they can have confidence to invest and enter into Power Purchase Agreement s.

62. Next, AWEA explains that, under an Asset Purchase Agreements, a generation project is constructed and then sold.[108] The buyer often has the right to terminate the Asset Purchase Agreement if its network upgrade cost responsibility exceeds a certain level. Because Transmission Owner Initial Funding can cause network upgrade costs to be 30 to 40 percent higher on a net present value basis, the buyer may seek to terminate

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[103] Ameren and ITC Companies Reply Brief at 10.

[104] AWEA Reply Brief at 16-17.

[105] AWEA Initial Brief at 8.

[106] *Id.* at 9.

[107] *Id.*

[108] *Id.* at 10.

the Asset Purchase Agreement if Transmission Owner Initial Funding is selected, which would leave the generation developer with significant sunk costs and no buyer for its generating facility. Alternatively, the buyer may seek to re-open the Asset Purchase Agreement and shift the increased cost to the generation developer, which could render the project uneconomic for the developer. AWEA explains that in some cases, the parties might also agree to share the increase in cost, but that too is problematic because the buyer of a facility is usually is a state-regulated utility and the public service commission likely did not approve the added millions of dollars that would be the buyer's share. Thus, the utility would have to file an application at the public service commission for approval to bear the increased cost, a process that could take months and cause significant delays to project development.

63. AWEA next argues that the Commission's decision will significantly impact lenders and investors in generation projects.[109] AWEA states that lenders and tax equity investors undertook extreme due diligence before executing agreements, which included the cost of network upgrades under a GIA. AWEA explains that project financing and tax equity investment transactions restrict the ability of the project owner to enter into substantive amendments to the GIA. AWEA understands that the project documents agreed to with lenders or investors typically have not addressed the prospect of Transmission Owner Initial Funding for the interim period. Thus, the project owner must seek the consent of lenders or investors to amend the GIA or enter into another agreement to implement the GIA through Transmission Owner Initial Funding, which is a time-consuming process.[110] Due to the need to provide additional funding for payments under the service agreements, either or both parties to the project financing or tax equity deal may see delayed and diminished returns, which may threaten project economic viability.

64. AWEA next argues that the Commission should consider the impending expiration of the federal Production Tax Credit.[111] AWEA explains that if Transmission Owner Initial Funding is applied, the inevitable re-opening of Power Purchase Agreements, Asset Purchase Agreements, lender agreements and tax equity agreements will trigger generation developers to suspend orders with turbine manufacturers and other vendors, which will shift the production schedule and restart a 12 to 14 month delivery schedule with turbine manufacturers. AWEA then states that this will cause the December 31, 2020 Production Tax Credit deadline to be missed, which could cost consumers billions of dollars.

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[109] *Id.* at 11.

[110] *Id.* at 12.

[111] *Id.* at 12-13.

65. AWEA argues that regulatory certainty is a hallmark of administrative agency responsibility, and that generation developers have a right to rely on the network upgrade costs in their executed GIAs.[112] AWEA references a Supreme Court finding that, to abrogate an existing contract, the Commission must determine that circumstances are so burdensome that it would "adversely affect the public interest – as where it might impair the financial ability of the public utility to continue service, cast upon consumers an excessive burden, or be unduly discriminatory"[113] and that the Commission generally lacks authority "to abrogate existing contractual arrangements" absent extraordinary circumstances.[114] AWEA submits that none of those circumstances are at issue here: no transmission owner has shown any need to retroactively reform existing GIAs, nor shown that its company has been adversely affected by the lack of ability to attract capital because of the inability to apply Transmission Owner Initial Funding to GIAs since June 24, 2015.[115] Alternatively, AWEA argues, generation developers and interconnection customers will be financially harmed and will experience an excessive burden.[116] AWEA contends that retroactive application of Transmission Owner Initial Funding to existing GIAs will undermine regulatory certainty and harm the ability to obtain, or increase the cost to obtain, capital market backing for generation development.

66. AWEA argues that, if the Commission fails to preserve GIAs entered into from June 24, 2015 through August 31, 2018, it should establish a process to allow for generation developers, generation owners, and interconnection customers to recover their losses.[117] AWEA points to Order No. 888, where the Commission allowed utilities to recover stranded costs where utilities had invested in generation to serve certain retail load, but the retail load would now have the opportunity to obtain power supply from the marketplace. AWEA argues that the Commission should likewise allow generation developers, generation owners, and interconnection customers to recover stranded costs associated with their generation investments, which would include all development and construction costs if the project must be terminated because it is now uneconomic, any forfeited milestones, the increase in network upgrade costs if the project proceeds, any assessed penalties, increased costs under related third-party and vendor contracts, and the

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[112] *Id.* at 14.

[113] *Id.* at 15 (citing *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956)).

[114] *Id.* (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 582 (1981)).

[115] *Id.* at 15-16.

[116] *Id.* at 16.

[117] *Id.* at 17.

loss of Production Tax Credit value. MISO Transmission Owners refute AWEA's request for loss recovery, stating state that: (1) AWEA does not suggest from whom generators will cover such losses; (2) such losses are not stranded because generators were on notice of possible revisions to MISO's Tariff; and (3) while Order No. 888 involved a fundamental reform of the electric industry, there is no such transformation here.[118]

67. MISO Transmission Owners reject the argument that revising existing agreements to allow Transmission Owner Initial Funding will result in consequences for interconnection customers, claiming that this is not a sufficient legal basis to deprive transmission owners or affected system operators rights that are expressly allowed under the Tariff.[119] MISO Transmission Owners assert that the expiration of Production Tax Credits is likewise not a legitimate reason to deprive transmission owners of the right to elect the Transmission Owner Initial Funding option, because the timing of commercial operation and pending expiration of tax credits is a risk of doing business.[120]

68. MISO Transmission Owners and Ameren and ITC Companies contend that the only way to legally restore the transmission owners and interconnection customers to the position they would have been in had the Commission not erred in its now-vacated orders is to allow the MISO transmission owners to revise their agreements entered into between June 24, 2015 and August 31, 2018 to select the Transmission Owner Initial Funding option if they so choose.[121] MISO Transmission Owners argue that, when a court vacates an agency order, it intends to "deprive of force; to make of no authority or validity; to set aside" a prior Commission order.[122] MISO Transmission Owners and Ameren and ITC

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[118] MISO Transmission Owners Reply Brief at 19-20.

[119] *Id.* at 12-14.

[120] *Id.* at 14-15.

[121] MISO Transmission Owners Initial Brief at 10; Ameren and ITC Companies Initial Brief at 5-8. MISO Transmission Owners further state that, if an agreement was negotiated during the interim period but executed after August 31, 2018, the Commission should allow the transmission owner the right to elect the Transmission Owner Initial Funding Option. MISO Transmission Owners Initial Brief at 13 n.44. AWEA rejects this argument, arguing the transmission owners had notice as of the Ameren Remand Order that the agreements filed after August 31, 2018 may be subject to the previous *pro forma* Tariff language. AWEA Reply Brief at 9-0.

[122] MISO Transmission Owners Initial Brief at 10 (citing *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (quotations

Companies argue that the D.C. Circuit expressly vacated the Commission's prior orders, instead of choosing to remand the orders, which returns the parties to the *status quo ante*, particularly during any remand period.[123] Ameren and ITC Companies argue that the Commission committed legal error in issuing the vacated order and that "[w]hen the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made."[124]

69. Alliant refutes the argument that the vacatur of the Commission's orders makes any action taken by the Commission invalid.[125] Alliant asserts that section 313(c) of the FPA provides that the filing of a request for rehearing or a petition for judicial review does not operate as a stay of the order of which rehearing or judicial review is sought; Alliant contends that nothing in *Ameren* indicates that the GIAs which were agreed upon while the litigation was pending were also required to be modified based on that decision.[126] Invenergy argues that judicial vacatur does not automatically reinstate the prior rate.[127] Invenergy contends that the Commission generally disfavors the retroactive reopening of transactions where interconnection customers "made investment decisions based on the [auction price]" and "are required to invest capital in new or upgraded facilities" in order to meet their commitments.[128] Invenergy states that interconnection customers made investment decisions and invested capital in reliance on the executed agreements' terms, and revising such terms retroactively could be disruptive. Invenergy also argues that declining to reopen the already executed agreements in question here, is

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omitted)).

[123] *Id.* at 10-11 (citing *Transcon. Gas Pipe Line Corp. v. FPC*, 488 F.2d 1325 (D.C. Cir. 1973) (vacating orders and remanding for the Commission to consider all relevant factors in its decision making)).

[124] Ameren and ITC Companies Initial Brief at 10 (citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) (*Exxon*)).

[125] Alliant Reply Brief at 8.

[126] *Id.* at 8-9.

[127] Invenergy Reply Brief at 6.

[128] *Id.* (citing *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at P 56 (2017)).

consistent with the Commission's treatment of already-existing agreements when it ordered removal of Option 1 funding from MISO's Tariff on a prospective basis.[129]

70. MISO Transmission Owners and Ameren and ITC Companies argue that interconnection customers were on notice that the funding provisions of the *pro forma* GIA, FCA, and MPFCA were tentative and could be reverted to allow for the Transmission Owner Initial Funding option.[130] Ameren and ITC Companies contend that the Commission previously recognized that a judicial remand could require changes to agreements entered into during the pendency of these proceedings when it rejected a reservation of rights clause proposed in a GIA by Ameren Services Company.[131] Ameren and ITC Companies explain that the proposed reservation of rights clause stated that Generator Up-Front Funding was potentially subject to replacement with Transmission Owner Initial Funding, but the Commission found "that the proposed contested language is unnecessary, as any amendments to Article 11.3 of the *pro forma* GIA will be determined, if necessary, on remand in Docket No. EL15-68, *et al.*"[132]

71. Alliant, Invenergy, and AWEA rebut the notice argument from MISO Transmission Owners and Ameren and ITC Companies.[133] Alliant argues that the justness and reasonableness of individual GIAs that became effective during the interim period was not at issue in the now-vacated orders, and interconnection customers were not on notice that those agreements might be in jeopardy. Alliant states that interconnection customers were entitled to rely on those agreements when they procured funding for the underlying project.[134] Invenergy states that interconnection customers need information with sufficient time to make informed commercial decisions about their projects, and the transmission owners gave no indication during the study process or before entering into an interconnection agreement whether they would elect to initially

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[129] *Id.* at 6-7.

[130] MISO Transmission Owners Initial Brief at 11 (citing *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 22-23 (D.C. Cir. 2014) (*West Deptford*); Ameren and ITC Companies Initial Brief at 9.

[131] Ameren and ITC Companies Initial Brief at 9.

[132] *Id.* (citing *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,040, at P 19 (2016) (*MISO*)).

[133] Alliant Reply Brief at 5; Invenergy Reply Brief at 5-6; AWEA Reply Brief at 11-12.

[134] Invenergy Reply Brief at 5-6.

fund the network upgrades if successful on appeal.[135] Invenergy argues that notice that a change of some unknown amount might be assessed over a period of time at some point in the future is not an effective notice.[136] Invenergy contends that waiting for the remand proceeding and additional potential appeals to end before deciding whether to go forward with a project was not a reasonable option for many interconnection customers.

72. Alliant and AWEA further refute arguments that the Commission's decision in *MISO* put interconnection customers on notice that the Commission could order changes to specific GIAs retroactively in the event of reversal by the D.C. Circuit.[137] They argue that, although the Commission recognized in *MISO* that the GIA in that case might be subject to change at the conclusion of the litigation, the Commission explained that any such changes would be implemented under Article 30.11 of the GIA, whereby MISO could make a unilateral filing to modify the GIA under section 205 of the FPA, while the transmission owner and interconnection customer could make a unilateral filing under section 206 of the FPA.[138] The Commission found that the transmission owner in that case had sufficient right to make its arguments for changes to the GIA depending on the results of the appeals process. Alliant and AWEA conclude that, if an existing GIA is modified according to Article 30.11 by MISO under section 205 or by the transmission owner or interconnection customer under section 206, such changes to a specific GIA may only be made effective prospectively, and *MISO* says nothing about global retroactive reformation of all GIAs, FCAs, and MPFCAs.[139] Ameren and ITC Companies argue, on the other hand, that the agreements effective between June 24, 2015 and August 31, 2018 are *pro forma* agreements, the generic terms of which are set by the Tariff; therefore, the Commission's approval of the change to the Tariff (and thus the *pro forma* agreements under it) was vacated by the D.C. Circuit.[140]

73. AWEA refutes MISO Transmission Owners' reliance on *West Deptford* for the argument that, if the Commission is not allowed to retroactively amend agreements

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[135] *Id.* at 6, 10.

[136] *Id*. at 10.

[137] Alliant Reply Brief at 5-7; AWEA Reply Brief at 11-12 (referencing *MISO*, 155 FERC ¶ 61,040).

[138] Alliant Reply Brief at 7; AWEA Reply Brief at 12 (both citing *MISO*, 155 FERC ¶ 61,040 at P 19).

[139] Alliant Reply Brief at 8; AWEA Reply Brief at 12.

[140] Ameren and ITC Companies Reply Brief at 11.

to correct its errors, "[ratepayers will] be substantially and irreparably injured by Commission errors, and judicial review would be powerless to protect them from many of the losses so incurred."[141] AWEA argues that there is no such injury to transmission owners here; to the contrary, interconnection customers are at risk of increased costs, upended contracts, and terminated projects. MISO Transmission Owners reject AWEA's argument, asserting that it misses the mark – they state that returning the parties to the *status quo ante* is justifiable on its face and need not be further justified by evidence that doing otherwise will cause harm.[142]

(a) If so, and, to the extent a transmission owner elects such Transmission Owner Initial Funding option, how should such election be implemented?

74. Xcel argues that, if transmission owners and affected system operators are permitted to re-open executed agreements to elect Transmission Owner Initial Funding, the Commission should consider the following procedures: (1) require that proposed revisions to individual GIAs, FCAs or MPFCAs that have been previously accepted for filing be filed with the Commission under FPA section 205; (2) allow interconnection customers to ask that disputed revisions to their agreements be refiled unexecuted – even if the agreement was previously executed – so the interconnection customer may protest or comment on the filing; and (3) require that each Facility Service Agreement (FSA) setting forth the rates and terms of the transmission owner's proposed charge be filed with the Commission under FPA section 205.[143] Xcel states that, under section 205, the transmission owner would bear the burden of proof to demonstrate that the amended interconnection agreement and the proposed charges are just and reasonable.[144]

75. MISO disagrees with Xcel's argument that interconnection customers should be able to refile disputed revisions to the Transmission Owner Initial Funding aspects of their revised agreements unexecuted.[145] MISO states that the Commission should mandate the required revisions to the agreements in this proceeding rather than re-open executed agreements in future, individual section 205 proceedings. MISO states that it

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[141] AWEA Reply Brief at 13 (citing *West Deptford*, 766 F.3d at 22-23).

[142] MISO Transmission Owners Reply Brief at 18.

[143] Xcel Initial Brief at 15-16.

[144] *Id.* at 16.

[145] MISO Reply Brief at 4.

will promptly implement such mandated revisions by reforming the conforming agreements in the Electric Quarterly Reports. MISO asserts that, to the extent additional revisions are necessary, the parties can propose amendments to their agreements under section 30.11 of the *pro forma* GIA or section 16.4 of the *pro forma* FCA and MPFCA.[146] MISO disagrees with Xcel's implied argument that, if the Commission were to allow the Transmission Owner Initial Funding option as of June 24, 2015, the Commission would be retroactively amending agreements in violation of the filed rate doctrine. MISO states that, when determining whether a Commission order violates the filed rate doctrine, the courts inquire whether there was sufficient notice that the approved rate was subject to change. MISO asserts that all parties had sufficient notice that the agreements were subject to modification because the Commission was examining the reasonableness of the Transmission Owner Initial Funding option pursuant to FPA section 206; thus, there should be no requirement to file the agreements under section 205.[147] MISO states that it is unclear what a transmission owner would need to demonstrate under section 205, because the revised agreements would merely reflect the Transmission Owner Initial Funding option found to be just and reasonable in this proceeding. MISO argues that requiring section 205 filings now due to the Commission's legal error would not place the parties back in the position they would have been had the error not been made – MISO explains that, had the vacated orders never been issued, MISO would have reported the conforming agreements (continuing Transmission Owner Initial Funding) in the Electric Quarterly Reports.[148] MISO also disagrees with Xcel's argument that the transmission owner should bear the burden of proof to demonstrate that the amended interconnection agreement and the proposed charges are just and reasonable.[149] MISO states that, until it revises its *pro forma* agreements to remove Transmission Owner Initial Funding or the Commission orders them changed under FPA section 206, the current *pro forma* agreements (which include Transmission Owner Initial Funding) are the filed rate.

76. Alliant states that, if ITC Midwest is permitted to elect the Transmission Owner Initial Funding option for network upgrades in already effective agreements from the interim period, the changes to funding arrangements should be implemented in a way that protects IPL and its customers against additional costs.[150] Alliant states, for example, that to the extent IPL has elected Generator Up-Front Funding for any of the

[146] *Id.* at 5.

[147] *Id.* at 5-6; *see also* MISO Transmission Owners Reply Brief at 16.

[148] MISO Reply Brief at 6-7.

[149] MISO Transmission Owners Reply Brief at 21.

[150] Alliant Initial Brief at 9.

affected agreements, the Commission should limit the return on and of capital that ITC Midwest can recover to the amounts that IPL would have incurred under the originally-established financing arrangement, and should waive any requirement to provide financial security. MISO Transmission Owners reject Alliant's suggestion to limit a transmission owner's recovery in this manner, arguing that this approach is unsustainable given the Court's vacatur and the Commission's reversal.[151]

77. Invenergy argues that, going forward, a transmission owner should be required to provide a timely estimate of the costs that would apply should it elect the Transmission Owner Initial Funding option, so that the interconnection customer can make informed business decisions.[152] Invenergy states that the transmission owner should be required to provide the interconnection customer a cost estimate based on the information available at the time and a summary of the expected FSA terms should the transmission owner choose the Transmission Owner Initial Funding option.

[151] MISO Transmission Owners Reply Brief at 10-11.

[152] Invenergy Reply Brief at 10-11.

78. Ameren and ITC Companies and MISO Transmission Owners contend that there are three categories of agreements that must be addressed in different ways.[153] First, for agreements that have been executed but where the interconnection customer has not yet provided payment, they argue that the agreement should be modified to reflect the transmission owner's election of Transmission Owner Initial Funding and then the transmission owner should develop and file an FSA with the Commission. Second, for agreements where the interconnection customer has paid the transmission owner for the network upgrades but the upgrades are not yet completed and in service, Ameren and ITC Companies and MISO Transmission Owners argue that the Commission should allow transmission owners to modify the agreement to reflect the Transmission Owner Initial Funding election, refund any payments received from the interconnection customer for the network upgrades, and develop and file an FSA reflecting the charge for the full cost (including return on and of capital) of the network upgrades.[154] They contend that the transmission owner should refund the amount it received from the interconnection customer without interest because the transmission owner was merely acting as a pass-through of the interconnection customer's capital and the transmission owner was not earning any return on the funds.[155] Third, for agreements that are in effect where the interconnection customer provided the funds to the transmission owner to construct the network upgrades and the upgrades have been completed and placed in service, Ameren and ITC Companies and MISO Transmission Owners argue that the transmission owner should be required to refund the payment made by the interconnection customer, less any applicable depreciation from the in-service date of the network upgrade to the date of the payment.[156] MISO Transmission Owners argue that this should be used to derive a calculated net book value of the asset, which will determine the capital amount to be used in the subsequent FSA.[157] They contend that, because the upgrade was originally funded

[153] Ameren and ITC Companies Initial Brief at 11; MISO Transmission Owners Initial Brief at 14.

[154] Ameren and ITC Companies Initial Brief at 12; MISO Transmission Owners Initial Brief at 14.

[155] Ameren and ITC Companies Initial Brief at 12; MISO Transmission Owners Initial Brief at 14-15 (citing *Tex. E. Transmission Corp.*, 63 FERC ¶ 61,064, at 61,270 (1994) (affirming an earlier order denying interest on a refund where the utility did not have use of the funds)).

[156] Ameren and ITC Companies Initial Brief at 13; MISO Transmission Owners Initial Brief at 15.

[157] MISO Transmission Owners Initial Brief at 15.

by the interconnection customer, a depreciation rate should be derived as an increment of the total original term of the original agreement. Ameren and ITC Companies and MISO Transmission Owners argue that the transmission owner would then develop an FSA for the remaining term of the original agreement that provides for the transmission owner's recovery of both a return on and of the capital amount repaid to the interconnection customer to be recovered over the reduced term of the FSA.[158]

(b) How would the transmission owner fund the network upgrades, especially where the interconnection customer may have already funded such network upgrades?

79. Xcel assumes that the transmission owner would fund the network upgrades using its normal corporate financing arrangements (short term debt, long term debt and equity), the same funding arrangements used to fund network upgrades not related to interconnection requests.[159]

80. Alliant states that, because ITC Midwest must obtain authorization from the Commission for the issuance of securities, any proposal by ITC Midwest to procure funds for financing the affected network upgrades must comply with financing requirements adopted by the Commission.[160]

81. Ameren and ITC Companies state that transmission owners will fund the payment to the generator to put the transmission owner and the interconnection customer in the same position they had been in had the Commission not issued the vacated orders.[161]

(c) How would the transmission owner recover a return on and of the capital cost of the relevant network upgrades?

82. Xcel states that there is no defined method to recover a return on and of capital for network upgrades in the MISO Tariff; however, in the past, some transmission owners have used the Attachment GG[162] rate methodology as calculated for that transmission

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[158] *Id.* at 16; Ameren and ITC Companies Initial Brief at 13.

[159] Xcel Initial Brief at 17.

[160] Alliant Initial Brief at 9.

[161] Ameren and ITC Companies Initial Brief at 13.

[162] Attachment GG (Network Upgrade Charge) of the MISO Tariff includes in the

owner to determine the fixed charge rate.[163] Invenergy disagrees with the suggestion that the return on and of capital should reflect the same inputs used for other charges developed under Attachment GG.[164] Invenergy argues that, while the Court expressed concerns related to the Commission's consideration of potential risks imposed on transmission owners when constructing and operating interconnection related network upgrades, it does not mean such risks exist. Invenergy contends that most network upgrades are replacements of existing equipment with upgraded equipment, and there can be no claim of additional risk to the transmission owner of owning what is basically the same equipment. Invenergy also argues that, because the interconnection customer must bear the higher capital costs of the Transmission Owner Initial Funding option, but also provide security on the capital costs, there is a much lower risk to the transmission owner than it might face in its ordinary operations.[165] Invenergy requests that the Commission make clear that it will consider these factors in determining the return on equity levels.

83. Alliant states that ITC Midwest may seek to recover a return on and of capital it has invested to fund network upgrades through its formula rate, as long as such costs are just and reasonable and are shown to have been prudently incurred.[166]

84. Ameren and ITC Companies and MISO Transmission Owners state that the rate reflected in the FSA would reflect the transmission owner's recovery on and of capital.[167]

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calculation of the network upgrade charge a return on capital investment, income taxes, depreciation expense, operating and maintenance expense (O&M), administrative and general expense, and other direct and indirect costs. The Commission has limited the calculation of the network upgrade charge using Attachment GG under the Transmission Owner Initial Funding option to the return on and of the capital costs of the relevant network upgrades. *See Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,111, at P 41 (2013) (*Hoopeston*).

[163] Xcel Initial Brief at 17.

[164] Invenergy Reply Brief at 12.

[165] *Id.* at 13 (Invenergy cites to the example of the Commission's *pro forma* Open Access Transmission Tariff (§ 17.3), where customers need only provide a deposit covering one month of service regardless of the length of their transmission service).

[166] Alliant Initial Brief at 9-10.

[167] Ameren and ITC Companies Initial Brief at 13; MISO Transmission Owners Initial Brief at 14.

(d) How should the Commission address the issue that GIAs entered into between June 24, 2015 and the date of the Ameren Remand Order likely already have an effective date?

85. Xcel believes that the effective date of the agreement should not change and the proposed revisions to individual agreements should be refiled with the Commission under FPA section 205.[168] The transmission owner would then recover the return on and of the funded capital at maximum over the remaining initial term of the agreement.

86. Alliant states that the Commission should confirm that agreements effective during the interim period may not be modified, because such agreements may only be modified prospectively, either by the Commission under section 206 of the FPA or by ITC Midwest under section 205 of the FPA.[169] Alliant and Invenergy argue that changes made under FPA section 206 may only take effect prospectively from the date of a Commission order; accordingly, any changes to existing GIAs that might be ordered by the Commission under section 206 would not affect the rights of interconnection customers that are parties to GIAs which became effective between June 24, 2015 and August 31, 2018.[170] Invenergy argues that none of the already executed agreements effective between June 24, 2015 and August 31, 2018 were the subject to the outcome of the now-vacated orders, and only the language in the *pro forma* agreements was at issue.[171] Ameren and ITC Companies counter that Alliant's and Invenergy's arguments ignore the Commission's ability to take corrective action in the face of legal error under FPA section 309,[172] which provides remedial authority to modify the past agreements, and which cannot be contracted away by the parties.[173] Ameren and ITC Companies and MISO Transmission Owners assert that MISO's *pro forma* GIAs are not subject to

[168] Xcel Initial Brief at 17.

[169] Alliant Initial Brief at 10; Alliant Reply Brief at 4-5.

[170] Alliant Reply Brief at 5; Invenergy Reply Brief at 4.

[171] Invenergy Reply Brief at 4.

[172] 16 U.S.C. § 825h (2012).

[173] Ameren and ITC Companies Reply Brief at 6.

protection from modification given the *Ameren* reversal and the fact that the rights of all parties under FPA sections 205 and 206 are preserved under Article 30.11.[174]

87. MISO Transmission Owners argue that, rather than focusing on the effective date as a determinant of how to implement revisions to an agreement, the focus should be on the status of the interconnection customer payments and the related network upgrades.[175] MISO Transmission Owners and Ameren and ITC Companies argue that effective agreements are routinely modified to reflect changed circumstances.[176] AWEA rejects the argument that there is no legal barrier to reformation of effective agreements because, as MISO Transmission Owners argue, effective agreements are routinely modified.[177] AWEA retorts that GIAs, FCAs, and MPFCAs may only be amended by mutual agreement of the parties, and if the transmission owner wants to reform the agreement unilaterally, it must file with the Commission.

iv. For GIAs entered into between June 24, 2015 and the date of this order, that the relevant transmission owner wants to elect the Transmission Owner Initial Funding option for, should the network upgrade principal subject to such election be valued at the construction cost minus depreciation?

88. Xcel recommends that the network upgrade principal subject to such election be valued at the depreciated amount (i.e., the interconnection customer's net book value), with the asset value transferred to the transmission owner depreciated over the remaining term of the agreement.[178]

89. Alliant states that it is reasonable that the network upgrade principle subject to such election should be valued at the construction cost minus depreciation, but the reasonableness of this approach depends on how it is implemented.[179] Alliant contends

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[174] *Id.*; MISO Transmission Owners Reply Brief at 17.

[175] MISO Transmission Owners Initial Brief at 17.

[176] *Id.*; Ameren and ITC Companies Initial Brief at 14.

[177] AWEA Reply Brief at 11.

[178] Xcel Initial Brief at 18.

[179] Alliant Initial Brief at 11.

that the construction cost presumably reflects the amount of funding for the network upgrade in question which was previously provided by the interconnection customer, and that depreciation expense generally permits the investor to realize a return of capital it has supplied over the service life of the assets funded by such capital. Alliant states that, to the extent the interconnection customer that elected the Generator Up-Front Funding option has recovered a portion of the capital invested in such upgrades through the collection of depreciation expense, the amount of the network upgrade principle subject to the Transmission Owner Initial Funding option may correspondingly be reduced by the amount of depreciation expense that has actually been recovered by the interconnection customer. Alliant argues that it would be unjust and unreasonable to require the interconnection customer to incur a loss on its investment in interconnection-related network upgrades simply because a transmission owner elects retroactively to choose the Transmission Owner Initial Funding option which did not exist when the interconnection customer made its investment.[180]

90. Ameren and ITC Companies and MISO Transmission Owners argue that the network upgrade principal should be valued at the construction cost minus depreciation.[181]

91. AWEA argues that the very fact that the Commission asked this question highlights the disruptive nature of what is being considered.[182] AWEA adds that there are other depreciation issues that must be considered; for example, while the transmission owner typically uses straight-line depreciation, the generation developer typically applies accelerated depreciation in the early years, which is recorded as an expense for federal and state income tax purposes. AWEA states that, if a MISO transmission owner returns the total invested amount in network upgrades to the generation owner, it will have a retroactive impact on tax years that have already been completed for the generation owner and any tax equity investors. AWEA explains that those tax years would have to be redetermined and refiled, which may result in increased tax liability.

[180] *Id.* at 12.

[181] Ameren and ITC Companies Initial Brief at 14; MISO Transmission Owners Initial Brief at 18.

[182] AWEA Initial Brief at 18.

(a) If so, from what date should the network upgrades be depreciated from (e.g., in service date), what time frame should the network upgrades be depreciated over (e.g., useful life or initial term of the relevant agreement), and what depreciation rates should apply?

92. Xcel states that the network upgrades should be depreciated over the remaining term of the agreement.[183] Alliant states that the amount of the depreciation deduction should be based on the same depreciation practices as those followed by the interconnection customer that originally funded the network upgrades.[184]

93. MISO Transmission Owners argue that the principal should be calculated as the actual construction cost less any depreciation from the in-service date of the network upgrades to the date of the repayment if the upgrades were placed in service.[185] They contend that a deduction for depreciation is not appropriate if the facilities are not yet in service. Ameren and ITC Companies argue that the network upgrade's in-service date and the date of the refunded capital can be identified.[186] They state that the intervening time frame would be the period for which depreciation would be taken.

(b) Should the interconnection customer instead receive the undepreciated value of the network upgrade in repayment by the transmission owner?

94. Xcel and Alliant answer that the interconnection customer should be paid the depreciated value of the network upgrades (i.e., the net book value on the interconnection customer's books and records).[187] Alliant states that, if a portion of the construction cost of the network upgrade has been recovered by the interconnection customer, payment to the interconnection customer based on the undepreciated value of the network upgrades may result in a taxable gain. Alliant continues that if an interconnection customer is a regulated utility, regulators may require the utility to refund to its customers any amount

[183] Xcel Initial Brief at 19.

[184] Alliant Initial Brief at 12.

[185] MISO Transmission Owners Initial Brief at 18.

[186] Ameren and ITC Companies Initial Brief at 14.

[187] Xcel Initial Brief at 19; Alliant Initial Brief at 12-13.

which it receives in excess of the original cost of the network upgrades less depreciation. AWEA states that any repayment should be provided at the depreciated amount, using the transmission owner's depreciation rate.[188]

95. Ameren and ITC Companies argue that the payment should be the same as the amount the transmission owner received from the interconnection customer (i.e., a lump sum) less applicable depreciation if the facilities were placed in service.[189] Ameren and ITC Companies contend that, if the facilities are not yet in service, then a deduction for depreciation is not appropriate.

(c) Should the interconnection customer be repaid in one lump sum payment or with several payments over time?

96. Xcel, MISO Transmission Owners, AWEA, Alliant, and Ameren and ITC Companies state that, assuming the Commission permits the Transmission Owner Initial Funding option language to be elected retroactively, the transmission owner should be required to pay the interconnection customer in one lump sum unless the parties mutually agree to an alternate payment schedule.[190]

v. Given that the unilateral right to elect the Transmission Owner Initial Funding option was not previously included in the *pro forma* FCA and *pro forma* MPFCA, should the Commission revise FCAs and MPFCAs entered into between June 24, 2015 and the date of the Ameren Remand Order in a similar fashion to the approach to revising the GIAs? If so, what are the various approaches that could be used to implement such election by the transmission owner or affected system operator?

97. Xcel and AWEA oppose revising FCAs and MPFCAs executed between June 24, 2015 and August 31, 2018.[191] They state that the *pro forma* FCA and MPFCA never

[188] AWEA Initial Brief at 19.

[189] Ameren and ITC Companies Initial Brief at 14-15.

[190] *Id.* at 15; Xcel Initial Brief at 19; MISO Transmission Owners Initial Brief at 18; AWEA Initial Brief at 19; Alliant Initial Brief at 13.

[191] Xcel Initial Brief at 19; AWEA Initial Brief at 19.

contained the Transmission Owner Initial Funding option prior to August 31, 2018, and argue that inserting this option in previously executed FCAs and MPFCAs would disrupt the commercial arrangements upon which interconnection customers relied, which could have substantial impacts on state regulatory resource decisions and retail rates. AWEA argues that the interconnection customer was induced to execute the FCA and acted on the terms of the executed FCA, which should not be changed at this late date. AWEA states that the same is true for projects that are in Phase III of MISO's queue, which should not be subject to retroactive application because it would be just as disruptive and cause cascading negative impacts.[192] AWEA argues that only those transmission owners/affected system operators who included language in an FCA executed during the interim period stating that the transmission owner reserves the right to apply Transmission Owner Initial Funding should be allowed to retroactively select Transmission Owner Initial Funding in an FCA. To the extent the Commission allows the transmission owner or affected system operator to elect the Transmission Owner Initial Funding option, Xcel states that the NSP Companies may elect to exercise that option for some FCAs and MPFCAs.[193]

98. Alliant states that, because FCAs and MPFCAs are comparable to GIAs, and the GIAs that became effective between June 24, 2015 and August 31, 2018 may only be modified prospectively pursuant to Section 205 or 206 of the FPA, which requires a demonstration that the proposed modification is just and reasonable, it would be appropriate for the Commission to apply the same standards in considering whether to revise FCAs and MPFCAs entered into between the dates in question.[194]

99. MISO Transmission Owners and Ameren and ITC Companies argue that all FCAs and MPFCAs entered into during the relevant period should be handled in the same way as the GIAs entered into during the relevant period.[195]

100. Invenergy contends that the Commission established no refund effective date with respect to FCAs and MPFCAs.[196] Invenergy argues that, because the *pro forma* FCA and MPFCA never included the Transmission Owner Initial Funding language, there is not an argument that the Commission would be restoring the Tariff language to what it was

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[192] AWEA Initial Brief at 20.

[193] Xcel Initial Brief at 13.

[194] Alliant Initial Brief at 14.

[195] MISO Transmission Owners Initial Brief at 18-19; Ameren and ITC Companies Initial Brief at 15.

[196] Invenergy Reply Brief at 5.

prior to the now-vacated orders in this proceeding. Moreover, Invenergy states that any reliance on a refund effective date would expire on December 25, 2017 and only be applicable to agreements that were executed prior to that date. Invenergy states that, if the Commission wanted to avoid the limitations of section 206 of the FPA by allowing MISO to make a filing under section 205 of the FPA to include the unilateral right of the transmission owner to elect the Transmission Owner Initial Funding option for the agreements that went into effect between June 24, 2015 and August 31, 2018, MISO would need to demonstrate good cause for waiving the prior notice requirement to permit retroactive application of the unilateral right language covering a period greater than three years in the past. Invenergy also asserts that a constructive notice argument is inapplicable to such agreements because restoration of the language prior to the now-vacated orders in the *pro forma* FCA and MPFCA would not permit Transmission Owner Initial Funding.[197]

vi. What would be the impact (financial or other) to the interconnection customer if it had to change the network upgrade funding method from the Generator Up-Front Funding option to the Transmission Owner Initial Funding option based on the election by the transmission owner? Would there be costs besides the cost of posting security on the capital costs of the network upgrades and the transmission owner's capital costs? If so, what types of additional costs would the interconnection customer need to incur and what is the total amount of that additional cost to the interconnection customer?

101. Xcel states that the NSP Companies have executed numerous GIAs, FCAs or MPFCAs as both a transmission customer and interconnection customer.[198] Xcel further states that the NSP Companies have purchased the output of third-party generators who were required to execute a GIA, FCA or MPFCA with MISO under a Power Purchase Agreement after a competitive resource solicitation process overseen by the Minnesota Commission.[199] Xcel states that the costs of the generation projects and Power Purchase Agreements have been reflected in the NSP Companies' retail rates through retail general rate cases and rate riders, and expects that if a substantial number of MISO transmission

[197] *Id.* at 6.

[198] Xcel Initial Brief at 8.

[199] *Id.* at 8-9.

owners exercise Transmission Owner Initial Funding for previously executed agreements, the result will be substantial transactional, state regulatory and administrative burdens.[200]

102. Xcel argues that reopening agreements executed in good faith could cause substantial harm because financial decisions were made and commercial agreements were executed based on Tariff rules in place at the time of execution.[201] Xcel states that the increased ongoing costs that would be imposed under Transmission Owner Initial Funding, which would likely be absorbed by the project developer, would be especially significant to projects that have negotiated a Power Purchase Agreement at a fixed price. Xcel further argues that the increased costs imposed on the projects could change the economics of a project to a point where it is no longer viable and could force the project into bankruptcy or force the project to withdraw from the MISO interconnection queue if interconnection agreements have been executed and generator funding of network upgrades provided but the project is not yet in service. Xcel explains that projects that are forced to withdraw from the queue could suffer significant financial harm through loss of security or cash deposits previously made for the projects.

103. Xcel also argues that reopening GIAs, FCAs and/or MPCFAs executed between June 24, 2015 and August 31, 2018 could put a wind generation project's Production Tax Credit at risk, or could result in operational risks to pending projects where the network upgrades have not yet been constructed if renegotiations result in the delay of construction activities associated with the transmission upgrades.[202]

104. Alliant states that, if ITC Midwest elects the Transmission Owner Initial Funding option for the IPL Agreements, it is likely to have an adverse financial impact on IPL.[203] Alliant asserts that the Commission has recognized that charges to recover capital costs of a network upgrade when the Transmission Owner Initial Funding option is elected retroactively may exceed the capital costs to IPL associated with that network upgrade under current funding arrangements. Alliant states that IPL may also be forced to incur the cost of posting financial security. Alliant contends that IPL might be double charged for transaction-related costs associated with procurement of funding for the network upgrades, first for costs to negotiate funding under the Generator Up-Front Funding option, and again for costs incurred by ITC Midwest to negotiate funding for the network upgrades under the Transmission Owner Initial Funding option. Alliant states that IPL

[200] *Id.* at 9.

[201] *Id.* at 20.

[202] *Id.* at 21.

[203] Alliant Initial Brief at 15.

would also incur administrative and other costs of unwinding the existing funding arrangements. Alliant also adds that any additional costs it incurs may not be recoverable from its retail ratepayers.[204]

105. AWEA states that the impacts are so far reaching that the costs cannot be calculated.[205] AWEA states that the posting of security may reach far beyond a single project; AWEA explains that most generation developers and owners are part of larger corporate organizations and that every time security must be posted for a special purpose project company, it impacts the overall corporate organization and its ability to post security for other projects. At some point, AWEA states, the cumulative requirement to post security will stifle the ability to develop generation and compete with other resources. Invenergy also takes issue with the proposed requirement to post security.[206] Invenergy argues that, if the Commission allows transmission owners to retroactively elect the Transmission Owner Initial Funding option, the Commission should waive any requirement to maintain security for the duration of the repayment period under the FSA. Invenergy states that interconnection customers have often completed financing and arrangements for security and would be forced to pay a higher cost over time for the network upgrades in addition to maintaining security over that period.

106. AWEA states that MISO's data showed that over 100 agreements became effective between June 24, 2015 and August 31, 2018, and argues that there would be a great disruptive impact in allowing retroactive reformation of these agreements.[207] First, AWEA argues that the cost of network upgrades will increase by staggering amounts.[208] AWEA points to the lowest cost example in its initial brief of network upgrade costs increasing from $3,413,000 to $4,456,697 under Transmission Owner Initial Funding on a net present value basis. AWEA argues that, with at least 100 agreements, that amounts to an increase from $341 million to $445 million with no increase in service. Second, AWEA argues that 100 agreements would have to be reopened, which would be a very time consuming process due to the need for MISO to draft GIAs, the parties to begin the negotiation process, and the agreements likely being filed unexecuted at the Commission

[204] *Id.* at 4-5.

[205] AWEA Initial Brief at 20-21.

[206] Invenergy Reply Brief at 11-12.

[207] AWEA Reply Brief at 4.

[208] *Id.* at 5.

to undergo lengthy review and appeals processes.[209] AWEA further contends that each agreement will then lead to a FSA that must also be negotiated and filed, imposing more burden on the Commission and parties. Third, AWEA argues that the reopening of 100 agreements would lead to significant delay and perhaps many project terminations, which would impact MISO's processes in its current queue due to the need for restudies across each sub-region for all cycles in 2015 through 2018.[210]

107. Invenergy argues that the retroactive election of the Transmission Owner Initial Funding option would materially impact project economics and other commercial arrangements that have been undertaken by Invenergy in eight agreements that went into effect during the interim period.[211] Invenergy contends that the retroactive application of the Transmission Owner Initial Funding option could also delay projects under development while the affected agreements are revised, existing funding arrangements are unwound, and FSAs are negotiated and finalized, which could take several months and potentially delay lower-queued projects.[212] Invenergy states that its costs for projects under construction could be increased through higher transmission owner return requirements, increased security requirements, and additional transactional costs to unwind any existing funding agreement. Invenergy contends that permitting the transmission owner to unilaterally increase costs at the end of the project development process could render currently cost-effective projects uneconomic. Further, Invenergy argues that retroactively revising an executed agreement could undermine the confidence of an interconnection customer's other counterparties.

vii. If agreements were to be revised to allow the transmission owner or affected system operator the unilateral right to elect the Transmission Owner Initial Funding option for the associated network upgrades, what criteria should be used for determining which agreements should be revised and whether any agreements should not be revised?

108. Xcel argues that a transmission owner electing the Transmission Owner Initial Funding option should be required to treat all executed GIAs, FCAs and MPFCAs comparably and should not be allowed to selectively implement the Transmission Owner

[209] *Id.* at 5-6.

[210] *Id.* at 6-8.

[211] Invenergy Reply Brief at 7-8.

[212] *Id.* at 8.

Initial Funding option in some interconnection agreements, but not others, absent good cause.[213] Xcel contends that the Commission could, however, allow transmission owners to elect not to use the Transmission Owner Initial Funding option: (1) for less expensive network upgrades where administering a charge for multiple years would be administratively burdensome; and (2) where a transmission owner is both the transmission owner (or affected system operator) and the interconnection customer, such that applying Transmission Owner Initial Funding would be an internal accounting exercise with no impact on the wholesale transmission rates to a third party. Xcel suggests that, to provide transparency to affected interconnection customers, the Commission should require transmission owners to post their criteria on OASIS to the extent the transmission owner will not apply the Transmission Owner Initial Funding option to all interconnection agreements.

109. Alliant states that the determination of whether a particular agreement should be revised should be based on (a) whether the interconnection customer has made any commitments in reliance on the currently effective agreement, and (b) whether the interconnection customer might be adversely affected.[214] Alliant contends that where, as in the case of IPL, an interconnection customer has procured financing or incurred other obligations that will be affected by the change in the funding arrangement, it would be inequitable to order the modification of such agreement.

110. AWEA argues that unilateral Transmission Owner Initial Funding has been available to elect in a GIA since well before June 24, 2015, and that if a MISO transmission owner did not elect Transmission Owner Initial Funding in a GIA entered into before June 24, 2015, the Commission should determine that such transmission owner is precluded from doing so for a GIA entered into from June 24, 2015 through August 31, 2018 and for projects in Phase III of MISO's queue.[215] AWEA believes that, without this approach, similarly-situated interconnection customers will be treated differently in violation of FPA and court precedent.

111. MISO Transmission Owners argue that, in order to ensure that each transmission owner and affected system operator exercises its discretion to elect to revise existing agreements in a manner that is not unduly discriminatory or preferential, the Commission should require each transmission owner and affected system operator who elects to revise existing agreements to provide an attestation describing its process for reforming agreements and indicating whether it had any agreements with affiliates that were eligible

[213] Xcel Initial Brief at 22.

[214] Alliant Initial Brief at 15-16.

[215] AWEA Initial Brief at 21-22.

for reformation and, if so, state that it treated affiliate and non-affiliate agreements comparably in deciding to revise agreements to invoke the Transmission Owner Initial Funding option.[216] AWEA refutes the argument that undue discrimination could be checked if a transmission owner were to submit such an attestation.[217] AWEA states that, if the transmission owner did not employ Transmission Owner Initial Funding prior to June 24, 2015, it would be patently discriminatory to do so now whether the agreement is with an affiliate or non-affiliate.[218]

112. Ameren and ITC Companies argue that the criteria for determining which agreements should be revised should be based on a sworn affidavit by an officer of the transmission owner that it would have elected Transmission Owner Initial Funding for the network upgrades had the Commission not issued the vacated order, and that it elects to revise the agreement to reflect the Transmission Owner Initial Funding option.[219]

(a) Please explain how this criteria could provide a means to differentiate between agreements that were entered into between June 24, 2015 and the date of the Ameren Remand Order such that the parties to such revised agreements would not be subject to undue discrimination.

113. Xcel states that the criteria discussed above should ensure that a transmission owner applies similar treatment to every interconnection customer, which should eliminate undue discrimination.[220] Alliant states that the retroactive application of the Transmission Owner Initial Funding option may not be harmful to the interconnection customer if the interconnection customer has not made any commitments in reliance on the terms of the GIA; however, it would be unjust and unreasonable to permit the

[216] MISO Transmission Owners Initial Brief at 19-20.

[217] AWEA Reply Brief at 14.

[218] *Id.* at 16.

[219] Ameren and ITC Companies Initial Brief at 16.

[220] Xcel Initial Brief at 22.

retroactive application of the Transmission Owner Initial Funding option if the interconnection customer will be adversely affected.[221]

114. Ameren and ITC Companies argue that the Commission should require the transmission owner to attest in an affidavit that it either had no affiliated interconnection requests (and thus cannot be discriminating between affiliates and non-affiliates) or, if it did, that it will require its affiliate to enter into an FSA like all other interconnection customers.[222] Ameren and ITC Companies state that subsequent Commission audits conducted in the normal audit cycle can be used to confirm that affiliates and non-affiliates were treated in a not unduly discriminatory manner.

viii. If GIAs, FCAs, and MPFCAs entered into between June 24, 2015 and the date of the Ameren Remand Order are revised, will the revisions affect the interconnection customers' position in or ability to proceed through the MISO interconnection queue? For instance, will there be delays to network upgrade construction while the parties to construction agreements renegotiate financing arrangements? How will any delays affect lower-queued customers? How will any delays affect the timeframe for negotiation of a GIA, FCA, or MPFCA entered into between June 24, 2015 and the date of the Ameren Remand Order? If customers' projects become unviable due to any cost changes through this process, will those customers be able to withdraw from the queue without the loss of any milestone payments?

115. MISO states that the queue position of interconnection customers with GIAs, FCAs, and MPFCAs executed during the interim period will not be affected by the revision of those agreements to allow for the election of Transmission Owner Initial Funding.[223] MISO explains that agreements entered into since June 24, 2015 fall into one of three groups: (1) projects and funding are complete and in-service; (2) projects have been partially funded and currently are under construction; or (3) the agreement has been signed, but no funding or construction has begun. In each of these situations, MISO

[221] Alliant Initial Brief at 16.

[222] Ameren and ITC Companies Initial Brief at 16.

[223] MISO Initial Brief at 8.

argues, the interconnection queue processes have been completed, so the queue position of the interconnection customer is not affected. MISO contends that downstream impacts on future queue groups could occur as a result of construction delays due to re-negotiation, but with an efficient negotiation timeline between transmission owners and interconnection customers, lower-queued interconnection customers should not be impacted. MISO supports facilitating a negotiation window similar to the timeline laid out in section 11 of Attachment X.[224] MISO asserts that, where agreement is not reached, the affected parties should be able to obtain speedy resolution from the Commission. MISO notes that, in the event lower-queued projects would be affected, interconnection customers still in the MISO queue would be eligible to withdraw and have their milestone payments refunded pursuant to the terms of section 7.6.2 of Attachment X.

116. Invenergy refutes MISO's suggestion that the existing GIAs could be retroactively modified with minimal impacts, or that adversely affected projects could simply withdraw their projects from the queue.[225] Invenergy argues that: (1) the option to withdraw is only realistically available to projects without executed interconnection agreements; (2) these projects may not want to withdraw from the queue; (3) the refund rights available to lower-queued projects depend on where they sit with respect to the decision points in the queue, and to the extent they have already passed Decision Point I or Decision Point II, a portion of their milestone payments are at risk of not being refunded if they withdraw. AWEA rejects MISO's suggestion that interconnection customers and transmission owners should quickly come to agreement on arrangements to allow Transmission Owner Initial Funding, arguing that the better way to protect the timely processing of MISO's queue is to not allow retroactive application of Transmission Owner Initial Funding.[226]

117. Xcel believes that reopening GIAs, FCAs and MPFCAs executed between June 24, 2015 and August 31, 2018 has the potential to negatively impact both the projects associated with the reopened agreements and lower-queued projects.[227] Xcel reiterates that, if increased costs make the project no longer viable, the project could be forced to

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[224] *Id.* at 9. Under this provision, the transmission owner, interconnection customer, and transmission provider can negotiate any disputed provisions of the appendices to the draft GIA, draft FCA(s) and/or draft MPFCA(s) for not more than 60 calendar days after tender of the final Facilities Study Report. MISO Tariff, Attach. X, § 11.2 (Negotiation) (109.0.0).

[225] Invenergy Reply Brief at 9.

[226] AWEA Reply Brief at 18-19.

[227] Xcel Initial Brief at 23.

withdraw from the interconnection queue and suffer significant financial harm through the loss of security or cash deposits. Xcel further states that such withdrawals could cause cascading restudies that could cause further delay to other interconnection customers' ongoing interconnection studies.

118. Alliant states that the position of a network upgrade in the MISO interconnection queue is not dependent on the type of funding that is selected; however, it is important that the process of converting to Transmission Owner Initial Funding, if permitted, be implemented in a manner that does not affect the construction schedule for network upgrades.[228] Alliant asserts that the Commission must adopt safeguards to ensure that the schedule for construction of the generating facilities being developed are not affected by cost increases resulting from the transmission owner's unilateral election of the Transmission Owner Initial Funding option.[229] Alliant argues that postponement or cancellation of plans for generation facilities under development may adversely affect the reliability of the MISO grid, and may alter the queue for the generation projects that remain active, as well as putting the milestone payments made by the generation developers at risk.

119. AWEA believes there will be immediate and significant impacts on MISO's interconnection queue.[230] AWEA states that, in most situations, the interconnection customer is a special purpose limited liability company that is part of a larger corporate organization that invests in generation development, ownership, and operation and that decisions are made from the larger corporate perspective. If unilateral Transmission Owner Initial Funding is applied to GIAs, FCA, or MPFCAs entered into from June 24, 2015 through August 31, 2018 and to projects in Phase III of MISO's queue, AWEA argues that the cost increase in network upgrades and security that must be posted will cause the corporate organization to assess whether it can continue with other projects that are currently in MISO's and other RTOs' queues. AWEA also states that there is the possibility that projects in Phase III of MISO's queue may need to withdraw from the queue in the immediate future due to the increase in costs from Transmission Owner Initial Funding. AWEA notes that withdrawal may cause the corporate organization to forfeit milestone payments already made, again impacting the corporate organization and ability to proceed through the queue with other projects.

120. AWEA argues that the increased cost or the re-opening of agreements could cause projects in Phase III of MISO's queue or with executed GIAs, FCAs, and MPFCAs to be

[228] Alliant Initial Brief at 16.

[229] *Id.* at 17.

[230] AWEA Initial Brief at 22.

terminated, which would undoubtedly have an impact on MISO's queue.[231] AWEA believes that if this were to occur, it would create the need for restudies, which could reach as far back as its 2015 study groups. AWEA suspects, based on past experience, that MISO would have to suspend work on its existing queue while MISO conducts restudies, after which MISO will need to confirm whether the lower-queued projects can go forward based on the new cost and any change in timing to complete network upgrades. AWEA argues that MISO will have to do this in succession for all impacted queue cycles and account for interconnection customers' decisions before it can resume work on the current queue cycles.

121. AWEA notes that the Commission accepted MISO's current three-phase GIP design predicated on the concept of avoiding late-stage withdrawals.[232] AWEA submits that, if the Commission allows retroactive application of Transmission Owner Initial Funding to existing agreements and projects in Phase III of MISO's queue, it will have put forces in motion that are akin to late-stage terminations for projects with executed GIAs or FCAs, and late-stage withdrawals for projects in Phase III of MISO's queue, all due to no fault of the interconnection customer.

122. Ameren and ITC Companies and the MISO Transmission Owners reject AWEA's request to exempt projects currently in Phase III of MISO's interconnection queue from retroactive implementation of Transmission Owner Initial Funding.[233] Ameren and ITC Companies claim that there is no legal basis for this request, and AWEA has not justified why projects in Phase III deserve a special carve-out from what is now the lawful filed rate.[234] Ameren and ITC Companies argue that projects in Phase III will not risk being automatically withdrawn as a result of the Commission restoring the Tariff to its proper form. MISO Transmission Owners argue that AWEA fails to explain how revising existing agreements will have any material impact on projects that have not yet executed an interconnection agreement.[235]

123. Ameren and ITC Companies state that it is not possible to say with certainty that any delays would not impact lower-queued customers, but they note that such delays are

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[231] *Id.* at 23.

[232] *Id.* at 24.

[233] Ameren and ITC Companies Reply Brief at 7; MISO Transmission Owners Reply Brief at 20.

[234] Ameren and ITC Companies Reply Brief at 8.

[235] MISO Transmission Owners Reply Brief at 20.

not uncommon in the interconnection queue, given the *pro forma* rights interconnection customers have to suspend construction of network upgrades.[236] AWEA rejects this argument, contending that the right to suspend construction under a GIA was eliminated years ago except for circumstances of force majeure.[237]

124. In response to concerns about delays and restudies, MISO states that, if withdrawals occur, MISO will perform a preliminary analysis to determine if a restudy is necessary, and, if so, whether MISO will have to suspend current work.[238] MISO states that it does not know with certainty what type of impact any potential withdrawals or terminations will have on the queue.

b. Commission Determination

125. After considering the briefs provided in response to the Commission's questions in the Ameren Remand Order, we find that transmission owners and affected system operators should have the unilateral right to elect the Transmission Owner Initial Funding option for any GIA, FCA, or MPFCA that became effective between June 24, 2015 and August 31, 2018 (i.e., during the interim period). Therefore, we direct MISO to file Tariff sheets, within 60 days from the date of this order, stating that transmission owners and affected system operators that were parties to any GIAs, FCAs, or MPFCAs that became effective during the interim period may elect Transmission Owner Initial Funding for the network upgrades in those agreements, provided that such election is done in a not unduly discriminatory manner. We further direct MISO's Tariff sheets to provide for the implementation of this requirement, as described below.

126. Courts have stated that "[t]here is . . . a strong equitable presumption in favor of retroactivity that would make the parties whole" and that "when the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made."[239] Although the Commission's implicit remedial authority and FPA section 309 provide the Commission with "considerable latitude when it is prescribing remedies,"[240] we find for the reasons

[236] Ameren and ITC Companies Initial Brief at 16-17.

[237] AWEA Reply Brief at 17-18 (referencing Article 5.16.1 in the *pro forma* GIA).

[238] MISO Reply Brief at 8.

[239] *Exxon Co. U.S.A. v. FERC*, 182 F.3d 30, 50 (D.C. Cir. 1999) (quoting *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993) (internal quotations omitted)).

[240] *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 360 (D.C. Cir. 2017); *see*

discussed below that providing transmission owners and affected system operators the right to elect the Transmission Owner Initial Funding option for any GIA, FCA, and MPFCA that became effective during the interim period is an appropriate remedy in this case to give effect to the Court's vacatur, as it seeks to return the parties to the position they would be in if the Commission had not issued the now-vacated orders.

127. Several parties claim that reopening existing agreements will create some regulatory uncertainty. For example, several parties outline a variety of costs associated with reopening existing agreements.[241] Several parties also argue that the retroactive application of Transmission Owner Initial Funding will threaten their ability to meet the Production Tax Credit deadline due to delays associated with the re-opening of Power Purchase Agreements, Asset Purchase Agreements, lender agreements and tax equity agreements, which could shift the production schedule of their projects.[242] AWEA argues that the increased cost or the re-opening of agreements could cause projects in Phase III of the Definitive Planning Phase in MISO's interconnection process or projects with executed GIAs, FCAs, and MPFCAs to withdraw from the interconnection queue or terminate their agreements, which they argue could necessitate restudies.[243]

128. As noted above, after review of the supplemental briefing, we find that these concerns are not so burdensome as to overcome the presumption that the Commission should place parties in the position they would have been in absent the Commission's legal error. While we acknowledge that re-opening existing GIAs, FCAs, MPFCAs may increase costs to certain interconnection customers or result in disruption to schedules as described by commenters, we are not persuaded that these potential impacts are so great that we should deprive transmission owners or affected system operators of an opportunity to earn a return on the capital costs of the network upgrades built on their system that should have been expressly allowed under the Tariff during the interim

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also Verso Corp. v. FERC, 898 F.3d 1, 10 (D.C. Cir. 2018) (explaining that section 309 "permits FERC to advance remedies not expressly provided by the FPA, as long as they are consistent with the [FPA]" and describing section 309 as allowing for "any and all acts necessary or appropriate to carry out the FPA's statutory ends") (internal quotations omitted); *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 956 (D.C. Cir. 2016) (stating that the Commission may use its remedial authority in section 309 to remedy the Commission's legal error).

[241] Xcel Initial Brief at 9, 20; Alliant Initial Brief at 4-5, 15; AWEA Initial Brief at 20-21.

[242] Xcel Initial Brief at 21; AWEA Initial Brief at 12-13.

[243] AWEA Initial Brief at 23.

period. Regarding agreements that are not filed with the Commission but that may be affected by our decision here, such as Power Purchase Agreements and Asset Purchase Agreements, we again acknowledge the potentially disruptive consequences of our decision. However, we find that the parties were on notice that the Commission's previous orders could be remanded or vacated,[244] and, therefore, these parties could have included language in such contracts to address the possibility that the Commission's orders would be vacated and limit the need for renegotiation in that event.

129. We disagree with arguments that the Commission would be engaging in retroactive ratemaking by revising prior agreements and that prior agreements may only be modified prospectively under FPA section 206.[245] We also disagree that any reliance on a refund effective date would expire on December 25, 2017.[246] The Commission has authority to take corrective action pursuant to section 309 of the FPA to remedy a legal error. As we note above, "both [section] 309 and FERC's implicit remedial authority under the [FPA] provide the agency with considerable latitude when it is . . . attempting to undo harms caused by its own mistaken or unlawful acts."[247] In this case, the Commission has the authority under section 309 to remedy its error by allowing election of Transmission Owner Initial Funding from June 24, 2015 for GIAs that became effective during the interim period.

130. We reject AWEA's argument that, if the transmission owner did not employ Transmission Owner Initial Funding prior to June 24, 2015, it would be discriminatory to

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[244] *See West Deptford*, 766 F.3d at 22-23 ("the filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service" (citing *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)) and "the notice exception has been applied when judicial invalidation of Commission decisions has resulted in retroactive changes in rates. . . . generators in those cases were aware in advance of the risk of litigation-induced change" (referencing *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299–-300 (D.C. Cir. 2001); *W. Res., Inc. v. FERC*, 72 F.3d 147, 151 (D.C. Cir. 1995); *Pub. Utils. Comm'n v. FERC*, 988 F.2d 154, 163-66 (D.C. Cir. 1993); *Natural Gas Clearinghouse*, 965 F.2d at 1075-77)).

[245] Alliant Initial Brief at 7-8.

[246] *See* Invenergy Reply Brief at 5.

[247] *See TNA Merch. Projects, Inc. v. FERC*, 857 F.3d at 360.

do so now.[248] The reinstated Tariff provisions grant the transmission owner the discretion to use Transmission Owner Initial Funding, and the ability to exercise initial funding was never limited only to transmission owners who previously invoked it. We also disagree with AWEA's argument that application of Transmission Owner Initial Funding to existing agreements from June 24, 2015 will undermine regulatory certainty. While we recognize the importance of regulatory certainty, we also find relevant here that, as stated above, interconnection-customer parties to GIAs, FCAs, and MPFCAs that became effective during the interim period were on notice that the Commission's orders in this proceeding may be subject to remand or vacatur.

131. We reject Xcel's request that the Commission confirm that transmission owners be allowed to apply the retroactive unilateral election of Transmission Owner Initial Funding to network upgrade costs assigned to non-affiliate interconnection customers and not to network upgrade costs assigned to affiliate interconnection customers.[249] This request would require the Commission to predetermine the outcome of a future filing without a record. If a transmission owner desires to treat funding of network upgrade costs differently for certain interconnection customers, it must make a showing that such treatment is done on a not unduly discriminatory basis in the future filing(s) we direct below.

132. We also reject arguments that: (1) if the Commission fails to preserve the financing arrangements included in agreements entered into from June 24, 2015 through August 31, 2018, it should establish a process to allow for generation developers, generation owners, and interconnection customers to recover their losses (including stranded costs associated with their generation investments) due to this change;[250] (2) the changes to funding arrangements caused by the retroactive implementation of Transmission Owner Initial Funding should be implemented in a way that protects IPL and its customers against additional costs;[251] and (3) the determination of whether a particular agreement should be revised should be based on (a) whether the interconnection customer has made any commitments in reliance on the currently effective agreement, and (b) whether the interconnection customer might be adversely affected.[252] These arguments are premised on the view that interconnection customers

[248] AWEA Initial Brief at 6.

[249] Xcel Initial Brief at 15.

[250] AWEA Initial Brief at 17.

[251] Alliant Initial Brief at 9.

[252] *Id.* at 15-16.

should not bear costs they face due to changes that they could not have foreseen, due to circumstances beyond their control. However, we find that interconnection-customer parties to agreements that became effective during the interim period were on notice that the Commission's orders on review could be remanded or vacated, and that a judicial remand and/or vacatur could require changes to agreements entered into during the pendency of these proceedings; as such, interconnection customers could have taken steps to mitigate these risks. Moreover, while the Commission has in the past allowed utilities to recover certain prudent and verifiable stranded costs that resulted from a fundamental reform to the regulatory structure of the electric industry in Order No. 888, as pointed out by AWEA,[253] we disagree that there is a comparable unforeseeable reform at issue here. Therefore, we do not agree that generators should be indemnified by others for their failure to anticipate the potential reinstatement of the Transmission Owner Initial Funding option to the *pro forma* GIA or the extension of the Transmission Owner Initial Funding option to the *pro forma* FCA and *pro forma* MPFCA after court review.

133. We reject arguments related to the requirement for the interconnection customer to post security pursuant to any agreement revised to allow for the election of Transmission Owner Initial Funding as outside the scope of this proceeding. We find that revising the Transmission Owner Initial Funding option to remove the security requirement[254] is outside the scope of this proceeding because section 11.6 of MISO's *pro forma* GIA, which requires an interconnection customer to post security on the capital costs of the network upgrades, was not part of the revisions directed by the Commission in the June 2015 Order nor was it raised in the Court's opinion vacating and remanding the case to the Commission.[255]

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[253] AWEA Initial Brief at 17 (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 21,628 (1996) (cross-referenced at 77 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 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 Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)).

[254] MISO Tariff, Attach. X, App. 6, Generator Interconnection Agreement § 11.6 (66.0.0).

[255] The Commission also did not direct any revisions to the *pro forma* FCA and *pro forma* MPFCA related to the posting of security in the June 2015 Order.

134. Invenergy contends that, in considering return on equity levels for network upgrades in the revised agreements, the Commission must consider that transmission owners may not actually face additional risks when constructing and operating interconnection related network upgrades.[256] Invenergy argues that most network upgrades are simply replacement of existing equipment with newer equipment and that interconnection customers provide security; thus, there is actually a much lower risk to the transmission owner than it might face in its ordinary operations. As discussed further below in the section on implementation, we will not in this order make a finding on what method is appropriate for determining the return on and of component of the network upgrade charge under Transmission Owner Initial Funding, as requested by Invenergy. MISO's Tariff does not set a specific method for computing the return on and of network upgrade costs under Transmission Owner Initial Funding and to make such a finding here would be outside the scope of the current proceeding.

135. Last, as noted above, we find that transmission owners and affected system operators should have the unilateral right to elect the Transmission Owner Initial Funding option not only for GIAs, but also for FCAs and MPFCAs, that became effective during the interim period. Accordingly, we find that FCAs and MPFCAs that became effective between June 24, 2015 and August 31, 2018 should be afforded the same treatment as GIAs entered into during that interim period. The Commission has previously found that transmission owners and affected system operators that enter into FCAs and MPFCAs are similarly situated to transmission owners in GIAs.[257] Also, the Court did not make a distinction among GIAs, FCAs, and MPFCAs when it vacated the Commission's orders. Because the Commission granted the Otter Tail complaint in full in the Ameren Remand Order, we therefore are allowing the transmission owner or affected system operator to elect the Transmission Owner Initial Funding option in FCAs and MPFCAs entered into as of June 24, 2015.

i. Implementation

136. We direct MISO to submit a filing within 60 days of the issuance of this order that provides a list of all agreements that became effective in the interim period (i.e., June 24, 2015 through August 31, 2018) under which the transmission owner or affected system operator is electing the Transmission Initial Funding option. In order to provide certainty for all the parties to agreements that became effective in the interim period, this filing will be the only opportunity for a transmission owner or affected system operator to elect the Transmission Owner Initial Funding option for such agreements. We believe that this is a reasonable remedy that balances the interest of the parties, the need for regulatory

[256] Invenergy Reply Brief at 12-13.

[257] June 2015 Order, 151 FERC ¶ 61,220 at P 47.

certainty, and ease of administration.[258] Furthermore, transmission owners and affected system operators had notice that the Commission's previous orders may be vacated or remanded, and that Transmission Owner Initial Funding may be reinstated in the *pro forma* GIA as well as expanded to the *pro forma* FCA and *pro forma* MPFCA; therefore, there is no need for the Commission to grant an extended amount of time for transmission owners or affected system operators to notify MISO that they would have elected Transmission Owner Initial Funding for an agreement executed during the interim period. In order to ensure that each transmission owner and affected system operator exercises its discretion to revise existing agreements in a manner that is not unduly discriminatory or preferential, we require that, if a transmission owner or affected system operator desires to treat funding of network upgrade costs differently for different interconnection customers, it must provide adequate support that such treatment is done on a not unduly discriminatory basis. The transmission owner or affected system operator should provide any necessary support to MISO, and MISO must include this information in an attachment to MISO's compliance filing.

137. We direct MISO to establish a process for implementation of the requirement that transmission owners and affected system operators be allowed to elect the Transmission Owner Initial Funding option in all GIAs, FCAs, and MPFCAs that became effective during the interim period.[259] Implementation of the election of Transmission Owner Initial Funding for GIAs, FCAs, and MPFCAs that became effective during the interim period will vary depending on how far the parties are in the network upgrade construction process. As explained by MISO, there are likely three main scenarios: (1) an interconnection customer has executed a GIA, FCA, or MPFCA or requested that a GIA, FCA, or MPFCA that the interconnection customer is a party to be filed unexecuted, and has not yet made payment to the transmission owner or affected system operator for any required network upgrades; (2) an interconnection customer has executed a GIA, FCA, or MPFCA and made an up-front payment to the transmission owner or affected system operator for any required network upgrades, but the network upgrades have not been placed in service; and (3) an interconnection customer has executed a GIA, FCA, or MPFCA, made the up-front payment to the transmission owner or affected system operator for any required network upgrades, and the network upgrades have been placed in service.

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[258] *See, e.g.*, *TNA Merchant Projects, Inc.*, 857 F.3d 354 (explaining the Commission's broad remedial authority to remedy its errors and correct unjust situations).

[259] If the transmission owner or affected system operator that is a party to the relevant agreement(s) chooses not to elect the Transmission Owner Initial Funding option, no further action needs to be taken by the parties to the agreement.

138. Under the first scenario, we require parties to the GIA, FCA, or MPFCA to amend the agreement if the transmission owner or affected system operator, as applicable, elects the Transmission Owner Initial Funding option. We direct MISO to refile the amended GIA, FCA, or MPFCA with the Commission within 60 days of the issuance of this order if: (1) it is already on file with the Commission;[260] (2) the interconnection customer requests that the agreement be filed unexecuted because it does not agree to specific rates, terms, and conditions of the revised agreement; or (3) if there are nonconforming changes.[261] We also direct MISO to file with the Commission an FSA, which necessarily will set forth the costs for the network upgrades including a return on and of capital, for the Transmission Owner Initially Funded network upgrade(s) included in the GIA, FCA, or MPFCA that falls under this first scenario after the parties submit the executed or unexecuted FSA to MISO. Regarding arguments questioning the appropriate method for determining the return on and of capital for the relevant network upgrades, we note that the Commission has accepted methods that use the inputs from Attachment GG of MISO's Tariff.[262] However, the Commission will consider alternate ways to compute the return on and of capital for network upgrades because the Tariff in effect during the interim period does not specifically require the use of Attachment GG. Each filing regarding an FSA that MISO submits to the Commission must adequately support any proposed method for determining the return on and of capital for the relevant network upgrades as just and reasonable and not unduly discriminatory or preferential.

139. Under the second scenario, we require the parties to the GIA, FCA, or MPFCA to amend the agreement if the transmission owner or affected system operator elects the Transmission Owner Initial Funding option, and MISO must refile the agreement with the Commission within 60 days of the issuance of this order if it meets one of the criteria discussed in paragraph 138. We direct the transmission owner or affected system operator to refund any payments that it received from the interconnection customer for

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[260] In other words, if the Commission has previously accepted tariff sheets for a GIA, FCA, or MPFCA (or such a filing is currently pending before the Commission) and the tariff sheets have not been cancelled, they are considered on file with the Commission. *See, e.g.*, MISO Tariff, Midwest ISO Agreements, SA 2527, ITC-Consumers GIA (J161), 33.0.0.

[261] Thus, if the agreement was previously reported in the Electric Quarterly Reports, no interconnection customer requests that it be filed unexecuted, and there are no other non-conforming changes, MISO could report the conforming agreement in the Electric Quarterly Reports. In its briefs, MISO does not explain how it plans to report the amendments to the agreements in its Electric Quarterly Reports filing. We note that MISO could describe the changes in the "Rate Description" field of the filing.

[262] *See Hoopeston*, 145 FERC ¶ 61,111 at P 41.

network upgrades in one lump sum payment, unless the parties agree to refund such payments using a different method. We also direct MISO to file with the Commission an FSA, which necessarily will set forth the costs for the network upgrades including a return on and of capital, for the Transmission Owner Initially Funded network upgrade(s) included in the GIA, FCA, or MPFCA that falls under this second scenario after the parties submit the executed or unexecuted FSA to MISO. As noted above, each filing regarding an FSA that MISO submits to the Commission must adequately support any proposed method for determining the return on and of capital for the relevant network upgrades as just and reasonable and not unduly discriminatory or preferential.

140. Under the third scenario, we require the parties to the GIA, FCA, or MPFCA to amend the agreement if the transmission owner or affected system operator elects the Transmission Owner Initial Funding option, and MISO must refile the agreement with the Commission within 60 days of the issuance of this order if it meets one of the criteria discussed in paragraph 138. We direct the transmission owner or affected system operator to refund any payments that it received from the interconnection customer for network upgrades, less depreciation calculated from the in-service date of the network upgrades to the date of repayment, in one lump sum payment, unless the parties mutually agree to refund such payments using a different method. We also direct MISO to file FSAs that provide the transmission owner or affected system operator with both a return on and of the remaining undepreciated capital repaid to the interconnection customer associated with these GIAs, FCAs, or MPFCAs with the Commission, within 60 days of the issuance of this order. After reviewing the briefs in this proceeding, we decline to require a specific method for the calculation of depreciation. The filing that MISO submits to the Commission that includes the FSAs associated with these GIAs, FCAs, or MPFCAs must adequately support any proposed method for determining the return on and of capital for the relevant network upgrades as discussed above for scenarios one and two, as well as the stated value of the remaining principal on the network upgrades and the depreciation rate chosen by the parties to the relevant agreement.

141. To summarize, MISO is directed to submit the following filings within 60 days from the date of this order: (1) a list of all GIAs, FCAs, or MPFCAs that became effective in the interim period under which the transmission owner or affected system operator is electing the Transmission Owner Initial Funding Option; (2) amended GIAs, FCAs, or MPFCAs that meet the conditions discussed above;[263] and (3) executed or unexecuted FSAs associated with the GIAs, FCAs, or MPFCAs under the third implementation scenario discussed above.[264] For the first and second implementation scenarios discussed above, we understand that the network upgrades are not yet in

[263] *See supra* PP 137-40.

[264] *See supra* P 140.

service; therefore, we require MISO to file each of these FSAs with the Commission at a future date after the parties submit the executed or unexecuted FSA to MISO.

3. Compliance Filing, Docket No. ER18-2513-000

i. Filing

142. MISO proposes to restore the right of the transmission owner to unilaterally elect the Transmission Owner Initial Funding option under the *pro forma* GIA for the capital cost of interconnection related network upgrades, as well as extend the unilateral right of the transmission owner or affected system operator to elect the Transmission Owner Initial Funding option under the *pro forma* FCA and the *pro forma* MPFCA for interconnection related network upgrades, effective August 31, 2018, as directed by the Commission in the Ameren Remand Order.[265] MISO states that the filing includes highlighted language that is pending in Docket Nos. ER18-1982-001, ER18-2054-000, and ER18-1410-000.[266] MISO asks that the Commission treat such highlighted language as subject to the outcomes of those pending proceedings.

ii. Protest and Answers

143. In its protest, AWEA repeats the arguments from its request for rehearing of the Ameren Remand Order and its supplemental briefs that the unilateral right of the transmission owner to elect Transmission Owner Initial Funding should not apply to the projects in Phase III of MISO's interconnection queue process.[267]

144. AWEA argues that the proposed Transmission Owner Initial Funding language should apply 60 days after the Commission issues an order addressing the compliance filing and the rehearing requests of the Ameren Remand Order.[268] AWEA argues that it is just and reasonable to establish a transition period before the more costly Transmission Owner Initial Funding option is made subject to the unilateral election of the transmission owners, so that the interconnection customers in MISO's queue will have an opportunity to make an informed decision on whether to proceed through the queue.[269] AWEA states

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[265] Compliance Filing, Transmittal Letter at 2-4.

[266] *Id.* at 4 note 9.

[267] AWEA Protest at 2-6.

[268] *Id.* at 6.

[269] *Id.* at 7.

that the Commission has previously ordered a transition period for other MISO queue reform initiatives that apply after the Commission issued its order.[270] AWEA references a Commission order granting MISO's request to exempt projects from the effective date of Order No. 842 for all projects that had completed interconnection Decision Point II in the MISO interconnection queue process, and states that the same harms are at issue here: increased costs to interconnection customers and potential harm to MISO's queue if projects must withdraw.[271] AWEA argues that, if the Commission reverses course on rehearing, interconnection agreements that became effective between August 31, 2018 and the date of the order on rehearing will be affected, and the Commission will have to attempt to undo the impacts caused by the transmission owner unilaterally electing the Transmission Owner Initial Funding option.[272] AWEA also states that there is recent precedent for the Commission postponing the effectiveness of new *pro forma* GIP and *pro forma* GIA revisions until the Commission acts on the pending rehearing requests.[273]

145. AWEA argues that the transmission owner should be required to notify the interconnection customer by Decision Point I in the MISO interconnection queue process if it is electing Transmission Owner Initial Funding.[274] AWEA contends that such notice is essential for interconnection customers to know the potential cost for network upgrades while they are making decisions to continue through MISO's interconnection queue and putting financial milestone payments at risk of forfeiture. AWEA states that, if the network upgrade costs in the system impact studies do not reflect the Transmission Owner Initial Funding pricing, the chances of late-stage withdrawals are high, which

[270] *Id.* at 6-7 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233, at P 100 (2012) (GIP revisions apply "90 days after the issuance of this order"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183 (providing interconnection customers 60 days to decide whether to comply with new milestones or withdraw)).

[271] *Id.* at 7-9 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,233 at PP 6-8, 17 (2018)).

[272] *Id.* at 9-10.

[273] *Id.* at 10 (citing *Reform of Generator Interconnection Procedures and Agreements*, Notice of Extension of Compliance Date, Docket No. RM17-8-000, Oct. 3, 2018 (suspending indefinitely the time to submit revised *pro forma* GIP and GIA provisions until 90 days after the Commission addressing pending rehearing requests)).

[274] *Id.* at 12-13.

would impact lower-queued projects and may cause restudies and delays.[275] AWEA, therefore requests that if the Commission accepts the compliance filing, then it should require MISO to submit further Tariff revisions that (1) require the election of the Transmission Owner Initial Funding option to be done in the Phase I system impact study or have the transmission owner's opportunity to elect such option forfeited and (2) disclose the estimated engineering, procurement, and construction costs for network upgrades and estimated net present value cost for network upgrades including all assumptions used in the net present value calculation.[276]

146. AWEA requests that the Commission order MISO to submit a compliance filing that specifies that the initial payment obligation under section 11.5 of the *pro forma* GIA does not apply where the transmission owner has elected Transmission Owner Initial Funding.[277] AWEA reasons that the initial payment is used to fund the engineering, procurement, and construction of network upgrades, but under Transmission Owner Initial Funding, no up-front funding is required from the interconnection customer.

147. AWEA also contends that the security requirement under section 11.6 of the *pro forma* GIA is not just and reasonable when the transmission owner elects Transmission Owner Initial Funding.[278] AWEA states that the Commission has found that requiring the interconnection customer to provide the funds up-front and then allowing the transmission owner to repay those amounts and collect it again from the interconnection customer over time is unjust and unreasonable.[279] AWEA argues that the requirement for the interconnection customer to provide security on the network upgrade costs is tantamount to requiring the interconnection customer to provide the funds up-front.[280] AWEA states that the Commission has explained that security under

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[275] *Id.* at 13.

[276] *Id.* at 14.

[277] AWEA states that the interconnection customer is required to provide an initial payment equal to 10 percent, 20 percent, or 100 percent of the cost of network upgrades within 45 days of the execution of the GIA. *Id.*

[278] AWEA states that the interconnection customer must post security equal to the remaining amount not covered by the initial payment under section 11.6 of the *pro forma* GIA. *Id.*

[279] *Id.* at 14-15 (citing *E.ON*, 137 FERC ¶ 61,076 at P 37).

[280] *Id.* at 15 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,072, at P 13 (2016) (the posting of security affects rates by increasing costs to interconnection

the *pro forma* GIA is provided to coincide with milestone dates when the transmission owner requires funds to complete the engineering, procurement, and construction of network upgrades.[281] AWEA contends that the transmission owner does not require such funds under Transmission Owner Initial Funding because it will have chosen to provide such funding itself up-front and therefore milestone payments are no longer required from the interconnection customer under the GIA. AWEA states that, if the Commission determines that security must be posted, then the Commission should require the transmission owner to list in the GIA, FCA, and MPFCA, the dates when it will expend funds for each work item and the amount, and therefore require security by those dates and in that amount.[282] Then, once each specific work item is completed, the security should be released or rolled over to support the next funding event.

148. AWEA requests Commission guidance on two topics. First, AWEA requests that the Commission clarify that the "option to build" right is not negated by the unilateral right of the transmission owner to elect Transmission Owner Initial Funding.[283] Second, AWEA requests that the Commission clarify that Transmission Owner Initial Funding is not available to transmission owners that did not elect it in a GIA executed before June 24, 2015.[284] AWEA states that if a transmission owner has not elected the Transmission Owner Initial Funding option in the past for GIAs that it has been a party to, then it would result in undue discrimination for such a transmission owner to elect Transmission Owner Initial Funding now.

149. In their answers, MISO and MISO Transmission Owners contend that AWEA does not suggest or demonstrate that the compliance filing fails to comply with the Commission's directives in the Ameren Remand Order, nor does AWEA's protest have anything to do with the issue in the compliance proceeding; therefore, the protest should be rejected as beyond the scope of this proceeding.[285] MISO and MISO Transmission

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customers)).

[281] *Id.* (citing *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,072 at P 14).

[282] *Id.* at 16.

[283] *Id.* at 17.

[284] *Id.* at 19.

[285] MISO Answer at 4-5. MISO Transmission Owners Answer at 2, 7.

Owners argue that AWEA's protest makes irrelevant and out-of-scope arguments and collaterally attacks the Ameren Remand Order.[286]

iii. Commission Determination

150. We accept MISO's compliance filing, to be effective August 31, 2018, subject to the outcome of Docket Nos. ER18-1982-001, ER18-2054-000, and ER18-1410-000, as requested. We find that the compliance filing implements the Commission's directives in the Ameren Remand Order. We reject AWEA's request to establish a transition period such that the Transmission Owner Initial Funding Tariff language is not effective until 60 days after the Commission issues its orders on MISO's compliance filing and on the requests for rehearing of the Ameren Remand Order. We find that the cases cited by AWEA are inapposite; in those cases, the Commission was adopting new reforms to MISO's *pro forma* GIP and/or *pro forma* GIA. By contrast, here we are accepting a compliance filing in response to a remand and vacatur from the D.C. Circuit. Interconnection customers had notice that the Commission's previous orders might be vacated or remanded on direct review, and that Transmission Owner Initial Funding may be reinstated in the *pro forma* GIA as well as expanded to the *pro forma* FCA and *pro forma* MPFCA.

151. We find that AWEA's remaining arguments are outside the scope of the compliance filing proceeding and are either (1) addressed in the determination on the supplemental briefing above or (2) a collateral attack on the Ameren Remand Order.

The Commission orders:

(A) AWEA's request for rehearing of the Ameren Remand Order is hereby denied, as discussed in the body of this order.

(B) We hereby direct MISO to file Tariff sheets, within 60 days from the date of this order, stating that transmission owners and affected system operators that were parties to any GIAs, FCAs, and MPFCAs that became effective between June 24, 2015 and August 31, 2018 may elect Transmission Owner Initial Funding for the network upgrades in those agreements, provided that such election is done in a not unduly discriminatory manner.

[286] MISO Answer at 5-10; MISO Transmission Owners Answer at 2, 7-12.

(C) We hereby direct MISO to make further filings and Tariff revisions to provide for the implementation of this requirement, as discussed in the body of this order.

(D) MISO's proposed Tariff revisions filed in Docket No. ER18-2513-000 are hereby accepted, to be effective August 31, 2018, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.	Docket Nos.	EL15-68-003 EL15-68-004
Otter Tail Power Co. v. Midcontinent Independent System Operator, Inc.		EL15-36-003 EL15-36-004
Midcontinent Independent System Operator, Inc.		ER16-696-004 ER16-696-005 ER18-2513-000

(Issued December 20, 2019)

GLICK, Commissioner, *dissenting*:

1. In today's order denying rehearing, the Commission doubles down on its decision, on remand from the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit or court) in *Ameren Services Co. v. FERC*,[1] to allow transmission owners and affected system operators in the Midcontinent Independent System Operator, Inc. (MISO) the discretion to unilaterally elect whether to self-fund network upgrades constructed on behalf of generator interconnection customers.[2] By simply reversing the vacated orders with nothing more than conclusory statements, the Commission is now in the untenable position of neither addressing the reasons for the court's remand nor grappling with the Commission's underlying concerns of undue discrimination. The order also permits the reopening of numerous previously-negotiated interconnection agreements, exposing parties to those agreements to substantial cost increases, which will, in turn, cause

[1] 880 F.3d 571 (D.C. Cir. 2018) (*Ameren*). In *Ameren*, the D.C. Circuit vacated the following orders: *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,220 (June 2015 Order), *order denying reh'g*, 153 FERC ¶ 61,352 (2015) (December 2015 Rehearing Order), *order denying reh'g*, 156 FERC ¶ 61,099 (2016) (August 2016 Rehearing Order); *Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,098 (August 2016 Compliance Order), *order denying reh'g*, 157 FERC ¶ 61,013 (2016) (October 2016 Rehearing Order).

[2] *See Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158 (2018) (Remand Order), *order on briefing, compliance & reh'g*, 169 FERC ¶ 61,233 (2019) (Remand Rehearing Order).

cascading impacts on multiple fronts and could lead to project terminations.[3] Today's order not only impacts all yet-to-be executed interconnection agreements in MISO, but it also unwinds executed agreements dating back to 2015. The Commission's decision to reverse course without addressing the Commission's original concerns about undue discrimination is particularly egregious here where the consequences are so extensive. Because I believe the Court is likely to remand the Commission's orders once again, I dissent.

2. In 2015, the Commission, acting on its own motion under section 206 of the Federal Power Act and partly in response to a complaint,[4] found that it is unjust, unreasonable, unduly discriminatory, and preferential to allow transmission owners the unilateral right to decide whether to fund network upgrades.[5] The Commission explained that giving a transmission owner the discretion to choose whether to fund a required network upgrade or whether to permit the interconnecting generator to finance the upgrade costs may result in discrimination by the transmission owner among interconnection customers. Moreover, the Commission found unilateral transmission owner funding may deprive interconnection customers of the opportunity to finance network upgrades with more favorable terms and rates, including avoiding a more onerous security requirement. As a result, the Commission concluded that certain interconnection customers could face increased costs compared to other similarly situated customers but with no increase in service.[6] For these reasons, the Commission concluded that MISO's *pro forma* interconnection agreements may not give transmission owners the unilateral discretion to choose whether to fund network upgrades.[7]

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[3] *See* American Wind Energy Association (AWEA) Initial Brief at 9.

[4] Otter Tail Complaint and Request for Fast-Track Processing, Docket No. EL15-36-000, at 1 (filed Jan. 12, 2015).

[5] June 2015 Order, 151 FERC ¶ 61,220 at P 48.

[6] *Id.* PP 48-49, 52. The Commission relied in part on the fact that MISO's interconnection pricing policy was unique and differed from the pricing policy the Commission established in Order No. 2003 in that a transmission owner electing to initially fund network upgrades in MISO would assign the non-reimbursable portion of the costs of the network upgrades directly to the interconnection customer through a network upgrade charge rather than recovering the costs of the network upgrades through transmission rates charged to *all* transmission customers. December 2015 Rehearing Order, 153 FERC ¶ 61,352 at P 30.

[7] June 2015 Order, 151 FERC ¶ 61,220 at P 54; December 2015 Rehearing Order, 153 FERC ¶ 61,352 at P 29.

3. In *Ameren*, the D.C. Circuit vacated and remanded the Commission's orders, explaining that it was unpersuaded by the Commission's justifications for its action.[8] While the court acknowledged that vertically-integrated transmission owners that still own integrated generation facilities would have an economic incentive to discriminate, it noted that only one of the petitioning transmission owners fell into that category.[9] The court was likewise unconvinced by the Commission's argument that transmission owner funding imposes increased costs on interconnection customers with no corresponding increase in service.[10] Yet, despite voicing concern with the Commission's failure to respond to the transmission owners' arguments,[11] the D.C. Circuit declined to reach the merits of the central question before it.[12] "Indeed," the court explained, "we should not do so until the Commission has developed a record by considering that question itself."[13]

4. On remand, instead of further developing the record, the Commission merely withdrew its determination in the vacated orders. The Commission directed MISO to restore the transmission owners' right to unilaterally elect self-funding, which the *pro forma* Generator Interconnection Agreement (GIA) included prior to the Commission's action in the vacated orders.[14] However, the Commission also went a step further and directed MISO to include that same right in MISO's other *pro forma* interconnection

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[8] *Ameren*, 880 F.3d at 585.

[9] *Id.* However, as the Commission notes today, the great majority of investor-owned transmission owners in MISO also own generation. *See* Remand Rehearing Order, 169 FERC ¶ 61,233 at P 38 (recognizing that "a majority of transmission owners in MISO also own generation . . . .").

[10] *Ameren*, 880 F.3d at 579-80.

[11] In particular, the Court stated that the Commission inadequately considered the argument that "all costs, and risks, are *not* baked in [to the existing compensation structure]—that, in fact, shareholders are forced to accept incremental exposure to loss with no corresponding benefit" as a result of generator up-front funding of network upgrades. *Id*. at 580-81. The Court similarly stated that the Commission did not adequately consider the argument that eliminating transmission owner funding absent the interconnection customer's consent modified the transmission owners' entire enterprise and required them to act in part as a non-profit business. *Id.* at 581

[12] *Id.* at 582 ("At present . . . we have no need to reach the merits of those questions. Because the Commission failed even to response to these concerns . . . it is sufficient not to require that it do so.").

[13] *Id.* at 584.

[14] Remand Order, 164 FERC ¶ 61,158 at PP 1, 33.

agreements, the *pro forma* Facilities Construction Agreement (FCA) and *pro forma* Multi-Party Facilities Construction Agreement (MPFCA). Relying solely on its conclusion that interconnection customers of an affected system operator under MISO's *pro forma* FCA or *pro forma* MPFCA are similarly situated to those of a directly-connected transmission owner under the *pro forma* GIA, the Commission found that the comparability principle requires the same funding options should apply in all three agreements.[15] In other words, because the Commission reinstated transmission owner funding in the *pro forma* GIA, the Commission required MISO—for the first time and without additional analysis—to give that same funding right to affected system operators in the *pro forma* FCA and *pro forma* MPFCA.[16]

5. While I supported the Remand Order, I am persuaded by an argument made in the request for rehearing that the record is not sufficient to support the Commission's determinations and that the Commission erred in not soliciting briefing in response to the remand. In particular, the Commission failed to meaningfully respond to arguments that it is unduly discriminatory to give affected system operators the unilateral discretion to choose self-funding for network upgrades under the *pro forma* FCA and *pro forma* MPFCA.[17] Instead, the Commission continues to rely solely on the comparability principle to extend the self-funding option from the *pro forma* GIA to affected system operators under the *pro forma* FCA and *pro forma* MPFCA. In doing so, the Commission sidesteps the most significant issue presented in this proceeding: transmission owners in MISO have the incentive to favor their own generation over others seeking to interconnect to the transmission system,[18] and giving transmission owners the discretion to pick and choose when to self-fund network upgrades vests them with the opportunity to do so.

6. In Order No. 2003, the Commission held that transmission providers must have a uniformly applicable set of procedures and agreements to govern the process of

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[15] *Id.* P 34.

[16] *Id.*

[17] *See* AWEA Protest, Docket No. EL15-36-000, at 6, 8 (arguing that factual support addressing the costs, benefits, and impacts of permitting affected system operators the right to unilaterally chose self-funding is necessary, as self-funding is more costly to the interconnection customers) (filed Feb. 2, 2015); *see also* AWEA Reply Comments, Docket No. EL15-68, at 6 (filed July 29, 2015) ("[A] self-funding option that resides solely with the interconnection transmission owner's election discretion is unduly discriminatory.").

[18] After all, as noted above, the majority of investor-owned transmission owners in MISO—in fact—also own generation. *See* Remand Rehearing Order, 169 FERC ¶ 61,233 at P 38.

interconnecting large generators to their transmission facilities, in significant part, to limit opportunities for transmission providers to favor their own generation.[19] As the Commission has held time after time since its landmark open access transmission reforms in Order No. 888, discretion in the provision of transmission service—when coupled with a transmission provider's incentive to discriminate—creates opportunities for undue discrimination.[20] Iterating this essential principle, protestors in the underlying proceeding

argued that extending the right to choose self-funding to affected system operators under the *pro forma* FCA and *pro forma* MPFCA is unduly discriminatory. They explained that transmission owner self-funding "is more costly" to the interconnection customer, and allowing transmission owners to choose which interconnection customers must pay these higher costs not only gives transmission owners the power to favor their own generation, it also "provides an environment where neighboring and similarly-situated interconnection customers pay differently for network upgrades."[21] This is precisely the type of behavior the Commission sought to eliminate in Order No. 2003, explaining that

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[19] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at PP 11-13 (2003) (concluding that "[t]he delays and lack of standardization inherent in the current system undermine the ability of generators to compete in the market and provide an unfair advantage to utilities that own both transmission and generation facilities"), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at P 2, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

[20] *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,679 ("We have identified a fundamental generic problem in the electric industry," which is that "owners, controllers and operators of monopoly transmission facilities that also own power generation facilities have the incentive to engage, and have engaged, in unduly discriminatory practices in the provision of transmission services by denying to third parties transmission services that are comparable to the transmission services that they are providing, or are capable of providing, for their own power sales and purchases. These practices drive up the price of electricity and hurt consumers. Furthermore, the incentive to engage in such practices is increasing significantly as competitive pressures grow in the industry."); Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at PP 1, 4, 6, 9 & n.7 ("The Commission's authority to require the addition of the Final Rule [Large Generator Interconnection Agreement] and Final Rule [Large Generator Interconnection Procedures] to the OATT derives from its findings of undue discrimination in the interstate electric transmission market that formed the basis for Order No. 888.").

[21] AWEA Reply Comments, Docket No. EL15-68, at 6 (filed July 29, 2015).

it would find any policy that creates opportunities for transmission owners to exploit the subjectivity of interconnection pricing to their own advantage to be unacceptable.[22]

7. In the Remand Order, the Commission chose not to address these challenges directly and, instead, simply echoed the Court's concerns that "the Commission did not adequately support its determination of discrimination" in the underlying orders.[23] While this approach may suffice for the limited purpose of *reinstating* the transmission owners' unilateral right to self-fund in the *pro forma* GIA, which pre-existed the Commission's action in this proceeding, it is not enough to *extend* that right to affected system operators under two separate agreements.[24] The Commission relies entirely on the fact that the Court did not overturn its prior finding that customers of an affected system operator are similarly situated to customers of a directly-connected transmission owner.[25] But notwithstanding this fact, the Commission must still grapple with protests challenging the transmission owners' unilateral right to self-fund as unduly discriminatory. Not only is the argument squarely presented for the Commission to address—it also represents a threat that the Commission has repeatedly corrected throughout its open access transmission reforms. I cannot support the Commission's decision to once again sweep this issue under the table. Instead of taking the easy way out and faulting the challenging parties for having failed to provide "evidence of actual discrimination,"[26] the Commission should grant rehearing and seek to develop a record sufficient for it to evaluate the threat of undue discrimination presented here.[27] In acting under section 206 of the FPA, the Commission bears the burden to establish a just and reasonable

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[22] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 696.

[23] Remand Order, 164 FERC ¶ 61,158 at P 29.

[24] In the Remand Order, when the Commission reinstated transmission owner funding in the *pro forma* GIA on the basis that it erred by acting without adequate support in the record, it arguably satisfied the FPA's requirements by undoing a prior action. But when the Commission then took the next step of granting Otter Tail's complaint in full and directing MISO to include the same transmission owner funding right in the *pro forma* FCA and *pro forma* MPFCA, the Commission was obligated to first determine that the existing tariff is unjust and unreasonable and second to establish a just and reasonable replacement rate. *See Emera Me. v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017). Here, the Commission is not only failing to reject a discriminatory policy as unacceptable, it is itself imposing that policy through its section 206 action.

[25] *See* Remand Order, 164 FERC ¶ 61,158 at P 34.

[26] Remand Rehearing Order, 169 FERC ¶ 61,233 at PP 37-39.

[27] That is, indeed, the purpose of the rehearing process—to permit the Commission to reconsider its decision and correct any errors before judicial review.

replacement rate. The Commission's failure to meaningfully address arguments that it is unduly discriminatory to give affected system operators the discretion to unilaterally choose self-funding is arbitrary and capricious and not the product of reasoned decisionmaking.

8. Based on a more developed record, the Commission could support its determination on remand with substantial evidence, whether that determination be that transmission owners should have the unilateral right to self-fund network upgrades in MISO, that generators should have that right instead, or that there is another just and reasonable and not unduly discriminatory option. Rather than engaging in this essential record development and meaningfully addressing the questions posed by the court, the Commission simply reverses the vacated orders with nothing more than conclusory statements that rely on effectively the same record the court dismissed. I cannot support today's order because it focuses so much on the court's vacatur that it is ignores the significance of the remand.

9. The Commission compounds the errors discussed above by today allowing transmission owners and affected system operators that were parties to any GIAs, FCAs, or MPFCAs that became effective between June 24, 2015, and August 31, 2018, to retroactively elect transmission owner funding for the network upgrades in those agreements.[28] I do not dispute that the Commission has significant discretion in remedying legal error pursuant to section 309 of the FPA[29] and that "there is a strong equitable presumption" in favor of putting parties in "the position they would have been in" had the Commission not erred.[30] However, I disagree that this principle requires the outcome the Commission orders today. Today's order suggests that, to give effect to the court's vacatur, it must permit parties to reopen interconnection agreements previously-negotiated without the transmission owners' and affected system operators' unilateral

[28] Remand Rehearing Order, 169 FERC ¶ 61,233 at P 126.

[29] *See* 16 U.S.C. § 825h (2018) ("The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."); *see also TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 361 (D.C. Cir. 2017) ("FERC enjoys broad authority when its past actions are determined to be wrong."); *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 954-56 (D.C. Cir. 2016) (discussing the Commission's broad remedial authority under FPA section 309 to remedy its legal error); *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993) ("[A]gency discretion 'is often at its 'zenith' when the challenged action relates to the fashioning of remedies.'").

[30] *See* Remand Rehearing Order, 169 FERC ¶ 61,233 at P 126 (citing *Exxon Co. U.S.A. v. FERC*, 182 F.3d 30, 50 (D.C. Cir. 1999)).

right to elect to self-fund network upgrades.[31] While I agree with the Commission that we must, on remand, give effect to the Court's vacatur, this is far from the only relevant consideration.

10. Rather than merely pointing a finger at the Court's vacatur and "acknowledg[ing]"[32] the significant and extensive costs at stake,[33] in fashioning a remedy the Commission must take the time to balance the "specific facts and equities"[34]—including the benefits and harms to the parties involved. The Commission claims that its decision reasonably balances "the interests of the parties, the need for regulatory certainty, and ease of administration."[35] But there is no evidence that the Commission engages in any such balancing. Furthermore, I believe that the evidence in the record before us weighs heavily in favor of preserving the existing GIAs, FCAs, and MPFCAs.

11. Here, the record shows that transmission owners and interconnection customers entered into over 100 contracts during the relevant period, June 24, 2015 through August 31, 2018. The Commission provided both transmission owners and interconnection customers the opportunity to offer evidence of the potential impact of revising (or leaving in place) these existing agreements. Transmission owners failed to produce any evidence of actual harm they have or will experience if the Commission leaves the existing agreements in place. The interconnection customers, on the other hand, demonstrated with empirical evidence the substantial harm that they will incur if the Commission revises the existing agreements.[36] The Commission must weigh *these* facts and *these* equities in coming to a decision. The Commission cannot discount that allowing revision of the agreements at issue would "pull the economic rug out from under" interconnection

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[31] *Id.*

[32] *See id.* P 129.

[33] *See* AWEA Initial Brief at 20-21; Alliant Initial Brief at 9, 20; Xcel Energy Services Inc. Initial Brief at 9, 20.

[34] *Black Oak Energy, LLC*, 167 FERC ¶ 61,250, at P 27 (2019).

[35] Remand Rehearing Order, 169 FERC ¶ 61,233 at P 136.

[36] *See, e.g.*, AWEA Initial Brief at 8-17 (describing the potential for significant financial disruption to generation developers and owners, buyers and sellers under executed power purchase agreements and asset purchase agreements, financial investors, capital markets, and third-party vendors, including queue delays, increased costs, and cancelled projects); Xcel Energy Services Inc. Initial Brief at 9, 19-21 (citing increased ongoing costs, bankruptcy, withdrawal from the queue, loss of security or cash deposits, and substantial transactional and state regulatory burdens, including impacts on state regulatory resource decisions and retail rates); MISO Initial Brief at 8-9 (describing potential strain on MISO's interconnection queue).

customers that "made operational decisions in reliance" on MISO's Tariff at the time that they executed their agreement(s) and "would be unable to 'undo' those transactions retroactively in light of the new, corrected rates."[37]

12. The sheer number of agreements at issue is also an important consideration and it bears noting that the Commission has no way of knowing whether transmission owners or affected system operators would have elected transmission owner funding had the option been available in the existing agreements at issue. In fact, circumstances may have changed since the execution of these agreements, such that the transmission owner or affected system operator now wants to elect transmission owner funding where it would not have done so in the past.[38] It is unfair to impose additional costs on interconnection customers that they may not have even encountered had transmission owner funding been available at the time that they executed their interconnection agreements. And perhaps most importantly, I question how the Commission can effectively enforce its directive that transmission owners may only retroactively elect transmission owner funding in the existing agreements "in a not unduly discriminatory manner"[39] when the governing tariff language gives them unfettered discretion to exercise this right unilaterally.[40]

Today, the Commission denies a request for rehearing that points out the flaws in the Remand Order without meaningfully addressing the arguments presented. I would grant rehearing and order briefing to develop the record that the Court required in *Ameren* and that is necessary to address the Court's central question—whether transmission owners in MISO actually face uncompensated risks when interconnection customers provide up-front funding for network upgrades that transmission owners construct, own, and operate. Rather than taking this path, the Commission simply reverses the vacated orders with a few conclusory statements that neither address the Court's remand nor the Commission's concerns of undue discrimination raised in the underlying proceeding. Without developing a thorough record, the Commission cannot support a just and reasonable replacement rate. Nor can it fairly balance the equities in fashioning a remedy to deal with the GIAs, FCAs, and MPFCAs that became effective between June 24, 2015, and the date of the Remand Order.

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[37] *La. Pub. Serv. Comm'n v. FERC*, 883 F.3d 929, 933 (D.C. Cir. 2018); *see also Black Oak Energy, LLC*, 167 FERC ¶ 61,250 at P 30 (applying the same standard).

[38] For example, in its initial brief, MISO stated that it was contacted by a small group of transmission owners in July 2018 indicating their interest in electing transmission owner funding, but as recently as September 2018, the group of transmission owners that are interested has changed. *Id.*

[39] Remand Rehearing Order, 169 FERC ¶ 61,233 at PP 125, 131, 136.

[40] *See E.ON*, 142 FERC ¶ 61,048, at P 39 (2013).

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner