

135 FERC ¶ 61,222
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Midwest Independent Transmission System Operator, Inc. Docket Nos. ER11-3326-000

Midwest Independent Transmission System Operator, Inc. ER11-3327-000

Midwest Independent Transmission System Operator, Inc. ER11-3330-000
(Not Consolidated)

ORDER CONDITIONALLY ACCEPTING AND SUSPENDING AMENDED
GENERATOR INTERCONNECTION AGREEMENTS AND MULTI-PARTY
FACILITY CONSTRUCTION AGREEMENT SUBJECT TO REFUND

(Issued June 10, 2011)

1. On April 8, 2011, pursuant to section 205 of the Federal Power Act (FPA),¹ Midwest Independent Transmission System Operator, Inc. (MISO) submitted for filing two unexecuted amended generator interconnection agreements (Amended GIAs). One Amended GIA, filed in Docket No. ER11-3326-000, is among MISO as Transmission Provider, Settlers Trail Wind Farm, LLC (Settlers Trail) as Interconnection Customer, and Ameren Services Company as agent for Ameren Illinois Company (Ameren Illinois) as the Transmission Owner. The other Amended GIA, filed in Docket No. ER11-3327-000, is among MISO as Transmission Provider, Pioneer Trail Wind Farm, LLC (Pioneer Trail) as Interconnection Customer, and Ameren Illinois as the Transmission Owner. MISO requests waiver of the Commission's 60-day prior notice requirement,² for an effective date of April 9, 2011 for the Amended GIAs.

¹ 16 U.S.C § 824d (2006).

² 18 C. F. R. § 35.3(a) (2011).

2. On April 11, 2011, MISO filed pursuant to section 205 of the FPA, in Docket No. ER11-3330-000, an unexecuted Multi-Party Facility Construction Agreement (MPFCA)³ to which Ameren Illinois, Settlers Trail, Pioneer Trail, California Ridge Wind Energy, LLC (California Ridge), and MISO are parties. MISO requests waiver of the Commission's 60-day prior notice requirement, for an effective date of April 12, 2011.

3. In this order we accept for filing the Amended GIAs effective April 9, 2011, as requested and the MPFCA, and suspend them for a nominal period, to become effective April 9, 2011 and April 12, 2011, as requested, subject to further modification as ordered below, and subject to refund.

I. Background

A. Docket Nos. ER11-3326-000 and ER11-3327-000

4. For purposes of this order, the circumstances that gave rise to the filings in Docket Nos. ER11-3326-000 and ER11-3327-000 are the same. On February 5, 2010, MISO, Ameren Illinois and the two Interconnection Customers executed GIAs involving Project No. G931 (Settlers Trail GIA) and Project No. G996 (Pioneer Trail GIA), collectively, Original GIAs. Both the Settlers Trail GIA and the Pioneer Trail GIA conformed to the then effective *pro forma* GIA, and were reported in MISO's Electric Quarterly Report (EQR).

5. On April 29, 2010, MISO informed Settlers Trail and Pioneer Trail of a modeling oversight in the system impact study (SIS) that was performed to determine the appropriate network upgrades for interconnection of their generating facilities. Specifically, the capacity of two higher-queued interconnection requests was under-represented in the model by a neighboring utility not affiliated with Ameren. The two higher-queued interconnection requests represent a total of 130MW of capacity but were included in the model at only 100 MW.⁴ With the model modified to include an

³ Under Attachment X, Generator Interconnection Procedures (GIP), Version 2.0.0 Effective March 3, 2011- Multi-Party Facilities Construction Agreement ("MPFCA") shall mean the form of facilities construction agreement, set forth in Appendix 9 to these Generator Interconnection Procedures. The MPFCA shall be used when multiple Interconnection Requests cause the need for the construction of Common Use Upgrades on the Transmission System or the transmission system of an Affected System and share cost responsibility for such Common Use Upgrades.

⁴ The two higher-queued interconnection requests both related to the Benton County Wind Farm (Benton County) generating facility. Benton County's original interconnection request was based on output of 100 MW, but was later increased in a

(continued...)

additional 30 MW, the Network Upgrades identified in the Original GIAs were not sufficient to mitigate the overloads on the transmission system that would be caused by the generating facilities. Instead, Additional Network Upgrades totaling \$10.26 million were required to address the overloads and reliably interconnect the generating facilities.⁵

6. Settlers Trail and Pioneer Trail objected to paying for the proposed Additional Network Upgrades and to delayed interconnection service, and requested that MISO file the unexecuted Amended GIAs pursuant to Section 11.3 of the GIP.⁶

B. Docket No. ER11-3330-000

7. The modification of the model noted above also impacted, as a group, the interconnections of Settlers Trail, Pioneer Trail, and California Ridge.⁷ In January 2011, MISO circulated a draft MPFCA to address the need for Common Use Upgrade⁸ totaling

separate interconnection request by 30 MW. However, the model used in the SIS for the projects in the instant proceeding was based only on the original 100 MW of output associated with the Benton County project. *See* MISO's Answer at 3.

⁵ As described in MISO's Answer, the majority (approximately 60 percent) of the new costs are associated with the Gilman South-Paxton East 138 kV line (\$7.98 million) and associated upgrades, with the costs relating to the Watseka-G931 Sub 138kV line reconductor (\$3.5 million). The Gilman South-Paxton East 138 kV line had already been identified as a Network Upgrade. However, the upgrade needed for this line changed from re-sagging the line (at a cost of approximately \$1.45 million) to re-conductoring the line (at a cost of approximately \$7.98 million). MISO's Answer at 4.

⁶ The estimated cost for Network Upgrades in the Settlers Trail Original GIA total \$5.5 million. The Pioneer Trail Original GIA did not identify any Network Upgrades.

⁷ On April 5, 2011, California Ridge, Ameren Illinois and MISO executed a GIA for Project No. H100 (California Ridge GIA H100). However, California Ridge did not sign the MPFCA. California Ridge Project H100 would also bear some of the costs of the additional Network Upgrades required to correct the modeling oversight under the proposed MPFCA. MISO Answer at n.5 (*citing* California Ridge Comments at 3). MISO states that the California Ridge GIA will be reported as a conforming agreement in its next EQR. Docket No. ER11-3330-000 Transmittal Letter at 2.

⁸ Under Attachment X, GIP, Version 2.0.0 Effective March 3, 2011- Common Use Upgrade shall mean an Interconnection Facility, Network Upgrade, System Protection Facility, or any other classified addition, alteration, or improvement on the

(continued...)

\$1.485 million to interconnect these three customers.⁹ The three interconnection customers objected to paying for their *pro rata* shares of the \$1.485 million costs of the Common Use Upgrade resulting from the modified model and to delayed interconnection service.

8. The combination of the two Amended GIAs and the MPFCA affects the timing of interconnection service for both Settlers Trail and Pioneers Trail. Full interconnection service for Settlers Trail will be delayed by two years beyond that provided in the Original Settlers Trail GIA, *i.e.*, from March 2012 to March 2014. Full interconnection service for Pioneer Trail will be delayed until March 2014 as well (due to the Common Use Upgrade), two and a half years beyond that provided in the Original Pioneer Trail GIA, *i.e.*, from September 2011 to March 2014. California Ridge likewise objects to paying the cost of the Common Use Upgrade. Therefore, they requested that MISO file the unexecuted MPFCA pursuant to Section 11.3 of the GIP.¹⁰

II. Notice and Responsive Filings

9. Notice of MISO's filings in Docket Nos. ER11-3326-000 and ER11-3327-000 was published in the *Federal Register*, 76 Fed. Reg. 21,724 (2011), with comments, interventions, and protests due on or before April 29, 2011. Notice of MISO's filing in Docket No. ER11-3330-000 was published in the *Federal Register*, 76 Fed. Reg. 21,887 (2011), with comments, interventions, and protests due on or before May 2, 2011. Ameren Illinois ; Settlers Trail and Pioneer Trail; Invenergy Thermal Development LLC, Invenergy Wind Development, and California Ridge; Iberdrola Renewables, Inc. (Iberdrola); American Wind Energy Association and Wind on the Wires (AWEA-WOW); NextEra Energy Resources, LLC (NextEra); and Gamesa Energy USA, LLC (Gamesa) filed timely motions to intervene and protests or comments in all three dockets. Electric Power Supply Association filed timely motions to intervene without substantive comments in all three dockets.

Transmission System or the transmission system of an Affected System that are needed for the interconnection of multiple Interconnection Customers' Generating Facilities and which are the shared responsibility of such Interconnection Customers.

⁹ The Common Use Upgrade identified in the MPFCA consists of the Paxton East-Rantoul Junction 138 kV line clearance.

¹⁰ Docket No. ER11-3330-000 Transmittal Letter at 2-3.

10. Ameren Illinois and MISO individually filed answers to the protests in all three dockets. Settlers Trail and Pioneer Trail filed a joint response to Ameren Illinois' and MISO's answers.

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serves to make the entities that filed them parties to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept MISO's and Ameren Illinois' answers as well as Settlers Trail's and Pioneer Trail's response to those answers because those pleadings have provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Additional Network Upgrades and Common Use Upgrades

a. Protest

13. Interconnection Customers¹¹ oppose MISO and Ameren Illinois' imposition of additional costs and the delay in timing for full interconnection service that would result from the Amended GIAs and MPFCA. Settlers Trail and Pioneer Trail specifically request that their generating facilities each be designated with 150 MW rights, effective in March 2012 and September 2011, respectively, i.e., retain the effective dates in the Original GIAs. Settlers Trail and Pioneer Trail believe it is appropriate to include the Additional Network Upgrades in the Amended GIAs and the Common Use Upgrade in the MPFCA.¹² However, Settlers Trail and Pioneer Trail assert that the costs for the

¹¹ Interconnection Customers shall mean Settlers Trail and Pioneer Trail when referring to the Amended GIAs at issue in Docket Nos. ER11-3326-000 and ER11-3327-000; and shall mean Settlers Trail, Pioneer Trail, and California Ridge when referring to the MPFCA. These three parties have jointly and separately submitted motions to intervene and protests.

¹² Settlers Trail and Pioneer Trail also note that there are unrelated changes to turbines that are included in the Amended GIAs that are not in dispute. Settlers Trail and Pioneer Trail Protest at n.41 and n.133.

Additional Network Upgrades and the Common Use Upgrade should be assigned to Ameren Illinois because Ameren Illinois owns transmission facilities and has the means to roll the cost into its transmission rate base.¹³

14. California Ridge adopts the same arguments presented in the Settlers Trail and Pioneer Trail Protest with respect to the cost assignment of the Common Use Upgrade in the MPFCA. California Ridge states that the proposed cost assignment is unsupported, unjust and unreasonable.¹⁴

15. Settlers Trail and Pioneer Trail note that Ameren Illinois and MISO offered options to interconnect the Settlers Trail and Pioneer Trail facilities at reduced output in order to address the error. Settlers Trail and Pioneer Trail declined the offer.¹⁵

16. Interconnection Customers assert that Commission precedent insulates them from the consequences of MISO's and Ameren Illinois' failure to include the 30 MW increase of a higher-queued interconnection project in the SIS. Interconnection Customers cite *Neptune*¹⁶ as support for their claim that they are only responsible for costs for circumstances that will affect the construction of their upgrades that are known at the time the SIS is conducted. They look to the Commission's decision in *ODEC*¹⁷ to support their claim that they are not responsible for the cost of network upgrades that were not included in the SIS. Interconnection Customers also look to the Commission's decision in *Marcus Hook*¹⁸ as authority for generator interconnection agreements establishing the interconnection customer's final cost responsibility.

¹³ Settlers Trail and Pioneer Trail Protest at n.133.

¹⁴ California Ridge Comments at 4.

¹⁵ Settlers Trail and Pioneer Trail Protest at 14-17.

¹⁶ Settlers Trail and Pioneer Trail Protest at 20 and 21 (citing *Neptune Regional Transmission Sys., LLC v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,098, order on reh'g, 111 FERC ¶ 61,455 (2005, *aff'd sub nom.*, *Public Serv. Elec. & Gas v. FERC*, 485 F.3d 1164 (D.C. Cir. 2007) (*Neptune*)).

¹⁷ Settlers Trail and Pioneer Trail Protest at 19, 22, and 23 (citing *Old Dominion Electric Cooperative et al. v. Virginia Power Company*, 133 FERC ¶ 61,009 (2010) (*ODEC*)).

¹⁸ Settlers Trail and Pioneer Trail Protest at 22 (citing *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289 (2008) (*Marcus Hook*)).

17. Interconnection Customers argue that there is no basis under the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to charge Interconnection Customers for any network upgrades other than those identified in the interconnection studies and GIAs; that the restudy provisions of MISO's Tariff were not triggered; and that there is no basis under the Original GIAs to require the Interconnection Customers to bear any of the consequence of the study error.¹⁹ Interconnection Customers also point to MISO's and Ameren Illinois' failure to properly include the capacity of the higher-queued customer that "was 'known at the time' the SIS commenced and was conducted."²⁰ They note that this failure was contrary to the Tariff and Business Practice Manuals, including Good Utility Practice.

18. Other parties state that interconnection customers need to be able to rely on the financial obligations and in service dates in executed generator interconnection agreements and argue that the uncertainty associated with whether or not additional provisions and costs for interconnection service could be added - due to no fault of the interconnection customer - would chill the development and construction of energy generation facilities throughout the United States.²¹

c. Answers and Response

19. Ameren Illinois asserts that the full output of the Interconnection Customer's facilities cannot be provided without compromising system reliability until Additional Network Upgrades and Common Use Upgrade are constructed and that no party in the proceeding has argued otherwise.²² As such, granting the Interconnection Customers their requested relief would compromise system reliability.

20. MISO responds that MISO and Ameren Illinois are not requiring the Interconnection Customers to "pay for costs occurring after [they] joined the queue" but are merely reestablishing the appropriate 'baseline' from which the studies [should have been] conducted.²³ Ameren Illinois asserts that, having identified that error, MISO and Ameren Illinois must charge the Interconnection Customers for the Network Upgrades

¹⁹ Settlers Trail and Pioneer Trail Protest at 25–34.

²⁰ Settlers Trail and Pioneer Trail Protest at 43.

²¹ Invenenergy Protest at 5; Iberdrola Renewables Comments at 3; Gamesa Comments at 3; NextEra Comments at 2; and AWEA Comments at 4.

²² Ameren Illinois Answer at 12.

²³ MISO Answer at 14.

for which they are responsible under the Tariff in order to comply with the filed rate doctrine, a tenet that applies equally to utilities and customers.²⁴

21. Ameren Illinois answers that the higher-queued generating facility that was improperly modeled in the SIS for the Original GIAs, is not interconnected to the Ameren Illinois system and that correctly modeling its output was therefore, not its responsibility.²⁵ For its part, MISO states that the modeling error was detected within 90 days of the execution of the Original GIAs and is being corrected appropriately.²⁶ MISO states that it and Ameren Illinois acted consistently with Good Utility Practice.²⁷ MISO states that there is no evidence in the record of gross negligence or intentional misconduct associated with the original study oversight, and therefore no liability for the error should be assessed to Ameren Illinois or MISO.

22. Settlers Trail and Pioneer Trail respond that they see no reason why Ameren Illinois could not implement, for example, a Special Protection Scheme to address any

²⁴ Ameren Illinois Answer at 7 (citing *Ameren Services Co. v. Prairieland Energy, Inc.*, 131 FERC ¶ 61,125, at n.7 (2010) (“The filed rate doctrine forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.”)); *N.Y. Power Authority v. Consolidated Edison Co. of N.Y., Inc.*, 112 FERC ¶ 61,304, at P 56 (2005) (granting retroactive refunds, explaining that it was not “changing a rate on file, but . . . enforcing the rates, terms, and conditions of several filed rate schedules, *reh’g denied*, 116 FERC ¶ 61,240 (2006);.”). *City of Vernon, Cal.*, 115 FERC ¶ 61,297, at n.41 (2006) (“The filed rate doctrine... applies to both the company providing service and to the customer taking service.”)).

²⁵ Ameren Illinois Answer at 6.

²⁶ MISO Answer at 15.

²⁷ MISO Answer at 22-23 (citing the definition of Good Utility Practice in the GIA, Article I. Good Utility Practice shall mean any of the practices, methods and acts engaged in or approved by a significant portion of the electric industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.)

thermal constraints for the Settlers Trail and Pioneer Trail projects until the Additional Network Upgrades are complete in 2014.²⁸

d. Commission Determination

23. At the outset, we note that no party argues that the Additional Network Upgrades and Common Use Upgrade, included in the Amended GIAs and MPFCA respectively, are not required for these interconnections. Indeed, the Interconnection Customers request that the Additional Network Upgrades and Common Use Upgrade be included in the Amended GIAs and MPFCA, respectively. Rather, Interconnection Customers seek to address an error made by the Transmission Provider in evaluating their interconnection requests. Specifically, Interconnection Customers request to (1) retain the earlier effective dates from the Original GIAs and (2) assign the additional cost responsibility to Ameren Illinois' transmission customers. Interconnection Customers believe that the cited precedent supports this outcome.

24. We find that the precedent relied upon by Interconnection Customers does not support the Interconnection Customers' suggested outcome because the additional higher-queued 30 MW interconnection request was known and existed at the time the interconnection requests involved in these dockets were being studied.²⁹ As explained below, we accept the Amended GIAs and MPFCA as they accurately reflect the network upgrades and effective dates required to reliably interconnect these generators. We note that granting the relief suggested by Interconnection Customers could adversely affect reliability and would result in cost assignment that is not supported by this record as further discussed below. As to the impact of this decision on other interconnection customers, we find the suggestion that such acceptance will "chill" development to be unsupported. Moreover, we expect this situation to be rare. Our acceptance, however, is subject to the Amended GIAs and MPFCA being further modified as discussed later in this order.

25. With regard to reliability, we find that granting the Interconnection Customers' requested relief in the amount and timing of interconnection service, i.e., designating Settlers Trail and Pioneer Trail as generating facilities each with 150 MW rights, effective in March 2012 and September 2011, respectively, would be a violation of

²⁸ Settlers Trail and Pioneer Trail Response at 45-46, n.102 (*citing* Ameren Illinois' Transmission Planning Criteria and Guidelines).

²⁹ Settlers Trail and Pioneer Trail Protest at 43. Interconnection Customers acknowledge that the higher-queued interconnection request for 30 MW was known at the time of the SIS was commenced and was being studied.

NERC Reliability Standards. MISO as the Balancing Authority must comply with NERC Reliability Standards and ensure that its transmission system is safe and reliable. Reliability Standard TLP-001-0, requires MISO to provide:

a valid assessment that its portion of the interconnected transmission system is planned such that, with all transmission facilities in service and with normal (pre-contingency) operating procedures in effect, the Network can be operated to supply projected customer demands and projected Firm (non-recallable reserved) Transmission Services at all Demand levels over the range of forecast system demands, under the conditions defined in Category A of Table I.³⁰

26. Along these lines, Article 5.1.1 “Standard Option” of the GIA contemplates that circumstances may arise where construction milestones will not be met and reasonably provides that for the possibility that construction timelines may need to be modified. Article 5.1.1 provides the following:

5.1.1 Standard Option. The Transmission Owner shall design, procure, and construct the Transmission Owner’s Interconnection Facilities, Network Upgrades, System Protection Facilities, Distribution Upgrades, and Generator Upgrades using Reasonable Efforts to complete the Transmission Owner’s Interconnection Facilities, Network Upgrades, System Protection Facilities, Distribution Upgrades and Generator Upgrades by the dates set forth in Appendix B, Milestones, subject to the receipt of all approvals required from Governmental Authorities and the receipt of all land rights necessary to commence construction of such facilities, and such other permits or authorizations as may be required. The Transmission Provider or Transmission Owner shall not be required to undertake any action which is inconsistent with its standard safety practices, its material and equipment specifications, its design criteria and construction procedures, its labor agreements, Applicable Laws and Regulations and Good Utility Practice. In the event the Transmission Owner reasonably expects that it will not be able to complete the Transmission Owner’s Interconnection Facilities, Network Upgrades, System Protection Facilities, Distribution Upgrades and Generator Upgrades by the specified dates, the Transmission Owner shall promptly

³⁰ NERC Reliability Standard TPL-001-0.1 at R1, available at http://www.nerc.com/files/TPL-001-0_1.pdf

provide written notice to the Interconnection Customer and Transmission Provider and shall undertake Reasonable Efforts to meet the earliest dates thereafter.

27. Thus, Article 5.1.1 permits the Transmission Provider or Transmission Owner to change the in-service date if the Transmission Owner's Interconnection Facilities, Network Upgrades, System Protection Facilities, Distribution Upgrades and Generator Upgrades cannot be completed by the specified dates in a manner that is consistent with its standard safety practices, its material and equipment specifications, its design criteria and construction procedures, its labor agreements, Applicable Laws and Regulations and Good Utility Practice.

28. We further find that granting the Interconnection Customers' requested relief regarding cost responsibility, i.e., that these costs be born by Ameren Illinois' transmission customers rather than by these Interconnection Customers is not supported by the record in this proceeding. We find that, under the circumstances presented here, the Interconnection Customers' cost responsibility is reasonable and consistent with the GIA and Commission precedent as discussed below. Therefore we do not need to consider this alternative.

29. Interconnection Customers' reliance on cited case law is misplaced given that the errors corrected in the Amended GIAs and MPFCA arise from information that was "known at the time" to MISO when the SIS commenced and was being conducted.³¹

30. Interconnection Customers point to the restudy provisions under MISO's Tariff and note that these provisions were not triggered. MISO appears to agree.³² We find that the unusual circumstances present here – that are not contemplated in the restudy provisions of the tariff - required MISO and Ameren Illinois not to ignore a known reliability concern but, consistent with Good Utility Practice, to address such concern.

³¹ *Neptune*, concerned with the "baseline" from which an interconnection customer's obligation for network upgrades is established, does not address situations where an error is made within the parameters of that "baseline." In fact, *Neptune* clarified that an interconnection customer's costs could increase either due to a 'true up' of cost estimates in an interconnection agreement or a restudy conducted consistent with the Transmission Provider's Tariff. *Neptune*, 110 FERC ¶ 61,098 at P 24.

³² MISO answer at 23: While the Tariff does not specifically address the mechanism for such a study, it is consistent with Good Utility Practice. (footnote omitted).

31. Interconnection Customers further argue that there is no basis under the MISO Tariff to charge interconnection customers for any network upgrades other than those identified in the interconnection studies and GIA and that there is no basis under the Original GIAs to require the interconnection customers to bear any of the consequence of the study error.³³ We disagree that the execution of the Original GIAs precluded further amendment in that such an outcome would be inconsistent with MISO's unilateral filing rights under section 205 of the FPA as described in Article 30.11 of the *pro forma* GIA, although we agree that the section 205 filing was required to correctly indicate the Additional Network Upgrades and Common Use Upgrade and to indicate the cost responsibility for those network upgrades. We note that in order to address the error here and to recover the costs of the Additional Network Upgrades and Common Use Upgrade from the Interconnection Customers, MISO submitted the Amended GIAs and MPFCA to the Interconnection Customers. Pursuant to direction from the Interconnection Customers who declined to execute the Amended GIAs and MPFCA, and consistent with MISO's filing rights, MISO filed the Amended GIAs unexecuted.

32. Finally, we note that MISO concedes that an error occurred during the study process that led to the Original GIAs and that Ameren Illinois asserts that it did not commit the modeling error.³⁴ But based on this record³⁵ and because MISO is a non-

³³ *Marcus Hook* notes the appropriate time for an interconnection customer to challenge costs but does not preclude the correction of a study oversight. *Marcus Hook*, 123 FERC ¶ 61,289 at P 29. *Ameren Servs. Co. v. Prairieland Energy, Inc.*, 131 FERC ¶ 61,125 (2010) (*Prairieland*) is an example of how the filed rate doctrine requires that all components approved for computation of the rate must be included in that rate. *Prairieland* applies that policy to the customer that withheld information concerning one of the rate components. In that case the customer was found to be at fault for failure to report its behind the meter data, as required, and was ordered to pay a higher rate based on the revised data, plus interest and attorneys' fees. However, the Commission did not address the type of circumstance presented here nor did it make sweeping statements that improperly computed rates could only be revised to 'punish' a party. Enforcement of the filed rate doctrine does not and never has rested on the fault of a party.

³⁴ See Ameren Illinois Answer at 6 and Exhibit A. Ameren Illinois states that it pointed out several flaws in the [study] model to MISO as the model related to the Ameren system. Ameren Illinois also states that it voiced concerns about the possibility of errors on the systems of neighboring transmission owners.

³⁵ Among other things, we note that in the present case, had no mistakes been committed, the Original GIAs would have included the same network upgrades as those included in the Amended GIAs here.

profit corporation, there are no parties which are more equitably assessed the costs of this error. Since the error results in real costs for network upgrades that must be constructed before the generators can be interconnected consistent with reliability requirements, the most appropriate parties to pay these costs under these circumstances are the generators that will benefit from the upgrades.

33. However, our preliminary analysis indicates that the Amended GIAs and MPFCA have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the Amended GIAs and MPFCA for filing, suspend them for a nominal period, and make them effective April 9, 2011 and April 12, 2011, as requested, subject to refund as discussed below.

2. Option I

a. Proposal

34. Under the Amended GIAs and MPFCA, Ameren seeks to apply a specific reimbursement mechanism under which Ameren Illinois would refund 100 percent of the cost of Network Upgrades to the Interconnection Customers and submit a service agreement to the Commission to collect the non-reimbursable portion through a monthly Network Upgrade Charge from the Interconnection Customers over time based on the formula contained in Attachment GG (Option 1).³⁶ Alternatively, Ameren Illinois would refund only the reimbursable portion to the Interconnection Customers (Option 2).

35. On March 22, 2011, in Docket No. EL11-30-000, the Midwest Generation Development Group (Development Group)³⁷ filed a complaint alleging that Option 1 is unjust, unreasonable, and unduly discriminatory in violation of the FPA and should be removed from the Tariff. Thus the complaint would result in Option 2 being the only means by which generators are reimbursed for their up-front payment of network upgrade costs, as applicable under the Tariff.

³⁶ Section III.d to Attachment FF, “Transmission Expansion Planning Protocol.” The Network Upgrade Charge is based on a revenue requirement determined by applying the formula in Attachment GG of MISO’s Tariff, which includes a rate of return, operating and maintenance (O&M) expense, depreciation expense, and tax expense.

³⁷ The Development Group is a coalition comprised of Clipper Windpower Development Co., Inc., E.ON Climate & Renewables North America, LLC (E.ON), Horizon Wind Energy LLC, Iberdrola Renewables, Inc, Invenergy Wind Development LLC, and Invenergy Thermal Development LLC.

b. Protest

36. Interconnection Customers reference the complaint under Docket No. EL11-30-000 and argue that Ameren Illinois' election of Option 1 for the Amended GIAs and MPFCA is unjust, unreasonable, and unduly discriminatory and should be replaced with Option 2.³⁸

c. Commission Determination

37. The issue of the justness and reasonableness of Option 1 is pending before the Commission in another docket. In light of that fact, we will accept for filing Ameren Illinois' proposed use of Option 1, subject to the outcome of Docket No. EL11-30-000.

3. Miscellaneous Issues**a. Proposed Tax Gross Up for Common Use Upgrade****i. Proposal**

38. The MPFCA includes a line item of \$125,000 as a "Tax Gross Up" in the cost of the Common Use Upgrade.³⁹

ii. Protests

39. Settlers Trail and Pioneer Trail object to the inclusion of the Tax Gross Up amount in the MPFCA. They point to Section 3.3.1, Indemnification for Contributions in Aid of Construction, which states in pertinent part:

The Parties intend that all payments made by the Interconnection Customers to Transmission Owner for the installation of the CUU shall be non-taxable contributions to capital in accordance with the Internal Revenue Code and any applicable state tax laws and shall not be taxable as contributions in aid of construction under the Internal Revenue Code and any applicable state tax laws. With regard only to such contributions, Transmission Owner shall not include a gross-up for income taxes in the amounts it charges the Interconnection Customers for the installation of the CUU unless (i) Transmission Owner has determined, in good faith, that the payments or property transfers made by Interconnection Customers to

³⁸ Settlers Trail and Pioneer Trail Protest at 54.

³⁹ MPFCA, Appendix A at Section 1.2.4.

Transmission Owner should be reported as income subject to taxation or (ii) any Governmental Authority directs Transmission Owner to report payments or property as income subject to taxation;

40. They argue that Section 3.3.1 of the MPFCA limits Ameren Illinois' ability to include Tax Gross Up to two circumstances and that neither is present here.⁴⁰ That is, they assert that Ameren Illinois has not demonstrated how or why it made a "good faith" determination that the payments or property from Common Use Upgrade should be reported as income, and that Ameren Illinois has not presented evidence that a Governing Authority directed Ameren Illinois to report the payments or property from the Common Use Upgrade as income.⁴¹

41. Lastly, Settlers Trail and Pioneer Trail argue that under well settled Internal Revenue Service (IRS) policy, an interconnection customer need not pay the Tax Gross Up on network upgrades required for interconnection service if the network upgrades satisfy the "safe harbor" provisions described in the IRS policy, and since a Common Use Upgrade is a network upgrade for interconnection service, then there is no reasonable basis for Ameren Illinois to be allowed to collect Tax Gross Up on the Common Use Upgrade.⁴²

42. California Ridge also objects to the proposed inclusion of the Tax Gross Up for the Common Use Upgrade in the MPFCA. California Ridge points out that in light of the IRS's "safe harbor" ruling, "it has become commonplace not to collect tax gross up on network upgrades required for interconnection service."⁴³ California Ridge argues that the same rationale that enables a Transmission Owner not to collect tax gross up on Additional Network Upgrades should apply to the Common Use Upgrade as a Common Use Upgrade is a network upgrade and a Common Use Upgrade serves the same purpose as a network upgrade: interconnecting generating facilities to the grid.⁴⁴

⁴⁰ Settlers Trail and Pioneer Trail Protest at 52.

⁴¹ Settlers Trail and Pioneer Trail Protest at 53.

⁴² *Id.* 53-54.

⁴³ California Ridge Comments at 6.

⁴⁴ *Id.* 7.

iii. Answer

43. Ameren Illinois responds to the Interconnection Customers' objections by arguing that the Common Use Upgrade costs "are not payments made pursuant to an Interconnection Agreement, but rather, are payments made pursuant to the Proposed MPFCA."⁴⁵ Since the proposed MPFCA is not an Interconnection Agreement, the payments made for Common Use Upgrade are not Up-Front Payments made pursuant to an Interconnection Agreement and do not meet the safe harbor method provided by Rev. Proc. 2005-35. Thus, Ameren Illinois states that it must report these payments as income, and that it is proper for a Tax Gross Up to be included under Section 3.3.1 of the proposed MPFCA.⁴⁶

iv. Commission Determination

44. We find that a MPFCA is a type of interconnection agreement. It meets the IRS definition of the term because the MPFCA is an agreement "entered into between a Utility and a Generator for the purpose of interconnecting the Generator with the Utility's Transmission System."⁴⁷ The fact that there is more than one generator involved and the agreement also addresses the relationship among the Generators is not relevant.

45. Since we find that the MPFCA is in fact a type of interconnection agreement, Ameren Illinois is not entitled to Tax Gross Up payments related to payments or property transfers made by the Interconnection Customers to Ameren Illinois.⁴⁸ MISO is directed to remove the Tax Gross Up provisions in the compliance filing ordered below.

b. Line Items for Contingencies

i. Proposal

46. Ameren Illinois' cost estimates for certain of the Additional Network Upgrades and the Common Use Upgrade include line items for "Contingency" or "Contingencies."

⁴⁵ Ameren Illinois Answer at 14.

⁴⁶ *Id.*

⁴⁷ Ameren Illinois Answer at 14 (*citing* Rev. Proc. 2005-35, Section 4.03).

⁴⁸ Apparently Ameren Illinois has not obtained a private ruling from the IRS confirming its claim that the payments made pursuant to the MPFCA is a taxable event. If, in the future Ameren Illinois obtains such a ruling from the IRS it can make a section 205 filing requesting that the MPFCA be amended to include the Tax Gross Up amounts.

Ameren Illinois proposes to collect \$2.56 million for contingencies in its cost estimate for the applicable Additional Network Upgrades and \$330,000 for contingencies in its cost estimate for the Common Use Upgrade.⁴⁹

ii. Protests and Answer

47. Interconnection Customers object to line items for contingencies being included in the Amended GIA for Settlers Trail and in the MPFCA. They argue that this line item is redundant because the Commission's interconnection services cost policies already provide for the interconnecting transmission owner to collect contingencies. They point out that the Commission provided a ± 20 percent cushion in Order No. 2003.⁵⁰ They further note that the effective cost margin would become larger were the ± 20 percent margin to be applied to costs that include a separate line item for contingencies. Ameren Illinois agrees that in these circumstances the estimates for network upgrades for these projects need not include a line-item for contingencies. Ameren agrees to work with MISO to modify the Amended GIAs accordingly and will reflect this approach in future GIAs.⁵¹

iii. Commission Determination

48. We find that the inclusion of separate line items for contingencies is unsupported. We acknowledge Ameren Illinois' concession in this matter. MISO is directed to delete the contingency line items in both of the Amended GIAs and in the MPFCA and to submit those changes in the compliance filing ordered below.

⁴⁹ Settlers Trail Proposed Revised GIA, Original Sheet Nos. 94-97; Proposed MPFCA, Original Sheet No. 41.

⁵⁰ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Statutes and Regulations, Regulations Preambles 2001-2005 ¶ 31,146, *order on reh'g*, Order No. 2003-A, FERC Statutes and Regulations, Regulations Preambles 2001-2005 ¶ 31,160 (2003), *order on reh'g*, Order No. 2003-B, FERC Statutes and Regulations, Regulations Preambles 2001-2005 ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Statutes and Regulations, Regulations Preambles 2001-2005 ¶ 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). Settlers Trail and Pioneer Trail Protest at n.151 (*citing* Section 8.3 of the LGIP in Order No. 2003 and Order No. 2003-A at P 173); California Ridge Comments at 6.

⁵¹ Ameren Illinois Answer at 13. Order No. 2003 on refile.

c. Interest During Construction/AFUDC

i. Proposal

49. In the Amended GIAs and MPFCA, Ameren Illinois includes line items for Interest During Construction and Allowance for Funds Used During Construction (AFUDC) in its cost estimates. Ameren Illinois proposes to include \$1.1 million in the cost estimate for the Additional Network Upgrades and \$130,000 in the cost estimate for the Common Use Upgrade, which represents, on average, 9.1 percent and 8.7 percent, respectively, of its total cost estimate for these facilities.⁵²

ii. Protests

50. Settlers Trail and Pioneer Trail assert that there is no just and reasonable basis to require Interconnection Customers to pay for interest during construction or AFUDC.⁵³ Furthermore, they state that under Commission policy, the Interconnection Customers, and not Ameren Illinois, are the ones entitled to collect interest.⁵⁴ They note that “[i]n Order No. 2003, the Commission explained the Interconnection Customer is entitled to a refund for all of the costs of the Network Upgrades for which it has paid, including a reasonable estimate of the carrying costs that it incurs in making the advance payments. These carrying costs are collected in the form of interest.”⁵⁵

iii. Answers

51. In its answer, Ameren Illinois states that in these circumstances⁵⁶ the estimates for network upgrades for these projects need not include interest charges or a line-item for contingencies. Ameren Illinois goes on to say that it agrees to work with MISO to modify the Amended GIAs accordingly and will reflect this approach in future GIAs.⁵⁷

⁵² Settlers Trail Amended GIA, Original Sheet Nos. 94-97 and MPFCA, Original Sheet No. 41.

⁵³ Settlers Trail and Pioneer Trail Protest at 46; Invenergy Protest at 5.

⁵⁴ Settlers Trail and Pioneer Trail Protest at 46-47.

⁵⁵ *Id.* (citing Order No. 2003, FERC Stats. & Regs. at P 723).

⁵⁶ Ameren Illinois does not explain the circumstances to which it is referring.

⁵⁷ Ameren Illinois Answer at 13.

iv. Commission Determination

52. We find that the inclusion of Interest During Construction and AFUDC is unsupported. We acknowledge Ameren Illinois' concession in this matter. MISO is directed to delete the Interest During Construction and AFUDC line items in both of the Amended GIAs and in the MPFCA and to submit those changes in the compliance filing ordered below.

d. Waiver of 60-Day Prior Notice Requirement

53. We will grant waiver of the 60-day prior notice requirement and make the Amended GIAs, as modified herein, effective April 9, 2011. We will also grant waiver of the 60-day prior notice requirement and make the MPFCA, as modified herein, effective April 12, 2011. We find that good cause has been shown for these waivers.⁵⁸

The Commission orders:

(A) MISO's Amended GIAs and MPFCA are hereby conditionally accepted and suspended for a nominal period subject to the outcome of Docket No. EL11-30-000, to become effective April 9, 2011, and April 12, 2011, as requested, subject to further modification as ordered herein, and subject to refund.

(B) MISO is hereby directed to make a compliance filing within 30 days of the date of this order modifying the Amended GIAs and MPFCA, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁸ See *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992).