

156 FERC ¶ 61,099  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Otter Tail Power Company

Docket Nos. EL15-36-002

v.

Midcontinent Independent System Operator, Inc.

Midcontinent Independent System Operator, Inc.

EL15-68-002

ORDER DENYING REHEARING

(Issued August 9, 2016)

1. In an order dated December 29, 2015,<sup>1</sup> the Commission rejected a request for rehearing and granted clarification of a June 18, 2015 order that addressed a complaint filed by Otter Tail Power Company (Otter Tail) regarding the network upgrade funding mechanisms provided for in Midcontinent Independent System Operator Inc.'s (MISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).<sup>2</sup> The Commission in the December 29 Order also directed MISO to make a compliance filing proposing changes to MISO's Tariff as MISO committed to do in an informational report filing.<sup>3</sup>

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<sup>1</sup> *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,352 (2015) (December 29 Order).

<sup>2</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,220 (2015) (June 18 Order).

<sup>3</sup> December 29 Order, 153 FERC ¶ 61,352 at P 65.

2. The June 18 Order found that MISO's *pro forma* Generator Interconnection Agreement (GIA) may be unjust, unreasonable, unduly discriminatory or preferential because it provides opportunities for undue discrimination and for increasing costs to interconnection customers where there is no increase in service, given that interconnection customers within MISO are held responsible for network upgrade costs and do not receive credits that reimburse them for those costs. In the June 18 Order, the Commission initiated an investigation to examine MISO's *pro forma* Facilities Construction Agreement (FCA), GIA, and Multi-Party Facilities Construction Agreement (MPFCA) pursuant to section 206 of the Federal Power Act (FPA) in Docket No. EL15-68-000.<sup>4</sup>

3. The Commission directed MISO to make a compliance filing proposing changes to MISO's Tariff, effective June 24, 2015, to revise Article 11.3 of MISO's *pro forma* GIA to make the transmission owner's election to initially fund network upgrades subject to the mutual agreement of the interconnection customer.<sup>5</sup>

4. On January 28, 2016, Indicated MISO Transmission Owners<sup>6</sup> requested rehearing of the December 29 Order. Indicated MISO Transmission Owners raise several challenges to the Commission's requirement that MISO transmission owners build, own, and operate transmission network upgrades for interconnecting generators without any opportunity to earn a return on those facilities, whenever an interconnecting generator chooses to fund such upgrades itself.<sup>7</sup>

## **I. Background**

5. MISO's *pro forma* GIA governs the network upgrades constructed for the interconnection customer by the transmission owner with which it directly interconnects. In October 2009, the Commission accepted MISO's proposal that an interconnection customer would be responsible for 100 percent of the costs of network upgrades rated

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<sup>4</sup> June 18 Order, 151 FERC ¶ 61,220 at P 2.

<sup>5</sup> December 29 Order, 153 FERC ¶ 61,352 at P 65.

<sup>6</sup> For the purposes of this order, Indicated MISO Transmission Owners include: International Transmission Company, ITC Midwest LLC, and Michigan Electric Transmission Company, LLC (collectively, ITC); Ameren Services Company, on behalf of its transmission-owning public utility affiliates Ameren Illinois Company, Union Electric Company, and Ameren Transmission Company of Illinois (collectively, Ameren); Otter Tail; and Indianapolis Power & Light Company.

<sup>7</sup> Rehearing Request at 2.

below 345 kV but will receive 10 percent reimbursement for projects that are rated at 345 kV and above.<sup>8</sup> This is referred to herein as MISO's Interconnection Customer Funding Policy. At that time, MISO's Tariff provided three alternatives for funding the costs of network upgrades for generator interconnections. Attachment FF of MISO's Tariff described two of these alternatives (Option 1 and Option 2),<sup>9</sup> which were incorporated into MISO's *pro forma* GIA by reference, while Article 11.3 in MISO's *pro forma* GIA<sup>10</sup> contemplated a third.

6. 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 interconnection customer a monthly network upgrade charge to recover the cost of the non-reimbursable portion of the network upgrade costs over time based on a formula contained in Attachment GG<sup>11</sup> of the MISO Tariff. The charge was established through a separate facilities service agreement. The Commission found Option 1 to be unjust and unreasonable and ordered MISO to remove the funding option from its Tariff, effective March 22, 2011.<sup>12</sup>

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<sup>8</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 8 (2009), *order on reh'g, clarification, and compliance*, 154 FERC ¶ 61,073 (2016). The Commission allows flexibility as to the specifics of interconnection pricing policies for transmission providers that are independent entities, and MISO's proposal was accepted by the Commission as an independent entity variation from the Commission-approved *pro forma* Large Generator Interconnection Agreement (LGIA). *Id.* P 50.

<sup>9</sup> 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.

<sup>10</sup> MISO's *pro forma* GIA is located in Appendix 6 to Attachment X of the MISO Tariff (Generator Interconnection Procedures).

<sup>11</sup> Attachment GG (Network Upgrade Charge) of the MISO Tariff includes in the 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.

<sup>12</sup> *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076, at P 43 (2011) (*E.ON I*), *order on reh'g*, 142 FERC ¶ 61,048, at P 39 (2013) (*E.ON II*), *order on reh'g*, 151 FERC ¶ 61,264 (2015).

7. Under Option 2: (1) the interconnection customer provides up-front funding for network upgrades and (2) the transmission owner refunds the reimbursable portion of the payment, as applicable,<sup>13</sup> 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 upgrades.

8. Under a third alternative 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.<sup>14</sup> In the December 29 Order, the Commission affirmed its finding that this alternative is unjust, unreasonable 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.<sup>15</sup> The Commission directed MISO to revise Article 11.3 of its *pro forma* GIA to make the transmission owner's election to initially fund network upgrades subject to the mutual agreement of the interconnection customer.<sup>16</sup> In a contemporaneous order issued today, the Commission accepts MISO's compliance filing, subject to condition.<sup>17</sup>

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<sup>13</sup> As noted previously, interconnection customers remain responsible for between 90 and 100% of network upgrade costs. *See supra* P 5.

<sup>14</sup> This option was originally identified in Order No. 2003. *See Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 720 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at PP 618, 658, *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). The option in the *pro forma* LGIA established by Order No. 2003 differs from the option in MISO's Tariff. Specifically, under Article 11.3 of the Order No. 2003 *pro forma* LGIA, a transmission owner electing to initially fund network upgrades would provide the up-front funding for the capital cost of the network upgrades, and then recover the costs of the network upgrades through its transmission rates charged to *all* transmission customers. In contrast, in MISO, a transmission owner electing to initially fund network upgrades would assign the non-reimbursable portion of the costs of the network upgrades directly to the interconnection customer through a network upgrade charge.

<sup>15</sup> *See* December 29 Order, 153 FERC ¶ 61,352 at PP 29-30 (citing June 18 Order, 151 FERC ¶ 61,220 at PP 6 n.8, 48-52).

<sup>16</sup> *Id.* P 65.

<sup>17</sup> *See Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC 61,098 (2016).

## II. Discussion

### A. Procedural Matters

9. On March 8, 2016, American Wind Energy Association filed a motion for leave to answer and answer in response to Indicated MISO Transmission Owners' request for rehearing. On March 23, 2016, Indicated MISO Transmission Owners filed a motion for leave to answer and answer in response to American Wind Energy Association's answer. Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.<sup>18</sup> Accordingly, we reject American Wind Energy Association's March 8, 2016 answer and Indicated MISO Transmission Owners' March 23, 2016 answer to that filing.

### B. Substantive Matters

#### 1. Indicated Transmission Owners' Request for Rehearing

10. Indicated MISO Transmission Owners contend that the December 29 Order results in a confiscatory and unconstitutional taking because it forces transmission owners to build, own, and operate transmission facilities on a not-for-profit basis and does not compensate transmission owners for their costs to provide utility service, including a return on capital invested for utility service.<sup>19</sup> Indicated MISO Transmission Owners assert that the Commission failed to balance consumer and investor interests appropriately because the December 29 Order bestows on interconnection customers the right to control whether a transmission owner can earn a just and reasonable return and the ability to force transmission owners to build, own, and operate transmission on a not-for-profit basis.<sup>20</sup> Indicated MISO Transmission Owners argue that the December 29 Order violates sections 205 and 206 of the FPA by setting rates, terms, and conditions that are unjust and unreasonable because they fail to provide a reasonable opportunity to earn a return on property dedicated to public utility service.<sup>21</sup> Indicated MISO

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<sup>18</sup> 18 C.F.R. § 385.713(d)(1) (2015).

<sup>19</sup> Rehearing Request at 3, 14-18 (citing *inter alia* *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (*Duquesne*); *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923) (*Bluefield*); *Coakley v. Bangor Hydro-Electric Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014)).

<sup>20</sup> *Id.* at 3 (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (*Hope*)).

<sup>21</sup> *Id.* at 4 (citing 16 U.S.C. §§ 824d, 824e (2012)).

Transmission Owners argue that the December 29 Order and its associated change to the MISO Tariff fails to compensate transmission owners for the business risk associated with building, owning, and operating transmission, thus flouting “bedrock principles” on return on equity and the prohibition on confiscatory rates.<sup>22</sup>

11. Indicated MISO Transmission Owners further argue that the December 29 Order fails to address transmission owners’ argument that the Commission’s proposal would force transmission owners to build transmission without an adequate return.<sup>23</sup> Indicated Transmission Owners argue that the December 29 Order fails to consider relevant factors and confuses important facts, such as the ability to recover a full rate of return from transmission customers, and also violates the Administrative Procedure Act due to the December 29 Order’s claim to solve one problem while creating a new problem that the Commission failed to consider.<sup>24</sup> Indicated Transmission Owners also assert that the December 29 Order departed from precedent without explanation by ignoring business risk for transmission owners in the rate of return and not allowing a transmission owner to earn a return for interconnection-related network upgrades.<sup>25</sup> Indicated Transmission Owners argue that the December 29 Order violates the Administrative Procedure Act

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<sup>22</sup> *Id.* (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 141; *Duquesne*, 488 U.S. at 307). Indicated MISO Transmission Owners cite P 141 of Opinion No. 531 on pages 4 and 21 n.55 of their rehearing request. The text of Opinion No. 531 they cite in support of the December 29 Order’s alleged error, however, appears in P 149, not P 141, of Opinion No. 531.

<sup>23</sup> *Id.* (citing 5 U.S.C. § 706(2)(A) (2012); *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998); *Transmission Agency of N. Cal. v. FERC*, 2010 U.S. App. LEXIS 25251 (D.C. Cir. 2010)).

<sup>24</sup> *Id.* at 4-5 (citing 5 U.S.C. § 706(2)(A) (2012); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*); *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009); *Ass’n of Oil Pipelines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996); *Ne. Util. Serv. Co. v. FERC*, 993 F.2d 937, 944 (1st Cir. 1993); *Mo. Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066, 1072-75 (D.C. Cir. 2003)); *see also id.* at 26 (describing December 29 Order as creating new problem by engaging in piecemeal deconstruction of MISO’s transmission cost allocation scheme).

<sup>25</sup> *Id.* at 5 (citing 5 U.S.C. § 706(2)(A) (2012); *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996); Order No. 2003, FERC Stats. & Regs. ¶ 31,146); *see also id.* at 24 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,111, at P 41 (2013) (*Hoopeston*), *aff’d on reh’g*, 149 FERC ¶ 61,099 (2014), *order on clarification, reh’g, and compliance*, 154 FERC ¶ 61,101 (2016) (describing December 29 Order’s inconsistency with *Hoopeston*)).

because there was no evidence of actual undue discrimination that required a remedy.<sup>26</sup> Indicated Transmission Owners describe the December 29 Order as contravening the Administrative Procedure Act due to its foundation on a false premise that a just and reasonable return is an “increased cost” that interconnecting generators are entitled to avoid.<sup>27</sup>

## 2. Commission Determination

12. We deny Indicated MISO Transmission Owners’ request for rehearing. Contrary to Indicated MISO Transmission Owners’ assertions, the December 29 Order in no way deprives them of a return, or the opportunity to earn a return, to which they are entitled. In short, where the transmission owner and interconnection customer could not reach mutual agreement, the Commission provided the interconnection customer, who is already responsible for almost all network upgrade costs, the opportunity to reject the transmission owner’s unilateral election to initially fund network upgrades and instead choose to fund such costs under Option 2. Where an interconnection customer chooses Option 2 to govern financing for a network upgrade, because the transmission owner does not fund the network upgrade, the transmission owner makes no investment that qualifies for inclusion in its rate base—i.e., the transmission owner makes no investment of which, or on which, it is entitled to a return. An interconnection customer choosing Option 2 does not alter the return that the transmission owner earns on the investments that it does make, and that are properly included in its rate base. Therefore, we reject Indicated MISO Transmission Owners’ argument that the December 29 Order implicates, let alone contravenes, the capital attraction standards of *Hope* and *Bluefield*.

13. As a general matter, a utility is entitled to an opportunity to earn a return that satisfies the capital attraction standards of *Hope* and *Bluefield*.<sup>28</sup> As explained in *Hope*, the Commission’s task is to allow a public utility the opportunity to offer its investors a

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<sup>26</sup> *Id.* at 5-6 (citing 5 U.S.C. § 706(2)(A) (2012); *State Farm*, 463 U.S. at 43; *Ill. Commerce Comm’n v. FERC*, 576 F.3d at 477); *Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843-44 (D.C. Cir. 2006) (*National Fuel*)).

<sup>27</sup> *Id.* at 6 (citing 5 U.S.C. § 706(2)(A) (2012); *State Farm*, 463 U.S. at 43).

<sup>28</sup> *Bluefield*, 262 U.S. at 692-93; *Hope*, 320 U.S. at 603 (internal quotations and citations omitted). *Hope* interpreted the Natural Gas Act, whereas the instant proceedings concern the FPA. Nevertheless, “courts rely interchangeably on cases construing each of these Acts when interpreting the other,” including the standards articulated by the Court in *Hope*. See *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1175-1182 (D.C. Cir. 1987) (citations omitted).

return that is commensurate with the risk associated with their investment, as represented by the utility's business and financial risks.<sup>29</sup> Under Option 2, the interconnection customer making the up-front investment bears the business and financial risks associated with financing and constructing the network upgrades. As discussed below, because the transmission owner does not bear that risk, its investors are not exposed to that risk, and it is therefore not necessary for the transmission owner to offer investors a return based on that risk in exchange for their investment capital.

14. We reject Indicated MISO Transmission Owners' argument that the December 29 Order fails to balance consumer and investor interests required by *Hope*: the Commission provided the interconnection customer, who is already responsible for network upgrade costs, the opportunity to reject the transmission owner's unilateral election to initially fund network upgrades and instead choose to fund such costs under Option 2.<sup>30</sup> Conversely, pursuant to the transmission owner's initial funding option in MISO's Tariff, the transmission owner may earn a return on network upgrades where there is mutual agreement and the transmission owner is itself initially funding the network upgrades. MISO's Interconnection Customer Funding Policy relieves a transmission owner of its investment responsibility by directly assigning network upgrade costs to the interconnection customer. It does not then stand to reason that the investor interests discussed in *Hope* should outweigh customer interests where transmission owners have not provided investment capital for such network upgrades.

15. Moreover, we note that Indicated MISO Transmission Owners do not allege that funding for network upgrades under Option 2 of MISO's Tariff is confiscatory inasmuch as it provides an insufficient rate of return to a transmission owner; rather, they take issue only with the fact that they will no longer unilaterally elect that financing option. In other words, they ask the Commission to permit a transmission owner to require an interconnection customer to use the transmission owner as a source of funding such that Option 2 becomes available to the interconnection customer only at the transmission owner's election. Yet under MISO's Tariff, the cost responsibility for the network upgrades required for interconnection resides with the interconnection customer, not the transmission owner. The Commission in the December 29 Order found that it would be

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<sup>29</sup> See, e.g., *Hope*, 320 U.S. at 603.

<sup>30</sup> The Commission reiterated that Option 2 is just and reasonable because, under MISO's Interconnection Customer Funding Policy, the interconnection customer is ineligible for credits to reimburse it for network upgrade costs, and because the interconnection customer could pay for these network upgrades with cash or find financing on more favorable terms than the terms the transmission owner would impose by initially funding such network upgrades. December 29 Order, 153 FERC ¶ 61,352 at PP 29-30, 58.

unjust and unreasonable to allow a transmission owner to unilaterally elect to initially fund network upgrades and that the transmission owner still had the right to earn a return where there was mutual agreement for the transmission owner to invest in those network upgrades.<sup>31</sup> Given that, under MISO's Interconnection Customer Funding Policy, responsibility for between 90 to 100 percent of the costs for network upgrades falls on the interconnection customer, who therefore has the incentive to find the lowest cost solution to funding its network upgrade(s), the Commission found that a transmission owner should not control the interconnection customer's decision of a funding source to meet the interconnection customer's obligation.<sup>32</sup> Accordingly, contrary to Indicated MISO Transmission Owners' assertion, and consistent with *Hope*, the Commission conducted the requisite balance between investor and consumer interests. Further, the Commission in the December 29 Order relied on evidence that a transmission owner's unilateral election to initially fund network upgrades may increase costs to an interconnection customer unreasonably,<sup>33</sup> and here Indicated MISO Transmission Owners do not challenge that evidence on rehearing.

16. In *Hope*, the Court held that “[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called ‘fair value’ rate base.”<sup>34</sup> Indicated MISO Transmission Owners have not shown how requiring an interconnection customer to post security to address risk during construction<sup>35</sup> and allowing an interconnection customer, as opposed to the transmission owner, the initial opportunity to fund network upgrades under Option 2 precludes transmission owners from operating successfully, maintaining financial integrity, attracting capital, and compensating

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<sup>31</sup> See December 29 Order, 153 FERC ¶ 61,352 at PP 30-34, 57, 59; see also *id.* P 59 (“Indicated Transmission Owners’ argument ignores the continued existence of the transmission owner’s initial funding option and as a result misses the fact that any return that was available to a transmission owner when the initial funding election was made on a unilateral basis by the transmission owner is still available when the transmission owner’s initial funding option is made on a mutually agreed upon basis.”).

<sup>32</sup> *Id.* P 56.

<sup>33</sup> *Id.* PP 30, 32-34, 57.

<sup>34</sup> *Hope*, 320 U.S. at 605.

<sup>35</sup> See December 29 Order, 153 FERC ¶ 61,352 at P 59 (“MISO’s Tariff requires the interconnection customer to post security in order to address risk during construction.”).

investors for the risks assumed, in violation of *Hope*. We disagree with Indicated MISO Transmission Owners' argument that allowing an interconnection customer to decide whether to provide the up-front funding for network upgrades under Option 2, or allowing the transmission owner to initially fund network upgrades upon mutual agreement, denies the transmission owner the ability "to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."<sup>36</sup> Where the interconnection customer has assumed the risk on network upgrades during construction, there is no evidence in the record that allowing the interconnection customer the choice to fund such network upgrades up front imposes *more* business risks onto the transmission owner. We therefore reject Indicated MISO Transmission Owners' argument that the December 29 Order fails to compensate transmission owners for their risks.

17. We reject Indicated MISO Transmission Owners' contention that the Commission has precluded them from earning a rate of return on the risk of their "total enterprise."<sup>37</sup> The Commission in the December 29 Order already disposed of the question of recovery of annual expenses, e.g., O&M costs.<sup>38</sup> This proceeding is about the recovery of capital costs. Here, an interconnection customer is cost responsible for its network upgrade(s) and thus must bear the financial risk for the network upgrades, either through self-financing under Option 2 or through paying a network upgrade charge due to the transmission owner that finances them under Article 11.3. Indicated MISO Transmission Owners have not explained how allowing an interconnection customer to fund network upgrades under Option 2 fails to protect against unspecified "other risks associated with construction (not otherwise addressed by insurance)" or operating risks due to requirements "to operate customer-financed assets in compliance with applicable Reliability Standards," violations of which could "result in penalties that would not be recoverable from customers."<sup>39</sup> Indicated MISO Transmission Owners do not explain such reliability risk. In particular, Indicated MISO Transmission Owners do not explain how network upgrades should be considered *additive* to the reliability risk associated with the transmission system prior to the addition of such network upgrades versus

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<sup>36</sup> *Bluefield*, 292 U.S. at 693.

<sup>37</sup> Rehearing Request at 18-19 & n.47 (citing *Pepco Holdings, Inc.*, 125 FERC ¶ 61,130 (2008); *Bangor Hydro-Elec. Co.*, 117 FERC ¶ 61,129, at P 70 (2006) (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 100 FERC ¶ 61,292, at P 12 (2002))).

<sup>38</sup> December 29 Order, 153 FERC ¶ 61,352 at P 57 & n.118.

<sup>39</sup> Rehearing Request at 22.

potentially *mitigating* existing reliability risk.<sup>40</sup> Finally, MISO's Interconnection Customer Funding Policy, as an independent entity variation from Order No. 2003, may not be implemented so as to afford a transmission owner the ability to significantly increase capital costs to an interconnection customer where that transmission owner has elected to initially fund network upgrades, while another interconnection customer is able to elect Option 2 and is not subjected to such increased capital costs.<sup>41</sup>

18. We also reject Indicated MISO Transmission Owners' argument that the December 29 Order contains insufficient evidence of undue discrimination in violation of *National Fuel*.<sup>42</sup> As the Commission explained in a similar context involving interconnection customers' choice to provide the up-front funding for network upgrades under MISO's Tariff:

This case does not concern the formation of generally applicable rules, like *National Fuel*, but rather concerns specific provisions of one tariff—MISO's—that govern reimbursement for the cost of network upgrades that result from generator interconnection. Nothing in *National Fuel* prohibits us from taking seriously a threat posed by the market rules of a single utility tariff. The Initial Order described, and remedied, just such an opportunity for undue discrimination. We therefore disagree with the MISO Transmission Owners' argument that *National Fuel* may properly be used to suggest that the Initial Order does not constitute reasoned decisionmaking.<sup>43</sup>

19. The same reasoning applies here: the December 29 Order concerns specific provisions of MISO's Tariff governing reimbursement for the cost of network upgrades that result from generation interconnection, not the formation of generally applicable rules. Moreover, in the December 29 Order, the Commission already rejected arguments

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<sup>40</sup> For example, the addition of a network upgrade to a transmission system could relieve congestion on a previously congested pathway, reducing the risk of a reliability event on that section of the transmission system.

<sup>41</sup> See *E.ON I*, 137 FERC ¶ 61,076 at P 38 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 696).

<sup>42</sup> Rehearing Request at 5-6, 23.

<sup>43</sup> *E.ON II*, 142 FERC ¶ 61,048 at P 21 (citing *National Fuel*, 468 F.3d at 833, 837-38).

on rehearing that the Commission's June 18 Order relied on insufficient evidence of undue discrimination, concluding "that, under the unilateral election of the initial funding option by a transmission owner, a transmission owner's cost [of] capital could significantly increase costs to an interconnection customer relative to the interconnection customer's cost [of] capital under Option 2."<sup>44</sup> We need not address again on rehearing Indicated MISO Transmission Owners' attempt to raise these arguments.

20. We reject Indicated MISO Transmission Owners' contention that the December 29 Order, combined with the removal of Option 1 in *E.ON*, constitutes "piecemeal deconstruction of MISO's transmission cost allocation scheme" and Indicated MISO Transmission Owners' preference "to retain the [transmission owner's initial] funding option as the default option, [and] allow Option 2 if the parties mutually agree to its use."<sup>45</sup> At the outset, we disagree that the findings in these proceedings amount to "deconstruction of MISO's transmission cost allocation scheme." The Commission's findings in these proceedings are informed by, and consistent with, the cost responsibility of interconnection customers for generator interconnection network upgrades under MISO's Tariff and where the interconnection customer does not otherwise receive credits for transmission service taken. Nothing in these proceedings changes the fact that, under the MISO Tariff, between 90 to 100 percent of the cost of network upgrades is allocated to an interconnection customer. Throughout these proceedings, we have found that a transmission owner unilaterally electing to initially fund network upgrades may result in increased costs to an interconnection customer vis-a-vis Option 2, where such customer is already held responsible for such network upgrades costs and does not receive credits for transmission service taken. In other words, these proceedings involve the overall cost impact of network upgrades, not the allocation of those costs.

21. As to Indicated MISO Transmission Owners' criticism in this proceeding regarding *E.ON*, we find this is a collateral attack on that order. *E.ON* concluded that Option 1 was unjust, unreasonable, and unduly discriminatory based on the evidence and arguments in that proceeding, and that Option 2 itself was a just and reasonable alternative consistent with Order No. 2003.<sup>46</sup> In *E.ON*, the Commission did not address any evidence or arguments related to the transmission owners' initial funding option. The orders in this proceeding concerned transmission owners unilaterally electing to initially fund network upgrades because it was raised on the record here and not in the record of *E.ON* or other proceedings.

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<sup>44</sup> See December 29 Order, 153 FERC ¶ 61,352 at P 33.

<sup>45</sup> Rehearing Request at 26.

<sup>46</sup> *E.ON I*, 137 FERC ¶ 61,076 at P 40.

22. The Commission, in the December 29 Order, already addressed Indicated MISO Transmission Owners' argument that the December 29 Order diverges from Order No. 2003, recognizing that MISO's Interconnection Customer Funding Policy differs in some ways from Order Nos. 2003 and 2003-A.<sup>47</sup> The Commission, in the December 29 Order, also already addressed Indicated MISO Transmission Owners' arguments that the December 29 Order is inconsistent with *Hoopeston*.<sup>48</sup> We need not address this argument again on rehearing.

The Commission orders:

Indicated MISO Transmission Owners' request for rehearing of the December 29 Order is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>47</sup> *Id.* P 30 (citing June 18 Order, 151 FERC ¶ 61,220 at PP 6 n.8, 48-52).

<sup>48</sup> *Id.* PP 31-34, 57.