129 FERC ¶ 61,301
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer and Philip D. Moeller.

Midwest Independent Transmission System Operator, Inc. — Docket No. ER09-1619-000

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS

(Issued December 31, 2009)

1. On August 21, 2009, as supplemented on November 4, 2009, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted, under section 205 of the Federal Power Act (FPA),[1] proposed revisions to the Generator Interconnection Procedures in Attachment X of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) (August 21 Filing). Midwest ISO proposes to amend Attachment X to include two new *pro forma* agreements: a facilities construction agreement for a single interconnection customer (FCA) and a facilities construction agreement for multiple parties (MPFCA). As discussed below, we conditionally accept Midwest ISO's proposal and make the Tariff revisions effective October 20, 2009, as requested.

I. Background

A. Queue Issues and Commission Response

2. In response to concerns about the delays and backlogs in processing generator interconnection queues, and after a technical conference on interconnection queuing practices, the Commission issued an Order on Technical Conference[2] requiring Midwest ISO and other Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to report on the status of efforts to improve their queue processing

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[1] 16 U.S.C. § 824d (2006).

[2] *See Interconnection Queuing Practices*, 122 FERC ¶ 61,252 (2008) (Conference Order).

procedures and to advance the goals of Order No. 2003.[3] To that end, Midwest ISO proposed, and the Commission largely accepted, revisions to Attachment X in order to reform Midwest ISO's interconnection queue.[4] These revisions modified Midwest ISO's Generator Interconnection Procedures to limit delays caused by inactive projects in the queue. Among other things, Midwest ISO revised its procedure for processing interconnection applications from a "first come, first served" approach to an approach based on the progress that the generation project is making towards coming on-line, essentially a "first ready, first to proceed" approach. Midwest ISO also changed the characteristics of the milestones that a generation project must meet in order to proceed toward interconnection, and the amounts and the timing of the monetary deposits accompanying each milestone. Further, Midwest ISO introduced temporary Generator Interconnection Agreements (GIA) that conditionally permit projects that are ready to proceed to use available transmission capacity based upon the results of available studies.

B. Midwest ISO's Proposal

3. In the present filing, which it characterizes as a second phase of its interconnection queue reform, Midwest ISO proposes revisions to its Generation Interconnection Procedures to: (1) address physical constraints that delay the interconnection of new generation in many areas of the Midwest ISO footprint, and (2) streamline the processing of interconnection requests. Midwest ISO states that its current filing focuses on the need to expedite the construction of upgrades to the transmission system that are necessary to accommodate interconnection requests.

4. Midwest ISO states that it has seen a substantial increase in interconnection requests in its queue since the introduction of Renewable Portfolio Standards in seven states within the Midwest ISO footprint (Illinois, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin). The increased demand for renewable energy resources has resulted in a high number of generator interconnection requests in wind-rich regions of

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[3] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *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).

[4] *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183 (2008) (Queue Reform Order), *order on reh'g*, 127 FERC ¶ 61,294 (2009).

the Midwest ISO, which are often in locations distant from load, and distant from sufficient transmission infrastructure to support interconnection.[5]

5. Midwest ISO explains that the interconnection of a generating facility often triggers the need for upgrades on the affected transmission system of a neighboring transmission owner, as well as the transmission system to which the generator directly interconnects. Midwest ISO notes that, with clustering of interconnection requests, multiple interconnection customers may jointly cause the need for upgrades on an affected system or on the system to which they directly interconnect. Allocating cost responsibility for construction of these upgrades among multiple parties raises unique legal issues that were not anticipated at the time of Order No. 2003.[6] Midwest ISO adds that construction of these upgrades is further complicated by the need for separate agreements with affected systems and multiple interconnection customers to build the facilities necessary to support the interconnection of new generation studied in clusters.

6. To address these concerns, Midwest ISO proposes to streamline the processing of agreements for the construction of needed upgrades to the transmission system by incorporating two new *pro forma* agreements into its Generation Interconnection Procedures: an FCA (for a single interconnection customer) and an MPFCA (to address the situation where multiple interconnection customers cause the need, and share the cost responsibility, for common use upgrades[7] to accommodate their generator interconnection requests). Midwest ISO states that, by adding these agreements to its

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[5] Transmittal Letter at 3; August 21 Filing, Mr. Eric Laverty's Testimony (Laverty Testimony), Tab E, at 10 ("instead of plants locating in areas with a robust transmission system, as was generally the case when Order No. 2003 was written, Midwest ISO now has a high volume of wind generation locating in areas with transmission systems that will require significant upgrades to support interconnection of the additional resources").

[6] Mr. Laverty explains that the "Order No. 2003 process did not contemplate the conditions of the Midwest ISO queue, namely, the high volume of requests, withdrawals, and suspension that interact to complicate existing group study options and the interconnection of large amounts of generation in remote, less robust portions of the transmission system." Laverty Testimony at 18.

[7] Midwest ISO defines "Common Use Upgrade" as "an Interconnection Facility, Network Upgrade, System Protection Facility, or any other classified addition, alteration, or improvement on the Transmission System or the transmission system of an Affected System that are needed for the interconnection of multiple Interconnection Customer's Generating Facilities and which are the shared responsibility of such Interconnection Customers." Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, First Revised Sheet No. 3054; Original Sheet No. 3246Z.15.

Generation Interconnection Procedures, it will be able to reduce the time and expense that parties incur in negotiating, preparing, and filing FCAs and MPFCAs with the Commission.[8]

7. Midwest ISO states that the proposed *pro forma* FCA and MPFCA are based upon the facilities construction agreement filed in Docket No. ER05-1362 and approved by the Commission (Prairie State FCA).[9] While the Prairie State FCA is not a *pro forma* agreement, Midwest ISO considered it the appropriate Commission-approved agreement to serve as a template for facilities construction agreements. Midwest ISO states that the proposed *pro forma* FCA updates the Prairie State FCA based on the corresponding revisions to the GIA in its first phase queue reform filing, and that the proposed *pro forma* MPFCA further builds upon those GIA-based changes to include revisions necessary to accommodate multiple interconnection customers.

8. According to Midwest ISO, the proposed *pro forma* MPFCA is intended to provide certainty to the interconnection customer and the transmission owner. Midwest ISO states that, by including all of the jointly responsible interconnection customers in a single agreement and requiring them to provide irrevocable security in advance to fund the common use upgrades, the *pro forma* MPFCA provides certainty to the interconnection customers and the transmission owner that the common use upgrades will be funded and built. In addition, having a single agreement simplifies revisions if changes occur to the details of the common use upgrades. Midwest ISO states that the *pro forma* MPFCA will also help eliminate "the risk that the first mover must fund upgrades without a guarantee that others who jointly cause the need for the shared upgrade . . . will come on-line as planned and reimburse the first mover."[10]

9. Midwest ISO states that, given the funding concerns of the first mover problem, the existing procedures are insufficient because many projects may withdraw their interconnection request rather than be the first mover, causing uncertainty for lower-queued projects.[11] Therefore, to provide funding certainty for upgrades required by

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[8] Transmittal Letter at 5.

[9] *Id.* at 6 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 113 FERC ¶ 61,048 (2005)).

[10] Midwest ISO notes that the process contemplated under Order No. 2003 anticipates that the first project to require upgrades would fund them. However, when large transmission upgrades are determined through group studies, few interconnection customers volunteer to act as the first mover and fund large upgrades. Laverty Testimony at 13-14.

[11] *Id*. at 14.

multiple interconnection requests, Midwest ISO developed the common use upgrades concept and the related *pro forma* MPFCA.

II. Notice of the Filing and Responsive Pleadings

10. Notice of the August 21 Filing was published in the *Federal Register*, 74 Fed. Reg. 45,195 (2009), with interventions or protests due on or before September 11, 2009. Timely motions to intervene were filed by: The Detroit Edison Company; Wisconsin Electric Power Company; American Municipal Power, Inc.; Midwest ISO Transmission Owners;[12] Madison Gas & Electric Company, Missouri River Energy Services, and WPPI (collectively, Midwest TDUs); Otter Tail Company; Edison Mission Energy; Consumers Energy Company; and Indianapolis Power & Light Company. Timely motions to intervene and protests were filed by: NextEra Energy Resources, LLC (NextEra); Invenergy Wind Development LLC, Invenergy Thermal Development LLC, and Renewable Energy Systems Americas, Inc. (Midwest Generators); and Acciona Wind Energy USA, LLC (Acciona). Timely motions to intervene and comments were filed by: Wisconsin Public Service Corporation, Upper Peninsula Power Company, and Integrys Companies (collectively, Integrys); American Transmission Company, LLC (ATC); and Xcel Energy Services, Inc. (Xcel). Midwest ISO filed an answer in response to protests and comments. Integrys filed an answer to Midwest ISO's answer.

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[12] For purposes of this proceeding, the Midwest ISO Transmission Owners are: Ameren Services Company, as agent for Union Electric Company, Central Illinois Public Service Company, Central Illinois Light Company, and Illinois Power Company; American Transmission Company LLC; City of Columbia Water and Light Department (Columbia, Missouri); American Transmission Systems, Inc., a subsidiary of FirstEnergy Corp.; City Water, Light & Power (Springfield, Illinois); Duke Energy Corporation for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC, Michigan Electric Transmission Company, LLC; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Company; Muscatine Power and Water; Northern Indiana Public Service Company; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

11. On October 20, 2009, Commission staff requested additional information on certain aspects of Midwest ISO's August 21 Filing (October 20 Letter).[13] On November 4, 2009, Midwest ISO responded to the October 20 Letter with a supplemental filing (Supplemental Filing). Notice of the Supplemental Filing was published in the *Federal Register*, 74 Fed. Reg. 61,668 (2009), with interventions and protests due on or before November 25, 2009. Southern Minnesota Municipal Power Agency filed a timely motion to intervene.

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2009), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Midwest ISO's answer because it has provided information that assisted us in our decision-making process. We are not persuaded to accept Integrys's answer and will, therefore, reject it.

B. Standard of Review

14. The Commission applies an independent entity standard to evaluate RTO and ISO proposals for revisions to the procedures outlined in Order No. 2003.[14] Under that standard, independent entities such as RTOs and ISOs are entitled to more flexibility in proposing variations than are non-independent entities, primarily because they do not have affiliated generation and thus are less likely than non-independent entities to favor one generator over another. Under the independent entity standard, Midwest ISO must demonstrate that its proposed variations are just and reasonable and not unduly discriminatory, and that they would accomplish the purposes of Order No. 2003.[15]

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[13] The October 20 Letter also included a request for additional information on the two executed MPFCAs that Midwest ISO filed on August 7, 2009, in Docket Nos. ER09-1556 and ER09-1557.

[14] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 822-27; Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 759. *See also* Queue Reform Order, 124 FERC ¶ 61,183 at P 31; Conference Order, 122 FERC ¶ 61,252 at P 13.

[15] Conference Order, 122 FERC ¶ 61,252 at P 13 & n.10

C. Substantive Matters

15. We commend Midwest ISO and all the parties who worked on this proposal to improve Midwest ISO's queue process. Through its proposal, as revised by this order, Midwest ISO will be better able to address the challenges of processing many interconnection requests made in close geographical and electrical proximity to one another, in remote and less robust portions of the transmission system, as well as the challenges of allocating cost responsibility for construction of upgrades among multiple parties. Midwest ISO addresses these challenges by proposing to streamline the processing of interconnection requests through the use of *pro forma* FCA and MPFCA.

16. We find that Midwest ISO's proposal, as modified below, is just and reasonable and accomplishes the goal of Order No. 2003 to standardize procedures to "minimize opportunities for undue discrimination and expedite the development of new generation, while protecting reliability and ensuring that rates are just and reasonable."[16] Therefore, as discussed below, we conditionally accept Midwest ISO's proposal under the independent entity standard, subject to Midwest ISO making a compliance filing.

1. Cost Allocation and Cost Methodology

a. Midwest ISO Proposal

17. Midwest ISO proposes language in Article 3.2.1 of the *pro forma* MPFCA to ensure that interconnection customers will be jointly responsible for costs of the common use upgrades.[17] According to Midwest ISO, the MPFCA includes all jointly responsible interconnection customers in a single agreement and requires them to provide irrevocable security in advance, in order to provide certainty to interconnection customers that their projects will be funded and built.[18] This, Midwest ISO asserts, addresses the risk associated with the "first mover" problem as well as the related risk that if several projects withdraw after the agreement is executed, and there is no opportunity to "backfill" the vacancy with another project, the remaining interconnection customers will

[16] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 11.

[17] MPFCA, Article 3.2.1 states in part:

> Except as expressly otherwise agreed, Interconnection Customers shall be collectively responsible for these [common use upgrade-related] costs, based on their proportionate share of cost responsibility, as provided in Appendix A.

[18] Laverty Testimony at 29.

be required to fund a much larger share of a project or delay their in-service date while waiting for a restudy.[19] Midwest ISO states that, by identifying all known interconnection customers that cause the need for common use upgrades and including them in an MPFCA, Midwest ISO provides the appropriate estimate for each project to assess its potential cost responsibility while ensuring that the necessary common use upgrades are built. This, it says, is consistent with the process contemplated in Order Nos. 2003 and 2003-A, under which a lower-queued project that is ready to proceed before higher-queued projects might bear some of the cost originally allocated to higher-queued projects.[20] Also, consistent with Order No. 2003-A, Midwest ISO notes that the interconnection customer will be responsible for the costs of network upgrades needed to support its in-service date, including the costs originally assigned to higher-queued projects.[21]

b. <u>Comments</u>

18. Intervenors are, by and large, supportive of Midwest ISO's proposal. For example, Xcel Energy states that Midwest ISO's proposal is the appropriate next step in addressing the problems faced by Midwest ISO in administering its generation interconnection queue.[22]

19. Some intervenors, however, raise concerns about whether Midwest ISO's cost allocation under the MPFCA is just and reasonable. Integrys asks that the Commission require Midwest ISO to further revise the *pro forma* FCA and MPFCA to reflect the long-term allocation and transmission benefits, either in the instant proceeding or in Docket No. ER09-1431-000.[23] Integrys claims that the MPFCA spreads upgrade costs

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[19] *Id.* at 30.

[20] Transmittal Letter at 41-42 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 409; Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 320).

[21] *Id.* at 41 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 320).

[22] Xcel Energy at 7.

[23] On July 9, 2009, Midwest ISO and its transmission owners proposed, in Docket No. ER09-1431-000, changes to its cost allocation methodology for network upgrades associated with generation interconnections. Midwest ISO proposed to revise: (1) the cost of generation interconnection-related network upgrades of transmission facilities rated 345 kV or above to be allocated 90 percent to interconnecting generators, and 10 percent allocated regionally on a postage stamp basis; and (2) the cost of interconnection-related network upgrades of facilities rated lower than 345 kV to be allocated 100 percent to interconnecting generators. Integrys states that Midwest ISO and its transmission

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only to a limited set of interconnection requests that may fall within a specific grouping or sub-grouping (e.g., Group 5 projects or a subgroup of Group 5 projects).[24] Integrys argues that this results in a group or subgroup of interconnection customers paying several hundred million dollars of network upgrades while later groups are able to free-ride and use the prior groups' network upgrades without paying for them.[25] Therefore, Integrys contends that the MPFCA does not resolve the first mover/free rider problem created by Midwest ISO's cost allocation revisions in Docket No. ER09-1431-000.[26]

20. NextEra supports the use of a standardized multi-party facilities agreement such as the MPFCA. However, NextEra argues that the use of the MPFCA must be defined and limited. It contends that, due to the absence of sufficient regional transmission planning and construction, facilities are being built in response to interconnections rather than systematic regional transmission development. NextEra is concerned that the MPFCA should not be used to impose further costs on generators at the expense of appropriate transmission planning and cost allocation, or to impose excessive, unforeseeable costs on generators.[27] NextEra is concerned that Midwest ISO makes no distinction in its

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owners, in a joint answer to intervenor protests in Docket No. ER09-1431-000, explicitly tied the outcome of the Docket No. ER09-1431-000 proceeding to the outcome of this proceeding. Integrys at 4. The Commission conditionally accepted the proposed amendments to Midwest ISO's Tariff and directed further compliance filings. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060 (2009), *reh'g pending*.

[24] The Group 5 projects consist of 32 individual interconnection requests totaling approximately 2,039 MW in Southwest Minnesota, Northwest Iowa, and Eastern South Dakota. Under Midwest ISO's generator interconnection procedures, these projects were studied as a group for the purpose of conducting interconnection studies. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,019, at n.8 (2009) (Brookings Line Order), *reh'g pending*.

[25] Integrys at 6-7.

[26] *Id*. at 4, 6.

[27] For example, NextEra argues that Midwest ISO is using the MPFCA to impose "very significant transmission development costs on generators" related to the Brookings Line when the Brookings Line does not fit within the context of an affected system upgrade. Rather, NextEra notes that the Brookings Line is one of several projects for the CapX2020 initiative, which is a transmission infrastructure plan to meet the anticipated demand for electricity by load in Minnesota and the surrounding areas through the year 2020. NextEra at 5-6. Moreover, it asserts that the cost impact on generators would be

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proposal between the use of the MPFCA to develop smaller upgrades on affected systems or multi-hundred million dollar transmission lines.[28] Therefore, NextEra suggests that the Commission direct Midwest ISO to refine its use of the MPFCA, perhaps by: (1) narrowing the definition of common use upgrades, (2) requiring identification of the common use upgrade or affected system upgrade in the generation interconnection agreement, and/or (3) specifying that the FCAs and MPFCAs can be used to compel generators to fund only the minimum facilities needed to support their interconnections.

21. Acciona is concerned about the lack of a tariff provision to deal with the situation in which an interconnection customer is terminated under the MPFCA and excess capacity or headroom is created by construction of a facility that may not be fully utilized by the interconnection customers paying for it.[29] Acciona requests that the Commission direct Midwest ISO to work with its stakeholders to develop a process by which interconnection customers that come along later and use the facility should be required to share the costs of the facility. Acciona states that New York Independent System Operator, Inc. (NYISO) uses such rules to ensure that no customer obtains a free ride.[30]

22. Midwest Generators assert that Midwest ISO's proposal raises the significant risk that the withdrawal of some projects will create a cascading withdrawal of the remaining projects that would otherwise support the common use upgrade. This, in turn, will shift the costs to projects further down the queue and likely cause those projects to also withdraw.[31] Therefore, Midwest Generators suggest that Midwest ISO adopt an approach used by the California Independent System Operator Corporation (CAISO) to facilitate interconnection of multiple generators in the Tehachapi region. They state that the CAISO approach allows interconnection customers to roll into their transmission rates the costs of the facilities until subsequent generators make use of the facilities and provide funding.[32]

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further "exacerbated" if the Commission approves Midwest ISO's interim cost-allocation proposal in Docket No. ER09-1431. *Id.* at n.13.

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

[29] Acciona at 6.

[30] *Id.* at 6 (citing New York Independent System Operator Corp. Tariff, Attachment S).

[31] Midwest Generators at 7.

[32] *Id*. at 8 (citing *California Indep. System Oper. Corp.*, 119 FERC ¶ 61,061, *reh'g denied*, 120 FERC ¶ 61,244 (2007)).

c. Midwest ISO Answer and Supplemental Filing

23. Midwest ISO states that Integrys's concerns with long-term cost allocation and transmission benefits are general and go beyond the scope of this filing. Midwest ISO states that the acceptance of the *pro forma* agreements will not affect long-term cost allocation since the agreements will be based on the effective version of Attachment FF at the time of execution of the agreement.[33]

24. Midwest ISO also states that Integrys's assertions regarding the first mover problem are incorrect. According to Midwest ISO, the MPFCA addresses this issue by moving toward a cost sharing that places the cost responsibility with identifiable, queued generation that would require the common use upgrade, and allows Midwest ISO to replace a defaulting interconnection customer with the next interconnection customer in line with a comparable project through a "backfill" provision.[34] While many stakeholders have presumed that, after a common use upgrade is in place, the next batch of interconnection customers will get a free ride, Midwest ISO states that this has not proven to be the case, as the subsequent batches are showing that they need even more upgrades above and beyond the existing common use upgrades.

25. Additionally, Midwest ISO argues that NextEra's proposed limitations to common use upgrades are not needed because the upgrade can be either large or small. Midwest ISO also states that engineering judgment and good utility practices are used to determine the reasonableness of the next size capacity upgrade required for a reliable system and the queued generators that can be interconnected as a result of the upgrade. Further, it notes that requiring strict adherence to a minimal upgrade standard for each project can result in an "inadequate patchwork of transmission system" with reliability concerns.[35]

26. In regards to Acciona's concern about excess capacity (i.e., headroom), Midwest ISO states that the risk of a windfall for a later interconnection customer who uses excess capacity on an existing system has so far proven to be a "theoretical potential" only. It adds that such a risk is no different from what already exists for any transmission asset that is not fully subscribed. Midwest ISO notes that Order No. 2003 already provides for cost allocation to a later interconnection customer that funds upgrades that were previously the responsibility of another.[36] In regards to NYISO's tariff, Midwest ISO

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[33] Midwest ISO Answer at 8-9.

[34] *Id*. (citing Transmittal Letter at 34).

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

[36] *Id.* at 17-18 & n.36.

believes that Acciona is referring to the provision of NYISO's tariff that provides for a financial interest for a developer in the excess capacity created in upgrades that the developer funds. Midwest ISO states that there are several distinctions between NYISO and Midwest ISO that would make such a proposal difficult to administer within Midwest ISO. Furthermore, in order to develop such tariff revisions, Midwest ISO would require a new stakeholder process to introduce the concepts of headroom in Midwest ISO's Tariff and Generator Interconnection Procedures process, and Midwest ISO would also need to develop tracking mechanisms to track funding payments.[37]

27. Midwest ISO also believes that to adopt a similar approach to CAISO would be inappropriate. Midwest ISO states that the MPFCA addresses upgrades on a more tightly interconnected portion of the system while the Tehachapi project is a very large, long radial line from a windy area to the rest of the CAISO system. Midwest ISO adds that CAISO uses a different cost allocation that is more appropriate for a new high voltage direct current facility, but would not be appropriate in all circumstances for Midwest ISO's footprint. Furthermore, Midwest ISO states that revising its cost allocation to accommodate the CAISO method would require imposing a charge across the Midwest ISO footprint.[38]

28. In the Supplemental Filing, Midwest ISO states that under Article 3.2.1 of the MPFCA, interconnection customers are collectively responsible for their proportionate share of costs. Furthermore, Midwest ISO states that its default methodology for allocating the cost of common use upgrades among generators is provided in section 5.1.5 of Midwest ISO's Generator Interconnection Business Practice Manual. Midwest ISO also states that Commission precedent supports including such details in the Business Practice Manuals and used this methodology for the executed MPFCAs.[39]

d. Commission Determination

29. We find that Midwest ISO's proposal takes important steps toward resolving the "first mover" issue and minimizing the impacts of an interconnection customer's departure from a study group on the remaining members of that group. The *pro forma* MPFCA is intended to provide a cost-sharing mechanism that places the cost responsibility with identifiable, queued generation that would require the common use upgrade. Moreover, through the backfill provision of the MPFCA, Midwest ISO would be able to replace a defaulting interconnection customer with the next interconnection

[37] *Id.* at 16-17.

[38] *Id.* at 19.

[39] Supplemental Filing at 4-5. *See supra* note 13.

customer in line with a comparable project. We will conditionally accept Midwest ISO's cost allocation and methodology under the *pro forma* agreements as just and reasonable, as discussed below.

30. We find that the cost methodology that Midwest ISO will use to assign and allocate costs to interconnection customers for building common use upgrades will affect the rates, terms and conditions outlined in the *pro forma* MPFCA. Therefore, we require Midwest ISO to incorporate these allocation factors in its Tariff. Having these allocation factors in the Tariff will ensure greater transparency and consistency for all customers. We direct Midwest ISO to incorporate into Appendix A of the proposed *pro forma* MPFCA the cost allocation methodology in a compliance filing due within 30 days of the date of this order.

31. We disagree with Integrys's contentions regarding the first mover issue. As indicated above, Midwest ISO's proposal is an important step toward resolving that problem by providing a cost sharing mechanism among all interconnection customers that would require the common use upgrade. As stated above, the purpose of the *pro forma* MPFCA is to meet the challenges that arise when multiple interconnection customers jointly trigger the need for common use upgrades and to allocate costs among those generator interconnection customers. Further, Integrys's concerns regarding allocation of costs between generator interconnection customers and other beneficiaries of network upgrades are outside the scope of this proceeding and are the subject of another proceeding (Docket No. ER09-1431-000, *et al.*).[40] We will not rule on them here.

32. We find that NextEra's general argument regarding the application of the *pro forma* MPFCA is outside the scope of this proceeding. Any concerns regarding the cost impact on generators that arise from issues pending before the Commission in Docket Nos. ER09-1431-000 and ER09-1581-000 should be raised in those proceedings. Also, we note that, in this proceeding, the allocation of network upgrade costs among multiple generator interconnection customers through a *pro forma* MPFCA simply implements existing tariff language related to group study provisions in the Tariff.[41]

[40] *See supra* note 23.

[41] For example, section 4.1 of the Midwest ISO Tariff states that "[F]or Group Studies, the determination of cost responsibility for common facilities necessary to accommodate two or more Interconnection Requests participating in a Group Study the cost responsibility of the Parties for common facilities may depend on factors other than Queue Position." *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,027, at P 131-33, *order granting rehearing,* 109 FERC ¶ 61,085, at P 25-33 (2004).

33. Also, in regards to Acciona's concern that excess capacity or headroom may be created when an interconnection customer terminates under the MPFCA, and Midwest Generators' contention that the withdrawal of projects will lead others to withdraw as well, Midwest ISO notes that the MPFCA is designed to allocate costs among the relevant interconnection customers to ensure that all parties pay their appropriate share of costs for which they bear joint responsibility. Although the potential consequence of a windfall for later interconnection customers, and cascading withdrawals of potential customers, may exist, these concerns appear to be speculative at this time since no commenter has provided any concrete evidence of such a scenario. Therefore, we decline to require Midwest ISO to consider this issue in this proceeding. Moreover, as we explained in Order No. 2003, independent system operators, like Midwest ISO, have significant flexibility to propose an appropriate cost allocation for interconnection-related network upgrades to meet its regional needs.[42] However, we understand that Midwest ISO plans to continue discussing the headroom issue with its stakeholders.[43] We further note that the Organization of Midwest ISO States, through its Cost Allocation Regional Planning Process, is already examining the existing cost allocation regime in the Midwest ISO tariff to ensure that cost causers and beneficiaries are properly allocated costs.[44]

2. <u>Commitment to an MPFCA Prior to Executing a GIA</u>

a. <u>Midwest ISO Proposal</u>

34. Midwest ISO states that the MPFCA will govern the common use upgrade and will apply to multiple parties, rather than being tied to a single interconnection customer. This method may require interconnection customers to fund common use upgrades before they have completed GIAs for their projects and thereby require an earlier financial commitment.[45]

b. <u>Comments</u>

35. Midwest Generators state that, prior to the execution of the GIA, the interconnection customer has no right to interconnect to the Midwest ISO transmission system, and may not have all the necessary information regarding costs, services, and

[42] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 28.

[43] Midwest ISO Answer at 17 at n.35.

[44] *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 16, 68 (2009).

[45] Transmittal Letter at 32-34.

terms that may affect its decision to enter into a GIA. Midwest Generators add that an interconnection customer would risk falling short of funding requirements under the MPFCA because interconnection customers' financing arrangements are typically conditioned on executing a GIA. Therefore, Midwest Generators argue that it is unreasonable to require an interconnection customer to enter into a MPFCA to fund or provide security for facilities if that interconnection customer has not yet entered into a GIA.[46] Midwest Generators ask the Commission to require Midwest ISO to revise its procedures to clarify that interconnection customers will not be required to execute an MPFCA prior to entering into a GIA.

c. Midwest ISO Answer

36. Midwest ISO contends that using an MPFCA provides greater certainty in funding common use upgrades by requiring all interconnection customers that jointly cause the need for the upgrades to commit to funding upgrades in advance.[47] Midwest ISO notes that, when multiple parties are involved, it is problematic for one project to delay funding its share of an upgrade under an MPFCA while awaiting a GIA. By proposing to share these costs for common use upgrades in advance, the MPFCA distributes this burden among the relevant interconnection customers and thereby avoids the "first mover/free rider" problem. Further, Midwest ISO states that under the Generator Interconnection Procedures, the MPFCA and related GIAs are generally developed simultaneously, and that by the time an interconnection customer is asked to execute the MPFCA, the interconnection customer will either have executed its GIA, or will know what the GIA will require.

37. Moreover, Midwest ISO states that, contrary to Midwest Generators' assertions regarding financing arrangements, the MPFCA is a legitimate obligation of an interconnection customer under the Generator Interconnection Procedures and GIA. If the interconnection customer cannot obtain financing for its share of the common use upgrades under an MPFCA, it also would not be able to meet its obligation under the GIA to fund upgrades. Finally, Midwest ISO states that, to the extent that an interconnection customer funds common use upgrades prior to negotiating a GIA and eventually withdraws its project, the interconnection customer will still receive a benefit in the form of Financial Transmission Rights associated with the MPFCA pursuant to Attachment FF.[48]

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[46] Midwest Generators at 6.

[47] Midwest ISO Answer at 21.

[48] *Id*. at 22.

d. Commission Determination

38. As Midwest Generators point out, Midwest ISO's proposal may require interconnection customers to execute an MPFCA prior to a GIA. As such, in some cases, interconnection customers may have to commit to funding upgrades prior to receiving interconnection commitments. On balance, we find that when multiple parties are involved in an upgrade to an affected system, it is just and reasonable for Midwest ISO to require interconnection customers to execute an MPFCA prior to executing a GIA. That said, as stated below, we expect that these agreements will be executed simultaneously or that the interconnection customer will know what its cost responsibility will be under its GIA.

39. As Midwest ISO describes, advance funding commitments from all relevant interconnection customers are necessary to provide certainty of funding and to avoid the "first mover/free rider" problem. Mr. Laverty explains that, as projects jointly cause the need and share the responsibility for network upgrades, the range of potential transmission upgrade costs for a specific generation project grows wider and is more interdependent on the actions of other projects. Generators still "seek additional certainty that shared upgrades will be built, and that they will not be held hostage to larger, potentially bankrupting upgrade costs by their competitor that refuses to fund its share."[49]

40. Additionally, as Midwest ISO explains, in most cases, the MPFCA and GIA will be executed simultaneously or the interconnection customer will know what the GIA will entail. Moreover, Midwest ISO states that even if the interconnection customer funds the common use upgrade prior to executing a GIA and withdraws from the project, that interconnection customer can receive Financial Transmission Rights associated with the MPFCA under the Tariff. Furthermore, there is no evidence that an interconnection customer's financing arrangements would be jeopardized by executing the MPFCA before the GIA. In fact, by having earlier knowledge regarding the estimated cost of all network upgrades required for a generator interconnection, the interconnection customer should be in a better position to understand what financing arrangements are necessary.

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[49] Laverty Testimony at 13.

3. Using an MPFCA for Common Use Upgrades on the Transmission System Where the Interconnection is Located

a. Midwest ISO Proposal

41. Midwest ISO states that it will use an FCA for a single interconnection customer and that the MPFCA will be used for common use upgrades on either: (1) an affected system[50]; or (2) the transmission system where the interconnection occurs.

b. Comments

42. Midwest Generators state that Midwest ISO should clarify that the FCA will only be used to address facilities constructed on the system of a transmission owner that is not the interconnecting transmission owner.[51] Midwest Generators believe that Midwest ISO's proposal is clear as to this intent; however, an interconnecting transmission owner in one of Midwest Generators' projects has recently indicated that a GIA and FCA will govern the upgrades on the interconnecting transmission owner's system.

43. If Midwest ISO's intent is that the interconnection customer should be required to execute both a GIA and an FCA with respect to facilities constructed by the interconnecting transmission owner, Midwest Generators ask the Commission to reject that approach. They contend that it is duplicative to require both an FCA and a GIA when the GIA includes all necessary terms and conditions concerning construction of facilities by the interconnecting transmission owner, and is likely to encourage ambiguity and conflict.

c. Midwest ISO Answer

44. Midwest ISO reiterates that an FCA will be used for a single interconnection customer for upgrades on an affected transmission system and the MPFCA will be used for common use upgrades on either: (1) an affected system; or (2) the transmission system where the interconnection occurs.[52] Midwest ISO states that an MPFCA would be used where multiple interconnection customers jointly cause the need for common use

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[50] Midwest ISO defines "Affected System" as an electric transmission or distribution system associated with an existing generating facility or of a higher queued Generating Facility, which is an electric system other than the Transmission System that may be affected by the Interconnection Request. Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, First Revised Sheet No. 3053.

[51] Midwest Generators at 12.

[52] Midwest ISO Answer at 23.

upgrades on the system to which they directly interconnect. Otherwise, splitting the common use upgrades costs among multiple GIAs imposes a greater burden on the project because all of the related interconnection customers would not negotiate the same document. Moreover, the withdrawal of a single project would affect the common use upgrades and require the amendment and renegotiation of multiple GIAs rather than a single agreement.[53]

d. Commission Determination

45. We agree with Midwest ISO that it is appropriate to utilize an MPFCA for common use upgrades when such upgrades occur on either: (1) an affected system; or (2) the transmission system where the interconnection occurs. Furthermore, we agree with Midwest ISO that it is appropriate to use an MPFCA in situations where multiple interconnection customers cause shared common use upgrades on the transmission system where the interconnection occurs. An FCA will be used for a single interconnection customer for upgrades on an affected system.

46. By definition there is no circumstance in which a common use upgrade can exist without having multiple interconnection customers sharing the cost responsibility for the network upgrades.[54] And it stands to reason that there is some likelihood that the common use upgrade will reside in the same transmission system where one of those interconnections occurs.[55] Midwest Generators are correct that there could be two agreements, a GIA and an MPFCA, governing the construction of different facilities on the same transmission system of one interconnection customer: The GIA would govern the work required for the interconnection customer located in the host zone, while the MPFCA would govern the work required for several interconnection customers, including the one in the host zone. We note that this outcome is far more efficient than utilizing multiple GIAs to govern the construction of the network upgrades that will be used by all of the interconnecting parties.

[53] *Id*. at 23-24.

[54] *See supra* note 7.

[55] It is also possible that the common use upgrade will be located on a transmission system adjacent to the transmission systems that are hosting the interconnections.

4. Threshold for an Interconnection Customer to Withdraw from an MPFCA

a. Midwest ISO Proposal

47. Under Article 6.1 of the MPFCA, Midwest ISO proposes that, if an interconnection customer withdraws from an MPFCA, and the resulting cost adjustments cause any of the remaining interconnection customers' costs to increase by more than 25 percent, then any such interconnection customer has an option to withdraw from the MPFCA and have the unused portion of its irrevocable security refunded.[56]

b. Comments

48. Both Midwest Generators and Acciona argue that the thresholds that would allow an interconnection customer to terminate an MPFCA as a result of another customer's termination are too high. Midwest Generators argue that the proposed 25 percent increase would apply a disproportionate standard on parties to the MPFCA based on their existing funding obligations. For example, a remaining interconnecting customer with a $5 million initial commitment could withdraw if its costs increased by $1.25 million, while a remaining interconnection customer with a $50 million initial commitment could withdraw only if its costs increased by $12.5 million.[57] Midwest Generators recommend that, to alleviate the disproportionate cost reallocation scheme, the standard should be revised to be an increase equal to the lower of 25 percent of the initial allocation or $2 million. Midwest Generators state that a maximum $2 million threshold will accommodate the average upgrade cost.[58] Acciona proposes that the threshold be reduced to the lesser of 10 percent or $2 million.[59]

c. Midwest ISO Answer

49. Midwest ISO states that the 25 percent threshold was a compromise based on stakeholder discussion and negotiation. Midwest ISO believes that reducing the limit to 10 percent, as suggested by Acciona, could provide a greater opportunity for projects to withdraw. Midwest ISO states that, although the proposed $2 million amount has some merit because it provides a certain amount that does not require calculation, it will give larger projects greater opportunity to withdraw. Midwest ISO also states that, because

[56] Transmittal Letter at 45-46.

[57] Midwest Generators at 10.

[58] *Id.* at 10-11.

[59] Acciona at 4.

the withdrawal of a larger project can cause even more concern to other projects in the MPFCA, it is not unreasonable to require larger projects to face the same percentage as other projects, even if it requires a higher dollar amount.[60]

d. Commission Determination

50. We accept Midwest ISO's proposed 25 percent threshold. We agree with Midwest ISO that if the threshold is revised to be an increase equal to the lower of 25 percent or $2 million, as suggested by Midwest Generators, there will be a greater opportunity for interconnection customers with significant cost responsibility to withdraw from an MPFCA. The suggestion to revise the threshold to the lower of 10 percent or $2 million raises the same issue, and adds the possibility that all interconnection customers may more easily terminate under a 10 percent cost impact. We disagree with Midwest Generators that the 25 percent standard affects large projects disproportionately; the point of the threshold is to require a similar, proportionate effect for a project to terminate. We find that it is not unduly discriminatory to apply a proportionately larger dollar threshold to large projects than to small projects under this uniform standard. We therefore accept this provision under the independent entity variation standard.

5. Irrevocable Security Under Article 6.1

a. Midwest ISO Proposal

51. Under Article 6.1 of the MPFCA, an interconnection customer is required to provide irrevocable security to cover its share of common use upgrades by the earlier of: (1) 30 calendar days prior to the due date of the first payment under payment schedule specified in Appendix A, or (2) the first date specified in Appendix A for the transmission owner to order equipment for installing the common use upgrade. If an interconnection customer fails to provide the acceptable irrevocable security, the interconnection customer will be terminated from the agreement, its interconnection request will be withdrawn from the transmission provider's interconnection queue, and the transmission provider may declare a breach under the interconnections customer's related GIA.[61]

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[60] Midwest ISO Answer at 25. As an example, Midwest ISO states that a project with a $50 million commitment that could more easily accommodate a cost increase, could withdraw based on a $2 million (4 percent) increase, rather than a $12.5 million threshold under the 25 percent standard.

[61] Transmittal Letter at 45-49

b. Comments

52. Acciona states that security must be provided much sooner to minimize construction delays for a project. Acciona proposes that Midwest ISO be required to revise Article 6.1 such that the interconnection customer be required to provide security at the earlier of: (1) 90 calendar days prior to the due date of the first payments specified in Appendix A, or (2) 60 days prior to the first date specified in Appendix A for the transmission owner to order equipment.[62]

c. Midwest ISO Answer

53. Midwest ISO states that it would not oppose making the revisions suggested by Acciona if directed by the Commission to do so. It anticipates, however, that negotiations among the parties in the event of a withdrawal will be necessary and notes that, in some circumstances, the parties may need to act quickly in order to provide funding (e.g., by the date that equipment must be ordered, rather than 60 days before).

54. Midwest ISO is in favor of retaining the proposed timeline to provide the irrevocable security because the lead time for payments and ordering equipment will differ for each MPFCA. Since interconnection customers must provide security by "the earlier of" the two dates and, because the parties will jointly negotiate the MPFCA based upon dates provided by the transmission owner, Midwest ISO states that this timeline should be sufficient to prevent unnecessary delays.[63]

d. Commission Determination

55. We accept Midwest ISO's proposed language under Article 6.1. We recognize that the MPFCA is new to Midwest ISO. As Midwest ISO gains experience with the MPFCA, it will have a better basis upon which to determine whether an earlier date may be more appropriate for an interconnection customer to provide irrevocable security. If an earlier date is warranted, Midwest ISO can submit a filing under FPA section 205 to propose one.

6. Suspension Under Article 3.1.2

a. Midwest ISO Proposal

56. The suspension provision in Article 3.1.2 of the MPFCA will not include the interconnection customer's right to suspend work for *force majeure* events and, instead,

[62] Acciona at 4.

[63] Midwest ISO Answer at 27.

Midwest ISO states that the provision will provide that the transmission owner may suspend work associated with the common use upgrades in the event that it has not received adequate funding due to a default by one or more interconnection customers.[64] Midwest ISO states that, to accommodate multiple interconnection customers in the MPFCA, the *force majeure* suspension provision must be deleted because permitting a single project involved in an MPFCA to suspend and avoid funding the common use upgrade would prevent the construction of the common use upgrade needed by related projects. Midwest ISO adds that the revision ensures that a transmission owner is not obligated to perform work or incur additional expenses associated with common use upgrade construction without adequate funding from the interconnection customers.[65]

b. <u>Comments</u>

57. Midwest Generators request that the right to suspend for a *force majeure* event be included in the MPFCA. They state that, under Midwest ISO's earlier queue reform amendments, an interconnection customer's suspension right was limited to *force majeure* events. Midwest Generators argue that Midwest ISO is proposing to further reduce an interconnection customer's ability to suspend construction and therefore ask the Commission to reject Midwest ISO's proposal.[66]

c. <u>Midwest ISO Answer and Supplemental Filing</u>

58. Midwest ISO states that any suspension by one interconnection customer would create "uncertainty and delay for the projects . . . or shift costs and risks on [other interconnection customers]."[67]

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[64] MPFCA, Article 3.1.2 in part states:

> Transmission Owner reserves the right, upon written notice to Interconnection Customers, to suspend, at any time, work by Transmission Owner and the incurrence of additional expenses associated with the construction and installation of the [common use upgrade], upon the occurrence of a Default, including a Default caused by an Interconnection Customer's failure to provide irrevocable security . . . .

[65] Midwest ISO Answer at 27.

[66] Midwest Generators at 7.

[67] Midwest ISO Answer at 28.

59. In its Supplemental Filing, Midwest ISO explains that the suspension provision in the GIA and the MPFCA serve the same function; that is, to ensure that delays in the construction of a generating facility do not delay the construction of the related upgrades to the transmission system that are needed to support other generators. For an MPFCA, these upgrades are the common use upgrades that are needed to support all of the interconnection customer signatories to the MPFCA. Midwest ISO states that, under the MPFCA, suspension by an interconnection customer is unnecessary because the MPFCA eliminates the additional risk involved in having multiple interconnection customers fund common use upgrades by requiring irrevocable security as an inherent part of the MPFCA.[68] Interconnection customers that execute an MPFCA fund common use upgrades in advance with irrevocable security, and that security is drawn down as needed to build the common use upgrades unless the interconnection customer desires to make payments in lieu of draws upon security. Midwest ISO adds that this methodology ensures that the common use upgrades will be constructed regardless of whether there is a delay related to the construction of one interconnection customer signatory's generation facility. Midwest ISO states that if the MPFCA provided any interconnection customer signatory with the right to suspend the MPFCA and the construction of the common use upgrade, the advantage of guaranteeing construction of the common use upgrade through advance payment by all interconnection customers would be lost and the purpose of the MPFCA would be frustrated.[69]

d. <u>Commission Determination</u>

60. We find that the proposed suspension provision meets the independent entity variation standard. Order No. 2003 provides that a generator can suspend its project for up to three years. It does so in order to provide generators with maximum reasonable flexibility to adjust to various business and other problems, thus encouraging new generation.[70] In the Queue Reform Order, the Commission found that the Midwest ISO region was facing serious queue issues, "problems that do not benefit customers or generators whose projects are likely to come to fruition," and therefore it was reasonable for Midwest ISO to apply a stricter suspension provision.[71] The Commission accepted, under the independent entity standard, Midwest ISO's *force majeure* suspension provision.

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[68] Supplemental Filing at 6.

[69] *Id*.

[70] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 177.

[71] Queue Reform Order, 124 FERC ¶ 61,183 at P 91.

61. Here, Midwest ISO explains that the MPFCA involves multiple interconnection customers who are committing to a common use upgrade. We agree with Midwest ISO that it would be impractical for one interconnection customer to suspend since the MPFCA involves multiple projects for the upgrade. If one interconnection customer were to exercise its right to suspend under *force majeure*, remaining interconnection customers would face uncertainty, delay, and additional costs. Therefore, given the complexity and the certainty needed in construction of an upgrade involving multiple parties, we find that it is just and reasonable for Midwest ISO to modify the suspension provision. We accept the suspension proposal under the independent entity standard.

7. Restudy Terms Under Article 2.2.5

a. Proposal

62. Midwest ISO proposes to add Article 2.2.5 to the MPFCA to provide that, if any interconnection customer withdraws from the MPFCA or fails to cure a breach resulting in termination, Midwest ISO will attempt to add, or "backfill," similarly situated requests to replace the withdrawn or terminated request.[72] If Midwest ISO is unable to implement a substitution, "and [Midwest ISO] deems it likely that another [common use upgrade] would be more prudent, [Midwest ISO] may, in its sole discretion after reasonable consultation with the [t]ransmission [o]wner, declare a restudy."[73]

b. Comments

63. Midwest Generators state that the proposed standards are too arbitrary and give Midwest ISO too much discretion to determine whether to pursue such a study. They contend that Article 2.2.5 should be revised to ensure that a restudy will occur only when it may lead to reduced costs for the remaining interconnection customers.[74] Acciona proposes that provisions be added to Article 2.2.5 so that if an interconnection customer is terminated and the Midwest ISO does not find a replacement, but proposes to reallocate costs, Midwest ISO or the relevant transmission owner would be required to provide an analysis to remaining interconnection customers confirming that the same common use upgrade facilities are still required.[75]

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[72] Transmittal Letter at 37.

[73] *Id.*

[74] Midwest Generators at 11.

[75] Acciona at 6.

c. Midwest ISO Answer

64. Midwest ISO states that Midwest Generators' request for a preemptive evaluation of the likely outcome of a restudy is unnecessary, unworkable, and ignores the fact that good utility practice is a requirement of the studies that produce the common use upgrades. The provisions under Article 2.2.5 are intended to permit Midwest ISO to "backfill" an interconnection customer that withdraws or breaches the MPFCA with the minimum need to restudy. Midwest ISO would perform a restudy if no "backfill" interconnection customer is available and if Midwest ISO determines that it is likely that another common use upgrade would be more prudent. Moreover, Midwest ISO states that it needs discretion to consider whether a restudy is needed on a case-by-case basis because each potential "backfill" opportunity and withdrawal will be unique. In most cases, Midwest ISO adds that it will work with interconnection customers and consult with the transmission owner, but to require it to consult with multiple parties that have varying and competing interests may prove to be unwieldy.

d. Commission Determination

65. We find that Midwest ISO's proposal is consistent with the Queue Reform Order in which the Commission accepted Midwest ISO's proposal to use group studies.[76] Article 2.2.5 of the MPFCA properly will give Midwest ISO the discretion to determine whether a restudy is necessary. We agree with Acciona, however, that Midwest ISO should provide any such analysis to the remaining interconnection customers to confirm that the same common use upgrades are still required. We will direct Midwest ISO to submit in a compliance filing revisions to the MPFCA providing that once an interconnection customer is terminated and Midwest ISO does not find a replacement, Midwest ISO will provide the remaining interconnection customers an analysis stating whether or not the same common use upgrades are needed, as well as the re-allocated costs for which each interconnection customer is responsible. We direct Midwest ISO to include these changes in a compliance filing to be submitted within 30 days of the date of this order.

8. Proposed Revisions to the FCA and MPFCA by ATC

66. While ATC generally supports Midwest ISO's proposal, it states that there are some areas of the FCA and the MPFCA where the terms are either in conflict with other

[76] Queue Reform Order, 124 FERC ¶ 61,183 at P 114.

terms or are confusing. Thus, ATC proposes revisions to improve the language in the agreements.[77]

a. Article 2 of the FCA

i. Comments

67. ATC states that Articles 2.2.2 and 2.2.3 of the FCA are confusing and are in direct conflict with other articles of the FCA and should be revised. Specifically, ATC states that Article 2.2.2 conflicts with Article 8.2 because Article 2.2.2 requires the interconnection customer to pay the transmission owner and transmission provider "damages" as well as the "costs and expenses" incurred as a result of a default, while Article 8.2 expressly absolves all parties, including the interconnection customer, from all "damages." Accordingly, ATC proposes to delete the following language: "the amount of damage billed to interconnection customer by transmission provider or transmission owner for any damages, including" and "damages" from Article 2.2.2, subsection (ii). ATC states that this revision will also resolve a conflict with Article 6.2 relating to invoices.[78]

68. ATC also states that Article 2.2.3 of the proposed FCA conflicts with other provisions of the FCA. ATC states that the phrase "through the date of termination" should be deleted from Article 2.2.3 because it appears to limit the interconnection customer's obligation to pay for network upgrades governed by the FCA. ATC states that the underlying assumption of the language in Article 2.2.3 is that the termination of the FCA equates to a termination of network upgrades, which could potentially jeopardize the transmission system's reliability. ATC states that retaining this language could potentially lead to disputes between the interconnection customer and transmission owner. ATC also recommends deleting this same language and adding "by transmission owner and transmission provider" in Article 2.5 of the FCA.[79]

ii. Midwest ISO Answer

69. As a general matter, Midwest ISO states that all the revisions proposed by ATC would rephrase certain sections of the FCA and MPFCA. Midwest ISO states that because the FCA and MPFCA are *pro forma* agreements, developed with other

[77] ATC at 5-6. ATC's proposed revisions are identified on the attachment to this order under Appendix A.

[78] ATC at 8 & n.7.

[79] *Id*. 9-10.

stakeholders, to apply to multiple transmission owners and interconnection customers, ATC's proposed revisions would be more appropriately raised and vetted in the stakeholder process. Accordingly, Midwest ISO supports the filed FCA and MPFCA without any changes. However, Midwest ISO notes that it is committed to working through the stakeholder process and anticipates that further discussions with stakeholders may result in future proposals to refine the FCA and MPFCA.[80]

70. Regarding ATC's specific revisions, Midwest ISO contends that they are unnecessary. According to Midwest ISO, the reference in Article 2.2.2 addresses "damages" in the event of a default by the interconnection customer and the language in Article 8.2 of the FCA provides for general immunity from consequential damages under any provision of the FCA. Midwest ISO states that it is not inconsistent to have protection from consequential damages for actions under the FCA, but to require a defaulting party to pay damages for breaching the agreement itself.[81]

71. Midwest ISO also states that ATC's proposed revision to Article 2.2.3 is unnecessary. According to Midwest ISO, the FCA provides for the interconnection customer's responsibility for "any actual costs which transmission owner (A) reasonably incurs in winding up work and construction demobilization and (B) reasonably incurs to ensure the safety of persons and property and the integrity and safe and reliable operation of the transmission owner transmission system."[82] Therefore, Midwest ISO asserts that ATC's concern with limitations on the interconnection customer's responsibility or the danger that the transmission system will be left in an unsafe condition are unfounded.[83]

iii. <u>Commission Determination</u>

72. We agree with Midwest ISO that the provision for "damages" in Article 2.2.2. is not inconsistent with Article 8.2. Article 2.2.2 requires that a defaulting party to pay damages for its default by providing that, as a condition of curing a breach, an

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[80] Midwest ISO Answer at 31-32.

[81] Midwest ISO notes that a similar scheme is included in the Commission-approved GIA, Article 18.3 provides protection from liability for consequential damages while Article 17.1.2 provides possible damages in the event of default. *Id.* at 32.

[82] *Id.* at 33.

[83] Midwest ISO notes that the Commission-approved GIA, in Article 2.4, also provides for limitations on the extent to which costs must be paid after termination and places a duty on the parties to use reasonable efforts to mitigate any costs and charges arising as a consequence of termination. *Id.*

interconnection customer must pay damages resulting from the default. Article 8.2 provides that no party to the agreement will be liable to any other party for consequential damages (e.g., loss of profit or revenue, loss of the use of equipment).

73. Also, we find that ATC's proposed revision in Article 2.2.3 is not necessary. ATC assumes that in the event of termination, the term "through the date of termination" will limit an interconnection customer's obligation to pay the transmission owner and thereby result in termination of the network upgrade. We do not agree. As Midwest ISO indicates, the interconnection customer is obligated to pay for all costs through the date of termination, plus any actual costs that the transmission owner reasonably incurs in completing the network upgrade. Accordingly, there is no evidence that termination of the agreement will necessarily equate to a termination of network upgrade construction, as ATC assumes.

74. Therefore, we find that the language in Articles 2.2.2, 2.2.3, and 8.2 is just and reasonable and decline to direct any changes.

b. Article 3.1.2.1 of the FCA

i. Comments

75. ATC proposes to revise Article 3.1.2.1 of the FCA because consequences associated with the interconnection customer's right to suspend for a *force majeure* event are in conflict with the right to exercise suspension and are confusing. ATC states that three specific provisions within Article 3.1.2.1 are irreconcilable:

> Interconnection Customer reserves the right, upon ten (10) days' advance written notice to Transmission Provider and Transmission Owner, **to suspend all work by Transmission Owner** associated with the construction and installation of the Network Upgrades and . . . .
>
> Suspension will **only** apply to the Interconnection Customer milestones and Interconnection Facilities described in the appendices of this Agreement.
>
> In the event that Interconnection Customer suspends work pursuant to this Article, **no construction duration, timelines and schedules set forth in Appendix A shall be suspended during the period of suspension unless ordered by a Governmental Authority**, with such order being the Force Majeure event causing the suspension.

ATC asserts that the first sentence indicates that the interconnection customer's right to suspend directs the transmission owner to suspend all work by the transmission owner. The second sentence provides that interconnection customer's suspension right does not apply to the transmission owner's work, but only applies to the interconnection customer's milestones and its interconnection facilities. ATC adds that the third sentence above indicates that "no construction duration, timelines and schedules" will be suspended, unless it is ordered by a governmental authority, not the exercise of suspension right by the interconnection customer.[84]

76. ATC recommends that the following language to be deleted from Article 3.1.2.1: "Suspension will only apply to the Interconnection Customer milestones and Interconnection Facilities described in the appendices of this Agreement;" "Network Upgrades, System Protection Facilities and Transmission Owner Facilities will be constructed on the scheduled . . . or security shall be released upon the determination that the Network Upgrades and System Protection Facilities will no longer be constructed;" and "In the event that Interconnection Customer suspends work pursuant to this Article . . . with such order being the Force Majeure event causing the suspension."[85] ATC contends that these revisions will preserve the interconnection customer's right to suspend transmission owner's work and reduce the opportunity for confusion or conflict between the parties.

ii. <u>Midwest ISO Answer and Supplemental Filing</u>

77. Midwest ISO states that ATC's concern is that the suspension of all work during the occurrence of a *force majeure* event under this provision conflicts with the provision that "no construction duration, timelines and schedules set forth in Appendix A shall be suspended during the period of suspension unless ordered by a Governmental Authority, with such order being the Force Majeure event causing the suspension."[86] Midwest ISO states that it is necessary to retain this language to maintain consistency with the GIA.[87] Moreover, according to Midwest ISO, it is not inconsistent to suspend work on the project and have timelines and schedules continue.[88]

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[84] ATC at 12-13.

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

[86] Midwest ISO Answer at 35-36.

[87] *Id.* at 36 (citing GIA, Article 5.16.3).

[88] For example, Midwest ISO states that for long-lead time items, the transmission owner may require payments and could proceed to acquire the necessary equipment in preparation for construction even while a *force majeure* event at the actual construction site prevented activity there. *Id.*

78. In the Supplemental Filing, Midwest ISO states that it did not intend for Article 3.1.2.1 of the FCA to provide the interconnection customer with a right to suspend work on the transmission owner's network upgrades or interconnection facilities.[89] Midwest ISO states that it does not object to revising the FCA to more closely track the language in the *pro forma* GIA if so directed by the Commission. To that end, it proposes the following edit to Article 3.1.2.1 to incorporate the language in the *pro forma* GIA more clearly into the FCA:

> ~~Interconnection Customers reserves the right, upon then (10) days' advance written notice to Transmission Provider and Transmission Owner, to suspend, all work by Transmission Owner associated with the construction and installation of the Network Upgrades and System Protection Facilities only if~~ Provided that such suspension is permissible under the authorizations, permits or approvals granted for the construction of the Network Upgrades and System Protection Facilities Interconnection Customers will not suspend unless a Force Majeure event occurs. Interconnection Customers must provide written notice of its request for suspension to Transmission Provider and Transmission Owner, and provide a description of the Force Majeure event that is acceptable to the Transmission Provider. Suspension will only apply to the Interconnection Customer milestones and Interconnection Facilities described in the appendices of this Agreement.

79. In regard to the inquiry in the October 20 Letter regarding Article 3.1.2.1 to explain, with examples as appropriate, what work, on what facilities, the interconnection customer and transmission owner would suspend if the interconnection customer suspends for a *force majeure* event, Midwest ISO states that this section follows the language in the GIA and applies the same standard to the FCA by limiting suspension to the interconnection customer milestones and interconnection facilities described in the FCA's appendices. Midwest ISO explains that the FCA is used for network upgrades on the transmission system owned by an affected system transmission owner who is a transmission owner other than the owner of the transmission system where the interconnection customer will interconnect.

80. Midwest ISO states that because the suspension of the related FCA would only affect the facilities listed in the appendices of the FCA, the interconnection facilities would not be listed in the appendices of an FCA, even though they are referenced in the definition of "Network Upgrades" in Article 1.21 of the FCA. Interconnection facilities

[89] Supplemental Filing at 7-8.

would not be built under an FCA because they are defined as being located on the interconnection customer's side of the point of interconnection, which is on the direct connect transmission owner's transmission system.

iii. Commission Determination

81. We agree with ATC that certain provisions of Article 3.1.2.1 pertaining to suspension of work contain confusing language and do not follow similar provisions of Midwest ISO's *pro forma* GIA.[90] As ATC asserts, the first sentence read in conjunction with the second sentence is confusing. The first sentence indicates that an interconnection customer's written notice to suspend due to a *force majeure* event will "suspend all work" by a transmission owner. The second sentence states that "suspension will only apply to the Interconnection Customer milestones and Interconnection Facilities. . . ." Therefore, to reconcile these sentences, we accept Midwest ISO's proposed edit in its Supplemental Filing that tracks the language in Article 5.1.6 of the *pro forma* GIA. We direct Midwest ISO to modify Article 3.1.2.1 of the FCA, in a compliance filing to be submitted within 30 days of the date of this order.

82. We do not agree with ATC that suspension of all work during the occurrence of a *force majeure* event under Article 3.1.2.1 conflicts with the provision that "no construction duration, timelines and schedules set forth in Appendix A shall be suspended during the period of suspension unless ordered by a Governmental Authority, with such order being the Force Majeure event causing the suspension." Even if an interconnection customer exercises its right to suspend in a *force majeure* event, the construction of the network upgrade, including timelines and schedules set forth in Appendix A of the FCA, may continue. Nothing in this language limits the interconnection customer's right to suspend under this provision. We find that this language follows the provisions contained in *pro forma* GIA and is just and reasonable.

c. Article 6.1 of the FCA

i. Comments

83. ATC states that Article 6.1 of the FCA requires clarification regarding security.[91] First, ATC contends that Article 6.1 contains conflicting guidance on the amount of the security that the interconnection customer must provide. According to ATC, a sentence in Article 6.1 of the FCA suggests that the amount of security is the amount of the next monthly obligation under Appendix A:

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[90] GIA, Article 5.16.3.

[91] ATC at 15-19.

> Interconnection Customer shall, subject to the standards of this Article 6.1, maintain a parental guarantee, surety bond, letter of credit, or some other credit assurance **sufficient to meet its monthly payment obligation under Article 3.2.1, as specified in the following paragraph**.

84. Yet, ATC asserts, the following language in the same Article indicates that the amount of the security is to be reduced "on a dollar-for-dollar basis" to reflect the payment received from the interconnection for the prior month's invoice:

> Interconnection Customer shall maintain as of the first day of each month beginning on the due date for Interconnection Customer's first payment under the payment schedule specified in Appendix A . . . a parental guarantee, surety bond or letter of credit in an amount sufficient to cover the applicable costs and cost commitments required of the Party responsible for building the facilities . . . and **shall be reduced on a dollar-for-dollar basis for payments made to the Transmission Owner for these purposes as defined and established under Appendix A**.

85. ATC believes that the intent of Article 6.1 is to track the process used in the GIA; that is, to indicate that the interconnection customer is to have posted sufficient security for any remaining amounts due to the transmission owner as each month elapses and each monthly invoice is received and thereafter paid.[92]

86. Second, ATC states that the language in Article 6.1 indicating that the amount of the security is to be reduced based on the "monthly payment schedule" warrants revision. According to ATC, the purpose of the security is to ensure that, in the event that the interconnection customer does not pay the amounts invoiced, there is sufficient security for the transmission owner to receive payment for the amounts the transmission owner has incurred. Therefore, ATC proposes to revise the language to indicate that the amount of the security can be reduced based on the amounts *paid* by the interconnection customer.

87. Finally, ATC argues that the language in Article 6.1 that requires the interconnection customer to continue to provide security after the network upgrades come into operation is confusing. It is unclear, according to ATC, why the interconnection customer would be required to maintain security after the network upgrades have been placed in service since, presumably, after the network upgrades are operational, the interconnection customer would have made the monthly payments and the amounts

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[92] *Id.* at 16.

received by the transmission owner would be sufficient to cover the costs of the network upgrades. Therefore, ATC proposes to delete the word “after” and replace it with “until” to reflect the interconnection customer’s obligation to keep and maintain an adequate amount of security *until* the network upgrades are in placed in service, but not for a longer period.[93]

ii. Midwest ISO Answer and Supplemental Filing

88. Midwest ISO states that ATC’s proposed revisions in Article 6.1 are unnecessary. Midwest ISO states that the language in this section generally tracks the Commission-approved Prairie State FCA. In addition, according to Midwest ISO, these provisions should be flexible to allow different transmission owners and interconnection customers the ability to agree to different credit arrangements.[94] Furthermore, Midwest ISO suggests that ATC can specify its arrangements in the appendices of the FCA if it determines that additional specificity is needed for its FCA.

89. In the Supplemental Filing, Midwest ISO asserts that adopting ATC’s proposed revisions to Article 6.1 may result in unintended consequences for other transmission owners who handle security and payment differently than ATC. It explains that ATC is different from other transmission owners because it operates as a limited liability company, electing to be taxed as a partnership, and is a for-profit, transmission only company. Midwest ISO emphasizes that the transmission owners in the Midwest ISO footprint have their own procedures for handling security and financing issues; accordingly, the *pro forma* FCA and MPFCA must be flexible enough to accommodate various methods. Midwest ISO advocates that ATC’s proposed revisions to Article 6.1 are better addressed with all stakeholders in the Midwest ISO’s Interconnection Process Task Force.[95]

90. Midwest ISO states that the first paragraph of Article 6.1 that references a “monthly” payment obligation pursuant to Article 3.2.1 applies to any monthly payments under Attachment FF and requires an interconnection customer to maintain security to support repayments in certain circumstances. Specifically, Midwest ISO explains that Article 3.2.1 describes the costs of the interconnection and Article 3.2.2.1 references Attachment FF of the Midwest ISO Tariff, which governs repayment to the interconnection customer of differing percentages of these costs in certain circumstances. Attachment FF includes an option for the transmission owner to elect to refund the entire

[93] *Id.* at 17-18.

[94] Midwest ISO Answer at 38.

[95] Supplemental Filing at 11-12.

amount paid by the interconnection customer and then collect back the funds as a monthly charge. Midwest ISO asserts that such a security requirement is warranted to ensure repayment under Attachment FF because, for network upgrades built under an FCA or MPFCA, there is no ongoing relationship for interconnection services as exists for parties under the GIA.[96]

91. Midwest ISO explains that ATC does not use the generally applicable Attachment FF described above, but provides 100 percent repayment of network upgrade costs under its specific Attachment FF. As a result, the monthly repayment option referenced in Attachment FF would not apply to ATC, but could be used by other transmission owners. Therefore, Midwest ISO argues that adopting ATC's proposed revisions to Article 6.1 may clarify ATC's processing of security, but could limit the options available to transmission owners.

92. Midwest ISO states that the reference to the need for an interconnection customer to maintain security after the interconnection facility is placed in service may have implications for the use of Attachment FF options by other transmission owners. Specifically, Midwest ISO notes that ATC's proposal to delete the reference to "after" and to replace it with "until" would also eliminate the reference to Article 3.2.1 and might affect the application of Attachment FF by other transmission owners. This proposed revision would effectively preclude a requirement for the interconnection customer to provide security to make monthly payment under one of the options in Attachment FF. Therefore, Midwest ISO reiterates that ATC's proposed revisions to Article 6.1 are unnecessary, but is willing to consider such revisions in the Midwest ISO's Interconnection Process Task Force stakeholder proceedings.

iii. <u>Commission Determination</u>

93. We find that it is reasonable for Midwest ISO to maintain provisions in Article 6.1 that would facilitate a generally applicable Attachment FF with options available to transmission owners. As Midwest ISO explains, the language must provide the flexibility necessary for transmission owners and interconnection customers to agree on different credit arrangements. Any specific arrangements can be accommodated in the FCA's appendices. Thus, we accept the provisions in Article 6.1 of the FCA. However, we expect Midwest ISO to continue to discuss any necessary revisions to this section during

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

its Interconnection Process Task Force stakeholder meetings and make any appropriate changes.[97]

d. Article 9 of the FCA

i. Comments

94. ATC contends that Article 9 of the FCA is insufficient because it fails to include a cross-default provision. According to ATC, an interconnection customer could default under the terms of the companion GIA, and that a GIA could be terminated by the transmission owner that was a counterparty to the GIA, while the transmission owner that is a party to the FCA would continue to be required to construct network upgrades that were required by a Generating Facility that would no longer be subject to a GIA. As a result, the transmission owner that was a party to the FCA would continue to build network upgrades that would no longer be necessary to support any new Generating Facility. To avoid this potential situation, ATC recommends adding the following language to the FCA: "(g) Default by the Interconnection Customer under the terms of the GIA which requires the Network Upgrades to be constructed under this Agreement."[98] ATC also notes that a cross default provision is included in Article 6.1 of the MPFCA.[99]

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[97] Midwest ISO admits that the provisions of Article 6.1 were not discussed in depth during the stakeholder meetings for the August 21 Filing, and states that it is open to discussing with stakeholder's revisions to Article 6.1, including ATC's proposed revisions. *Id.* at 14.

[98] ATC at 19-21.

[99] The relevant provision that ATC references is as follows:

> If an Interconnection Customer fails to provide acceptable irrevocable security pursuant to Article 6.1, Interconnection Customer will be terminated from this Agreement, its Interconnection Request will be withdrawn from the Transmission Provider's interconnection queue, and Transmission Provider may declare a breach under Interconnection Customer's related GIA, if any, and seek termination thereof.
>
> If an Interconnection Customer withdraws pursuant to this option, the unused portion of its irrevocable security will be released or refunded, but Transmission Provider may declare a breach under Interconnection Customer's related GIA, if

(continued…)

ii. Midwest ISO Answer & Supplemental Filing

95. Midwest ISO states that it understands ATC's concern and has discussed the use of cross-default provisions with its stakeholders. However, Midwest ISO states that it agreed with concerns that obligations to one transmission owner in a GIA should not be expressly listed in the FCA because binding a non-party (a different transmission owner) would raise additional complications.[100] Also, according to Midwest ISO, the presumption is that the defaulting customer under the GIA would inform the transmission owner with the FCA of its default and terminate the FCA. Midwest ISO also states that the MPFCA provides some additional guidance regarding the failure to provide additional security. Article 6.1 of the MPFCA indicates that the interconnection customer would be "deemed withdrawn" from the MPFCA and subject to a breach of its GIA if it fails to provide additional security, if needed, after a project withdraws from the MPFCA.[101]

96. In the Supplemental Filing, Midwest ISO reiterates that it agreed with concerns raised by stakeholders that one agreement (the FCA) should generally not list obligations to another transmission owner in a separate agreement (the GIA). To do so, would bind a non-party transmission owner to automatic termination of its agreement based on the interconnection customer's action under a separate agreement. Midwest ISO explains that if a cross-default provision were included, the parties of the FCA would not have agreed to the terms of the GIA that govern default of the separate GIA, and any events of termination under the GIA would automatically affect the FCA.

97. Midwest ISO claims that it is unlikely that a transmission owner would be obligated to continue to build network upgrades to support a GIA with an interconnection customer that defaulted, as ATC asserts. Midwest ISO states that an interconnection customer defaulting under its GIA would presumably not want to continue funding network upgrades under the FCA and inform the transmission owner with the FCA. This would allow the defaulting interconnection customer to trigger Article 2.2.3 of the FCA that obligates the transmission owner with the FCA to wind up its costs in the event of termination.[102]

> any, and its Interconnection Request will be withdrawn from the Transmission Provider's interconnection queue.

[100] Midwest ISO Answer at 39.

[101] *Id.* at 39.

[102] Supplemental Filing at 17.

98. Regarding the cross-default provision in the *pro forma* MPFCA that ATC references, Midwest ISO explains that that particular provision:

> addresses the parties' existing ability to pursue default under the MPFCA as a violation of the Generation Interconnection Procedures and GIA requirements to enter into agreements with affected systems that are necessary to support the interconnection. The Commission has explained that the parties have an obligation under the GIA to enter into the necessary FCA(s) with affected systems to build upgrades needed to support the interconnection. As a result of this obligation, the two sentences from Article 6.1 of the MPFCA indicate that the Midwest ISO will withdraw an [i]nterconnection [c]ustomer's [i]nterconnection [r]equest if it: (1) fails to provide irrevocable security for its related MPFCA or (2) withdraws from the MPFCA because its costs increase. In either case, the [i]nterconnection [c]ustomer is violating its responsibility under the [Generation Interconnection Procedures] and GIA to enter into an MPFCA and the Midwest ISO may declare a breach under [i]nterconnection [c]ustomer's related GIA on that basis without a cross default provision. This language in the MPFCA makes the obligation more transparent for parties that execute the MPFCA.[[103]]

iii. <u>Commission Determination</u>

99. We agree with Midwest ISO that the FCA should not list obligations of another transmission owner under the GIA. This could potentially raise contractual complications since a non-party transmission owner would be subject to automatic termination of its agreement based on the interconnection customer's action under a separate agreement. As Midwest ISO describes, it would be beneficial to the terminating interconnection customer to inform the transmission owner of its default as soon as possible in order to avoid any additional costs. The transmission owner under the FCA is required to wind-up costs in the event of termination. Therefore, we find that ATC's proposal to add a cross-default provision to Article 9 of the FCA is unnecessary.

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[103] *Id.* at 17-18 (internal citations omitted).

e. MPFCA

i. Comments

100. ATC states that the MPFCA contains similar inconsistencies as the FCA and should be revised accordingly. ATC states that Article 2.2 of the MPFCA contains the same language which obligates the interconnection customer to pay the transmission owner "through the date of termination" while Article 3.1.1 of the MPFCA requires the interconnection customer to "pay, consistent with section 3.2, the cost of the [common use upgrade]." ATC states that this inconsistency can be removed if the language from section 2.2 of the MPFCA "through the date of termination" were deleted.[104]

101. Additionally, ATC contends that section 6.1 of the MPFCA contains similar inconsistency regarding the amount and timing of the security to be provided by the interconnection customers. Furthermore, ATC states that the language "as specified in the following paragraph" is incorrect because the referenced text is not included in the MPFCA. Thus, ATC proposes revisions throughout Article 6.1.

ii. Midwest ISO Answer

102. Midwest ISO believes that ATC's proposed revisions to the MPFCA are unnecessary. Midwest ISO states that it understands the desire for certainty concerning security in Article 6.1, but credit arrangements vary among transmission owners and Midwest ISO does not want to limit options for parties to negotiate among themselves. Midwest ISO notes that ATC can include its arrangements in more detail in the appendices of FCAs or MPFCAs that it executes without the need to revise the text here. In addition, for an MPFCA, an interconnection customer would not need to pay the entire share if it terminates but a "backfill" interconnection customer is found.[105]

f. Commission Determination

103. As discussed above in reference to Article 2.2.3 of the FCA,[106] we do not agree that the phrase "through the date of termination" should be deleted. The language in the FCA and MPFCA provides that the interconnection customer is obligated to pay for all costs through the date of termination, plus any actual costs that the transmission owner reasonably incurs in completing the network upgrade.

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[104] ATC at 22.

[105] Midwest ISO Answer at 42 (citing MPFCA at Article 6.1).

[106] *See* discussion *supra* at P 73.

104. Regarding ATC's proposed revisions throughout Article 6.1 of the MPFCA, as discussed above in Article 6.1 of the FCA,[107] we find that it is reasonable for Midwest ISO to maintain provisions that would facilitate different methods of credit and security arrangements. However, as stated above, we expect Midwest ISO to continue to discuss any necessary revisions to this section at Midwest ISO's Interconnection Process Task Force stakeholder meetings.

105. Regarding the phrase "as specified in the following paragraph" in this Article, we agree with ATC that the phrase should be deleted since there is no "following paragraph" that it references. Therefore, we direct Midwest ISO to delete the phrase "as specified in the following paragraph" in a compliance filing to be submitted within 30 days of the date of this order.

<u>The Commission orders</u>:

(A) Midwest ISO's tariff sheets are hereby conditionally accepted, effective October 20, 2009, as discussed in the body of this order.

(B) Midwest ISO is hereby directed to make a compliance filing within 30 days of the date of this order modifying its proposed tariff revisions, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[107] *See* discussion *supra* at P 93.

Appendix A

ATC's Proposed Revisions are listed below:

FCA

2.2.2 Termination Upon Default. In the event of a Default by a Party, the Non-Breaching Party or Parties shall have the termination rights described in Articles 9 and 10; provided, however, if an event described in part (c) of Article 9.1 has not occurred, and provided the Default does not pose a threat to the reliability of the Transmission Owner Transmission System, neither Transmission Provider nor Transmission Owner may terminate this Agreement if Interconnection Customer is the Breaching Party and Interconnection Customer (i) has undertaken, in accordance with Article 9.2 to cure the Breach that led to the Default and has failed to cure the Breach for reasons other than Interconnection Customer's failure to diligently commence reasonable and appropriate steps to cure the Breach within the thirty (30) days allowed by Article 9.2, and (ii) compensates Transmission Provider or Transmission Owner within thirty (30) days for ~~the amount of damage billed to Interconnection Customer by Transmission Provider or Transmission Owner for any damages, including~~ costs and expenses, incurred by Transmission Provider or Transmission Owner as a result of such Default. In the event of an occurrence described in part (c) of Article 9.1, and providing the Default does not pose a threat to the reliability of the Transmission Owner Transmission System, the Non-Breaching Party or Parties shall not terminate this Agreement provided that the Breaching Party provided an assurance of payment acceptable to the Non-Breaching Party, and pays any applicable ~~damages~~ <u>costs and expenses incurred by Transmission Provider or Transmission Owner as a result of such Default</u>.

2.2.3 Consequences of Termination. In the event of a termination by any Party, other than a termination by Interconnection Customer due to a Breach by Transmission Owner, Interconnection Customer must pay Transmission Owner all amounts still due and payable for construction and installation of the Network Upgrades and System Protection Facilities (including, without limitation, any equipment ordered related to such construction), plus all out-of-pocket expenses incurred by Transmission Owner in connection with the construction and installation of the Network Upgrades and System Protection Facilities, ~~through the date of termination,~~ plus any actual costs which Transmission Owner (A) reasonably incurs in winding up work and construction demobilization and (B) reasonably incurs to ensure the safety of persons and property and the integrity and safe and reliable operation of the Transmission Owner Transmission System. Transmission Owner agrees to use Reasonable Efforts to minimize such costs.

2.5 Termination Obligations. Upon any termination pursuant to this Agreement, Interconnection Customer shall be responsible for the payment of all costs or other contractual obligations incurred ~~prior to the termination date~~ <u>by Transmission Owner and</u>

Transmission Provider including previously incurred capital costs, penalties for early termination, costs of removal and site restoration.

3.1.2.1 Right to Suspend for Force Majeure Event. Interconnection Customer reserves the right, upon ten (10) days' advance written notice to Transmission Provider and Transmission Owner, to suspend all work by Transmission Owner associated with the construction and installation of the Network Upgrades and System Protection Facilities only if a Force Majeure event occurs. Interconnection Customer must provide written notice of its request for suspension to Transmission Provider and Transmission Owner, and provide a description of the Force Majeure event that is acceptable to the Transmission Provider. ~~Suspension will only apply to the Interconnection Customer milestones and Interconnection Facilities described in the appendices of this Agreement.~~ Prior to suspension, Interconnection Customer must also provide security acceptable to the Transmission Owner, equivalent to the higher of $5 million or the total cost of all Network Upgrades, Transmission Owner's System Protection Facilities, and Distribution Upgrades listed in Appendix A of this Agreement. ~~Network Upgrades, System Protection Facilities, and Transmission Owner Interconnection Facilities will be constructed on the schedule described in the appendices of this Agreement unless: (1) construction is prevented by the order of a Governmental Authority; (2) the Network Upgrades and System Protection Facilities are not needed by any other project; or (3) Transmission Owner or Transmission Provider determines that a Force Majeure event prevents construction. In the event of (1), (2), or (3) security shall be released upon the determination that the Network Upgrades and System Protection Facilities will no longer be constructed.~~ If suspension occurs, Interconnection Customer shall be responsible for the costs which Transmission Owner incurs (i) in accordance with this Agreement prior to the suspension, (ii) in suspending such work, including any costs incurred to perform such work as may be necessary to ensure the safety of persons and property and the integrity of the Transmission Owner Transmission System and, if applicable, any costs incurred in connection with the cancellation of contracts and orders for material which Transmission Owner cannot reasonably avoid, and (iii) reasonably incurs in winding up work and construction demobilization; provided, however, that, prior to canceling any such contracts or orders, Transmission Owner shall obtain Interconnection Customer's authorization. Interconnection Customer shall be responsible for all costs incurred in connection with Interconnection Customer's denial of authorization to cancel such contracts or orders. Interest as provided in Article 3.2.2.2 on amounts paid by Interconnection Customer to Transmission Owner for the design, procurement, construction and installation of the Network Upgrades and System Protection Facilities, shall not accrue during periods in which Interconnection Customer has suspended construction under this Article 3.1.2. Transmission Owner shall invoice Interconnection Customer pursuant to Article 6 and use Reasonable Efforts to minimize its costs. ~~In the event that Interconnection Customer suspends work pursuant to this Article, no construction duration, timelines and schedules set forth in Appendix A shall be~~

~~suspended during the period of suspension unless ordered by a Governmental Authority, with such order being the Force Majeure event causing the suspension~~.

6.1 Creditworthiness. By the earlier of (i) thirty (30) days prior to the due date for Interconnection Customer's first payment under the payment schedule specified in Appendix A or (ii) the first date specified in Appendix A for the ordering of equipment by Transmission Owner for installing the Network Upgrades and System Protection Facilities, Interconnection Customer shall provide Transmission Owner, at Transmission Owner's option, with <u>sufficient security in </u>a form ~~of adequate assurance of creditworthiness~~ reasonably acceptable to Transmission Owner<u>, at Interconnection Customer's option, of either cash, a letter of credit, surety bond, or parental guarantee</u>. If ~~the adequate assurance~~ <u>security </u>is a parental guarantee or surety bond, it must be made by an entity that meets the creditworthiness requirements of Transmission Owner, have terms and conditions reasonably acceptable to Transmission Owner and guarantee payment of the amount specified in the next paragraph of this Article 6.1. If the adequate assurance is a letter of credit, it must <u>in the initial amount set forth in Appendix A, </u>be issued by a bank reasonably acceptable to Transmission Owner, specify a reasonable expiration date and may provide that the ~~maximum~~ <u>initial</u> amount available to be drawn under the letter shall reduce on a monthly basis in accordance ~~with the monthly payment schedule~~ <u>by the amount paid to Transmission Owner</u>. The surety bond must be issued by an insurer reasonably acceptable to Transmission Owner, specify a reasonable expiration date and may provide that the ~~maximum~~ <u>initial</u> amount <u>set fourth on Appendix A</u> assured under the bond shall reduce on a monthly basis in accordance with the ~~monthly payment schedule~~ <u>payments received by Transmission Owner</u>. ~~After~~ <u>Until</u> the Network Upgrades and System Protection Facilities have been placed in service and until Interconnection Customer fully compensates Transmission Owner for construction of the Network Upgrades and System Protection Facilities, Interconnection Customer shall, ~~subject to the standards of this Article 6.1,~~ maintain a parental guarantee, surety bond, letter of credit, or some other credit assurance sufficient to meet its ~~monthly payment~~ obligation<u>s</u> ~~under Article 3.2.1, as specified in the following paragraph. Interconnection Customer's estimated liability under Article 3.2.1 is stated in Appendix A~~ <u>under this Agreement</u>. ~~Interconnection Customer shall maintain as of the first day of each month beginning on the due date for Interconnection Customer's first payment under the payment schedule specified in Appendix A, and continuing through to the Commercial Operation Date, a parental guarantee, surety bond or letter of credit in an amount sufficient to cover the applicable costs and cost commitments required of the Party responsible for building the facilities pursuant to the construction scheduled developed in this Agreement for designing, engineering, seeking regulatory approval from any Governmental Authority, constructing, procuring and installing the facilities and shall be reduced on a dollar-for-dollar basis for payments made to the Transmission Owner for these purposes as defined and established under Appendix A.~~

6.2 Invoice. Each Party shall submit to the other Party, on a monthly basis, invoices of amounts due, if any, for the preceding month. Each invoice shall state the month to which the invoice applies and fully describe the services and equipment provided. The Parties may discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in which case all amounts a Party owes to the other Party under this Agreement, including interest payments or credits, shall be netted so that only the net amount remaining due shall be paid by the owing Party.

8.2 Consequential Damages. In no event shall any Party be liable to any other Party under any provision of this Agreement for any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages, including but not limited to loss of profit or revenue, loss of the use of equipment, cost of capital, cost of temporary equipment or services, whether based in whole or in part in contract, in tort, including negligence, strict liability, or any other theory of liability; provided, however, that damages for which a Party may be liable to another Party under another agreement will not be considered to be special, indirect, incidental, or consequential damages hereunder.

9.1 Events of Breach. A Breach of this Agreement shall include:

(a) The failure to pay any amount when due;

(b) The failure to comply with any material term or condition of this Agreement, including but not limited to any material Breach of a representation, warranty or covenant made in this Agreement;

(c) If a Party (i) is adjudicated bankrupt; (ii) files a voluntary petition in bankruptcy under any provision of any federal or state bankruptcy law or shall consent to the filing of any bankruptcy or reorganization petition against it under any similar law; (iii) makes a general assignment for the benefit of its creditors; or (iv) consents to the appointment of a receiver, trustee or liquidator;

(d) Assignment of this Agreement in a manner inconsistent with the terms of this Agreement;

(e) Failure of a Party to provide such access rights, or a Party's attempt to revoke access or terminate such access rights, as provided under this Agreement or the related GIA; ~~or~~

(f) Failure of a Party to provide information or data to another Party as required under this Agreement, provided the Party entitled to the information or data under this Agreement requires such information or data to satisfy its obligations under this Agreement; <u>or</u>

(g) Default by the Interconnection Customer under the terms of the GIA which requires the Network Upgrades to be constructed under this Agreement.

MPFCA

2.2.3 Consequence of Termination. In the event of a termination by or of any Party, other than a termination by Interconnection Customer due to a Breach by Transmission Owner, each Interconnection Customer whose participation in this Agreement is terminated must pay to the Transmission Owner the Interconnection Customer's proportionate share of all amounts still due and payable for construction and installation of the CUU (including, without limitation, any equipment ordered related to such construction), plus all out-of-pocket expenses incurred by Transmission Owner in connection with the construction and installation of the CUU, ~~through the date of termination~~ and, in the event of the termination of the entire Agreement, any actual costs which Transmission Owner (A) reasonably incurs in winding up work and construction demobilization and (B) reasonably incurs to ensure the safety of persons and property and the integrity and safe and reliable operation of the Transmission System. Transmission Owner agrees to use Reasonable Efforts to minimize such costs. The cost responsibility of other Interconnection Customers shall be adjusted, as necessary, based on the payments by an Interconnection Customer that is terminated from the Agreement.

An Interconnection Customer's irrevocable security will not be refunded in the event the Interconnection Customer is terminated from the Agreement, unless otherwise provided for in Article 6.1. Excess security will be refunded or released if any funds remain when the CUU is placed in service or if the Transmission Provider determines that the CUU is no longer needed. The irrevocable security of a terminated Interconnection Customer will be applied to the terminated Interconnection Customer's proportionate share of the cost of the CUU. Other Interconnection Customers that are parties to the Agreement will share the remaining CUU costs proportionately.

3.1.1 Transmission Owner Obligations. *In this section ATC does not require a change if section 2.2 above is fixed by removing "through the date of termination"* Transmission Owner shall (or shall cause such action to) design, procure, construct and install, and the Interconnection Customers shall pay, consistent with Article 3.2, the cost of the CUU identified in Appendix A. The CUU designed, procured, constructed and installed by Transmission Owner pursuant to this Agreement shall satisfy all requirements of applicable safety and/or engineering codes, including those requirements of Transmission Owner and Transmission Provider, and comply with Good Utility Practice, and further, shall satisfy all Applicable Laws and Regulations.

6.1 Creditworthiness. By the earlier of (i) thirty (30) Calendar Days prior to the due date for Interconnection Customer's first payment under the payment schedule specified in Appendix A or (ii) the first date specified in Appendix A for the ordering of equipment by Transmission Owner for installing the CUU, each Interconnection Customer shall provide Transmission Owner with the amount of security set forth on Appendix A for each Interconnection Customer in a form of irrevocable security reasonably acceptable to Transmission Owner ~~as an adequate assurance of creditworthiness~~ for Interconnection Customer's proportionate share of responsibility for the CUU. An Interconnection Customer's irrevocable security will not be refunded in the event the Interconnection Customer is terminated from the Agreement, except as provided in this Article. Pursuant to Article 2.2.5, the Midwest ISO may restudy any time that an Interconnection Customer is terminated from the Agreement. If an Interconnection Customer fails to provide acceptable irrevocable security ~~pursuant to Article 6.1~~ at the time and in the amount set forth in Appendix A. Interconnection Customer will be terminated from this Agreement, its Interconnection Request will be withdrawn from the Transmission Provider's interconnection queue, and Transmission Provider may declare a breach under Interconnection Customer's related GIA, if any, and seek termination thereof. If an Interconnection Customer is terminated from the Agreement, the Transmission Owner will retain the irrevocable security ~~of all remaining Interconnection Customers~~ of the terminated Interconnection Customer until such amount is replaced with other security as provided in this Section 6.1 or is determined not to be required, and Transmission Provider will determine whether to add additional interconnection customer(s) as parties to this Agreement pursuant to Article 2.2.5. Additionally, whether or not an additional Interconnection Customer is added to this Agreement, Transmission Provider shall adjust the proportionate share of the costs to be borne by the remaining Interconnection Customers when an Interconnection Customer has been terminated from this Agreement. If the addition of an Interconnection Customer to the Agreement results in a reduction of cost estimates, the cost estimates of all remaining Interconnection Customers will be reduced proportionately. It is expressly understood that an Interconnection Customers' proportionate share of the responsibility for the costs of the CUU may increase or decrease. If such cost adjustment causes the cost estimate for any of the remaining Interconnection Customers to increase by more than 25 percent above the cost estimate set forth in Appendix A, any such Interconnection Customer whose proportionate share of the cost estimate increases by more than 25 percent may withdraw from the Agreement within thirty (30) Calendar Days of the date that Transmission Provider notifies Interconnection Customer of the redetermination of its proportionate share of the cost responsibility. If an Interconnection Customer withdraws pursuant to this option, the unused portion of its irrevocable security will be released or refunded, but Transmission Provider may declare a breach under Interconnection Customer's related GIA, if any, and its Interconnection Request will be withdrawn from the Transmission Provider's interconnection queue. If an Interconnection Customer's withdrawal under this option causes the cost estimate for any of the remaining Interconnection Customers to increase by more than 25 percent from the estimate in Appendix A, that Interconnection Customer may also withdraw pursuant to this paragraph.

If the ~~adequate assurance~~ security provided to Transmission Owner is a parental guarantee or surety bond, it must be made by an entity that meets the creditworthiness requirements of Transmission Owner, have terms and conditions reasonably acceptable to Transmission Owner and guarantee payment of the amount specified ~~in the next paragraph of this Article 6.1.~~ Appendix A for such Interconnection Customer. If the ~~adequate assurance~~ security is a letter of credit, it must be issued by a bank reasonably acceptable to Transmission Owner, specify a reasonable expiration date and may provide that the maximum amount available to be drawn under the letter shall reduced ~~on a monthly basis in accordance with the monthly payment schedule.~~ to reflect payments made under this Agreement. The surety bond must be issued by an insurer reasonably acceptable to Transmission Owner, specify a reasonable expiration date and may provide that the maximum amount assured under the bond ~~shall reduce on a monthly basis in accordance with the monthly payment schedule.~~ may be reduced to reflect the payments made to Transmission Owner. ~~After~~ Until the CUU has been placed in service and until the Interconnection Customers have fully compensated Transmission Owner for construction of the CUU, each Interconnection Customer shall, subject to the standards of this Article 6.1, maintain a parental guarantee, surety bond, letter of credit, or some other credit assurance sufficient to meet its ~~monthly payment obligation under Article 3.2.1, as specified in the following paragraph.~~ obligations under this Agreement.

Each Interconnection Customer's estimated liability ~~under Article 3.2.1~~ is stated in Appendix A. If an Interconnection Customer provides the entire payment it must remit under the payment schedule as of the date of first payment, it need not provide additional security unless cost allocation changes pursuant to this Article 6.1 or additional funds are required by Transmission Owner to complete the CUU and allocated among the Interconnection Customers according to their proportionate shares.