



projects developed and approved through MISO's regional Midwest Transmission Expansion Planning (MTEP) Process, including Multi-Value Projects (MVPs). In this order, we reject Filing Parties' proposal, as discussed below.

## **I. Background**

2. In 1998, the Commission conditionally approved MISO as an Independent System Operator, at which time MISO assumed operational control of the transmission facilities in the region, including those needed for the utilities to provide service under their individual contracts with their individual transmission customers.<sup>5</sup> As originally proposed and accepted, transmission service for GFA transactions was not subject to the MISO Tariff. However, in Opinion Nos. 453 and 453-A, the Commission ultimately required that transmission owners take transmission service under the MISO Tariff to meet their transmission service obligations under their GFAs, in order that MISO satisfy Order No. 2000's requirement that it be the sole provider of transmission service over facilities under its control.<sup>6</sup> However, because the GFAs already provide for recovery of the costs of serving GFA customers, the transmission owners were exempt from the rates under the MISO Tariff for service associated with the GFAs, except for Schedule 10, the ISO Cost Recovery Adder, which reimburses the Midwest ISO for services it performs to administer GFA transmission service.<sup>7</sup>

3. In 2004, MISO proposed to expand its open access transmission tariff to include energy markets.<sup>8</sup> As a threshold issue, MISO stated in that filing that it would be unable to operate its proposed energy markets without integrating an estimated 300 GFAs that were then effective in the region.<sup>9</sup> In response, the Commission identified a need for

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<sup>5</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 84 FERC ¶ 61,231, *order on reh'g*, 85 FERC ¶ 61,250, *order on reh'g*, 85 FERC ¶ 61,372 (1998).

<sup>6</sup> See *Midwest Independent Transmission System Operator, Inc., et al.*, Opinion No. 453, 97 FERC ¶ 61,033 at 61,170-71 (2001), *order on reh'g*, Opinion No. 453-A, 98 FERC ¶ 61,141 (2002), *order on remand*, 102 FERC ¶ 61,192 (2003), *reh'g denied*, 104 FERC ¶ 61,012 (2003), *aff'd sub nom. Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (2004); see also Midwest ISO Tariff at section 37.1; *accord* 18 C.F.R. § 35.34(k)(1)(i) (2011).

<sup>7</sup> See Opinion No. 453-A, 98 FERC ¶ 61,141 at 61,413-14. Schedule 10 (ISO Cost Recovery Adder) of the Tariff provides for recovery of MISO's costs associated with investment and expenses to run the ISO.

<sup>8</sup> Midwest Independent Transmission System Operator, Application, Docket No. ER04-691-000 (filed Mar. 31, 2004).

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

further information about the GFAs and a desire to better understand how the GFAs and the proposed energy markets would affect one another.<sup>10</sup> The Commission initiated a three-step investigation of the GFAs under section 206 of the FPA<sup>11</sup> “to decide whether GFA operations [could] be coordinated with energy market operations, whether and to what extent the [transmission owners] should bear the costs of taking service to fulfill the existing contracts and whether and to what extent the GFAs should be modified.”<sup>12</sup> Following the investigation, the Commission approved the energy markets in two orders.<sup>13</sup>

4. The GFA Order found that the GFAs’ impact on the energy markets would be significantly less than MISO had projected and that MISO could reliably operate its energy markets while accommodating the GFAs.<sup>14</sup> Among other things, the GFA Order divided the GFAs into several categories, with differing consequences for their treatment. As discussed further below, the GFA Order required MISO to carve some of the GFAs out of its markets, and further addressed the applicability of charges under Schedules 16<sup>15</sup> and 17<sup>16</sup> to transactions taking place under GFAs.

5. The Commission directed MISO to carve out of the MISO energy markets three types of GFAs: (1) those GFAs for which the parties have explicitly provided that

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<sup>10</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,191 (2004).

<sup>11</sup> 16 U.S.C. § 824e (2006).

<sup>12</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,191 at P 67.

<sup>13</sup> *See Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, *order on reh’g*, 109 FERC ¶ 61,157 (2004), *order on reh’g*, 111 FERC ¶ 61,043, *reh’g denied*, 112 FERC ¶ 61,086 (2005), *aff’d sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007); *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,236 (2004) (GFA Order), *order on reh’g*, 111 FERC ¶ 61,042 (2005) (GFA Rehearing Order), *aff’d sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007).

<sup>14</sup> GFA Order, 108 FERC ¶ 61,163 at P 4.

<sup>15</sup> Schedule 16 (Financial Transmission Rights (FTR) Administrative Service Cost Recovery Adder) provides for the recovery of the costs of administering MISO’s FTR market.

<sup>16</sup> Schedule 17 (Energy Market Services) of the Tariff provides for a deferral of start-up costs related to the establishment of energy markets and recovery of such deferred costs and the ongoing costs of providing Energy Markets Service.

unilateral modification is subject to the *Mobile-Sierra* public interest standard of review;<sup>17</sup> (2) those GFAs that are silent with respect to the standard of review governing unilateral modification; and (3) those GFAs providing for transmission service by an entity that is not a public utility,<sup>18</sup> due to the Commission's finding that the MISO energy markets could be operated reliably, notwithstanding the exclusion of the carved-out GFAs.<sup>19</sup> As a result, transactions under carved-out GFAs are not subject to the Tariff's energy market scheduling and settlement requirements, except for limited situations, such as when MISO supplies energy to meet imbalances under GFA transactions, and are therefore financially exempt from many energy market charges.<sup>20</sup> However, the Commission required that all GFA transactions be assessed Schedule 17 charges.<sup>21</sup> The transmission owners are financially responsible for market settlements applicable to the transmission service they take under the MISO Tariff to meet their transmission service obligations under their carved-out and non-carved-out GFAs, unless another party has agreed to assume that responsibility.<sup>22</sup>

6. The Commission subsequently extended this treatment of carved-out and non-carved-out GFAs to MISO's operating reserves markets.<sup>23</sup> If the parties to a carved-out GFA meet their operating reserve requirements through the provisions of their GFAs, then the carved-out GFA transactions are not charged for operating reserves. However, to the extent that the parties to a carved-out GFA do not provide sufficient reserves in real-time, the GFA transaction is assessed for the operating reserves supplied by MISO

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<sup>17</sup> See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956). See also *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008).

<sup>18</sup> GFA Order, 108 FERC ¶ 61,163 at P 4, 141-146. The phrase "carved-out GFAs" refers to GFAs described by one of these three categories.

<sup>19</sup> *Id.* P 142.

<sup>20</sup> The Commission also identified those GFAs that specifically provide for unilateral modification using the just and reasonable standard of review as a fourth group of GFAs, which the Commission required to be fully subject to the scheduling and settlement rules in MISO's energy markets, including the nomination of FTRs. GFA Order, 108 FERC ¶ 61,163 at P 136-140.

<sup>21</sup> See *supra* note 16.

<sup>22</sup> GFA Order, 108 FERC ¶ 61,163 at P 300-302.

<sup>23</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172, at P 433-440 (2008) (ASM Order).

through the operating reserves markets. All other GFA transactions are fully subject to the scheduling and settlement requirements of the operating reserves markets. The transmission owners are financially responsible for operating reserves markets settlements applicable their GFA transactions, unless another party has agreed to assume that responsibility.

7. While the transmission owners are currently responsible for charges applicable to the transmission service they take under the MISO Tariff to meet their transmission service obligations under their GFAs, and generally recover such costs from their GFA customers through their GFAs, to the extent the GFAs provide for such recovery, the Commission has explained that GFA customers may be charged for certain MISO-provided services as new services that are not already provided in their GFAs, without modifying the rates, terms, and conditions of their GFAs. Specifically, the Commission permitted transmission owners to recover the MISO administrative, capital and operating costs incurred by the MISO TOs under Schedules 10 and 17 of the Tariff from their carved-out GFA customers under Schedule 23 of the Tariff.<sup>24</sup> In approving the proposal to charge GFA customers for these costs, the Commission found that the services underlying Schedules 10 and 17 represent “a monumental transformation” in the way electricity is sold and distributed in the MISO region.”<sup>25</sup> Further, the Commission found that these services “could not have been provided by the [Filing Parties] to the carved-out GFA customers prior to the advent of [MISO].”<sup>26</sup> The Commission, therefore, found that the costs passed through to GFA customers under Schedule 23 “address new services” and “are separate and distinct from those costs that the [MISO] TOs recover under current GFA provisions”<sup>27</sup>

8. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the Commission. Notably, the court held that subjecting carved-out GFA customers to the charges under Schedule 23 did not constitute a modification of the GFAs. The court observed that Schedule 23 would compensate transmission owners for “new services” and that the costs recovered thereunder were “separate and distinct from the costs collected under the [GFAs].”<sup>28</sup> Therefore, the court concluded that the assessment of

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<sup>24</sup> See *Transmission Owners of the Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,339, at P 38 (2005) (Schedule 23 Order), *order on reh’g*, 113 FERC ¶ 61,122 (2005), *aff’d sub nom. E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299 (D.C. Cir. 2007) (*East Kentucky*).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See *East Kentucky*, 489 F.3d at 1308.

Schedule 23 charges did not implicate the *Mobile-Sierra* doctrine because Schedule 23 does not “modify the rates, terms or conditions of services provided under the [GFAs]” but rather “imposes a new rate to recover the costs of new benefits and services” provided by MISO to GFA customers.<sup>29</sup>

9. Currently, MISO’s Tariff allocates costs to and recovers costs from Tariff customers for regionally-allocated costs resulting from transmission projects developed and approved through MISO’s MTEP Process. The costs of MVPs are recovered under Schedule 26-A (Multi-Value Project Usage Rate).<sup>30</sup> The costs of all other MTEP projects are recovered under Schedule 26 (Network Upgrade Charge from Transmission Expansion Plan). Both Schedules 26 and 26-A provide that transmission service provided pursuant GFAs are exempt from the charges under the respective schedules.<sup>31</sup> In other words, neither the transmission owner, nor the GFA customer, are assessed Schedules 26 and 26-A charges for the transactions under their GFAs.

## II. Filing

10. Filing Parties propose Schedule 40 to establish “a mechanism for direct cost recovery” of Schedule 26 and 26-A charges from GFA customers.<sup>32</sup> Proposed Schedule 40 provides that the customers of the transmission owner for all GFAs listed in its Attachment 1 are responsible for the charges associated with Schedules 26 and 26-A. Proposed Schedule 40 also provides that, if the GFA customer is not a market participant or transmission customer under the Tariff, MISO will file either an executed or unexecuted service agreement to permit the assessment of charges according to Schedule 40. In addition, if the GFA customer disputes the data provided by the transmission owner for billing purposes, the GFA customer and the transmission owner will work to resolve the dispute and will handle any reconciliation between the two parties. Conforming revisions include adding clauses to Schedules 26 and 26-A to clarify that GFAs shall not be charged under Schedules 26 and 26-A, except as permitted under Schedule 40, and that carved-out GFAs will also be subject to Schedule 40 charges.

11. Filing Parties contend that Schedule 40 is necessary to correct a systematic “cost-trapping” in the Tariff, which precludes transmission owners’ full recovery of MTEP

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<sup>29</sup> *Id.* at 1309.

<sup>30</sup> *See Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 (2010) (MVP Order), *order on reh’g*, 137 FERC ¶ 61,074 (2011) (MVP Rehearing Order).

<sup>31</sup> *See* MISO Tariff, Schedules 26 and 26-A.

<sup>32</sup> *See* Proposed MISO Tariff, Schedule 40.

project costs.<sup>33</sup> Filing Parties explain that the Tariff expressly allocates the costs of MTEP projects to GFA transactions. However, Schedules 26 and 26-A expressly provide that GFA transactions are not assessed charges under those schedules. Filing Parties consequently posit that this exemption results in a systematic under-collection of MTEP project costs for the transmission owners. In turn, such under-collection discourages investment in transmission infrastructure.

12. Filing Parties claim that the impact of this under-recovery is substantial. According to Filing Parties, MISO's most recent GFA status report indicates that the aggregate of the maximum MW transmitted for all listed GFAs is approximately 11 percent of peak load.<sup>34</sup> Thus, Filing Parties assert that approximately 11 percent of the revenue requirement of every MVP could be uncompensated under the current Tariff provisions.<sup>35</sup>

13. Filing Parties contend that removing GFA customer loads from the divisor in Schedules 26 and 26-A is not an acceptable solution. According to Filing Parties, this merely shifts the burden of costs that otherwise should be allocated to GFAs from the transmission project developers to non-GFA loads. Filing Parties assert that costs should neither be trapped with the transmission project developer nor over-allocated to other customers that derive no more or less benefit from the new transmission facilities than the GFA parties.

14. In support of their proposed Schedule 40, Filing Parties argue that Schedules 26 and 26-A seek to recover the cost of a new service that is not provided under any GFA.<sup>36</sup> Filing Parties assert that the services underlying Schedules 26 and 26-A represent a "monumental transformation" in the way new transmission facilities are planned and identified in the MISO region and in how their costs are recovered.<sup>37</sup> According to Filing Parties, prior to the establishment of MISO, there was no single regional plan or single entity responsible for identifying the optimal system enhancements for the region as a whole. Now, MISO has fulfilled the Commission's objectives regarding regional

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<sup>33</sup> See December 30 Filing at 15-16.

<sup>34</sup> *Id.* at 2-3 (citing Informational Compliance Filing of the Midwest Independent Transmission System Operator, Inc., FERC Docket Nos. ER04-691-000, ER04-106-000, EL04-04-000, and ER07-532-000, Regarding Grandfathered Agreements, at Tab A, pp. 9-17 (Nov. 1, 2011)).

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 17-19.

<sup>37</sup> *Id.* at 17.

transmission planning through its MTEP process, which identifies transmission projects that ensure reliability, provide economic benefits, such as increased market efficiency, or facilitate public policy objectives, such as integration of renewable power sources.<sup>38</sup> Therefore, Filing Parties contend, the services underlying Schedules 26 and 26-A cannot be duplicated or provided by any party operating in a smaller footprint than MISO, and thus could not have been provided prior to the advent of the MISO. Accordingly, Filing Parties contend that Schedule 26 and 26-A costs are properly assessed on GFA loads as proposed in new Schedule 40.

15. Further, Filing Parties contend that Schedules 26 and 26-A are analogous to, and secure the same types of benefits, as the services provided under Schedules 10 and 17, which the Commission has previously found warrant recovery from GFA loads outside of the GFA. For instance, Filing Parties assert that, in regard to allocation of Schedule 10 costs, the Commission cited “the benefits all users of the regional grid will receive when that grid is operated and planned by a single regional entity instead of multiple local entities whose goals may often conflict.”<sup>39</sup> In regard to MISO’s energy market services costs, the Commission found that benefits “will be experienced by all transacting over the [MISO] grid, including parties transacting under [GFAs],” which included “a more reliable and efficiently-used transmission grid, clear price signals for better infrastructure siting, better opportunities for demand response to participate in the market, and price transparency, which benefits even bilateral contract formation.”<sup>40</sup> Filing Parties claim that by definition, MTEP projects are transmission facilities planned from a “regional perspective” and are approved for regional cost recovery only if they resolve regional reliability issues or provide defined, quantifiable economic benefits in excess of costs.<sup>41</sup> Filing Parties assert that the Tariff criteria therefore require that these are “cost-effective transmission system improvements that will reduce congestion and the potential for curtailments.”<sup>42</sup> Accordingly, Filing Parties argue, the same rationale that supported charging GFA customers for MISO’s market services costs also supports charging GFA customers for the projects that are approved by MISO based on their ability to enhance those market benefits.

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<sup>38</sup> *Id.* at 5.

<sup>39</sup> *Id.* at 18 (citing *Midwest Indep. Transmission Sys. Operator Inc.*, Opinion No. 453-A, 98 FERC ¶ 61,141, at 61,412 (2002)).

<sup>40</sup> *Id.* at 18 (citing GFA Rehearing Order, 111 FERC ¶ 61,042 at P 176, 181).

<sup>41</sup> *Id.* at 19.

<sup>42</sup> *Id.* (citing GFA Rehearing Order, 111 FERC ¶ 61,042 at P 178).

16. Filing Parties also argue that, contrary to the MVP Order, those transmission owners sponsoring MVPs or other regionally beneficial projects can not recover the costs of their projects through the GFAs, because the project sponsors are likely not parties to all of the GFAs. As a result, Filing Parties assert that the project sponsors are precluded from recovering approximately 11 percent of the costs of their projects.<sup>43</sup>

17. Filing Parties further assert that the Schedule 40 does not implicate the *Mobile-Sierra* public interest standard of review because “Schedules 26 and 26-A reflect charges for new services provided under the GFAs, rather than a modification to the rates, terms, and conditions of the GFAs.”<sup>44</sup>

18. Furthermore, Filing Parties argue that, even if Schedules 26 and 26-A are not considered to recover the costs of a new service, the costs are properly recovered from GFAs.<sup>45</sup> Filing Parties claim that certain GFAs may be modified under the “just and reasonable” standard through filings at the Commission under FPA sections 205 and 206. According to Filing Parties, as described above, charging GFAs Schedule 26 and 26-A costs is just and reasonable because it ensures that TOs will properly recover their project costs and that non-GFA loads will not subsidize GFA customers for the benefits GFA customers will enjoy from regionally approved projects.

19. In addition, Filing Parties argue that failure to charge Schedule 26 and 26-A costs to carved-out GFA customers would cast an excessive burden on other customers. According to Filing Parties, excusing these contracts from responsibility of MVP costs would shift hundreds of millions, and perhaps over a billion, dollars of revenue requirements in the coming years from the GFA customers to non-GFA loads.<sup>46</sup>

20. Filing Parties also contend that Schedule 26 and 26-A costs are properly recovered from non-jurisdictional transmission owners as well. According to Filing Parties, regardless of the relationship between the non-public utility transmission owner and its loads, those loads are not immune to the benefits that arise from the transmission enhancements approved by MISO to meet regional needs.

21. Filing Parties request waiver of the Commission’s 60-day prior notice requirement, 18 C.F.R. § 35.3 (2011). Filing Parties state that, pursuant to section 35.11, good cause exists to grant waiver because a January 1, 2012 effective date coincides with

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<sup>43</sup> *Id.* at 20.

<sup>44</sup> *Id.* at 21-22.

<sup>45</sup> *Id.* at 22-24.

<sup>46</sup> *Id.*

the date that costs for MVP projects will begin to be charged under Schedule 26-A, and with the requested effective date, there will be no lag in recovery of the costs of MVP projects.

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

22. Notice of the December 30 Filing was published in the *Federal Register*, 77 Fed. Reg. 1478 (2012), with interventions and protests due on or before January, 20 2012.

23. Notices of intervention and timely motions to intervene were filed by the Illinois Commerce Commission; The Detroit Edison Company (Detroit Edison); Alliant Energy Corporate Services, Inc.; Organization of MISO States; Central Minnesota Municipal Power Agency (CMMPA); Consumers Energy Company (Consumers Energy); WPPI Energy; International Transmission Company d/b/a ITC Transmission, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC; Wisconsin Electric Power Company; Michigan Public Service Commission; American Municipal Power, Inc.; Missouri River Energy Services (Missouri River); as well as Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.

24. Timely motions to intervene and comments/protests were filed by Basin Electric Power Cooperative, East River Electric Power Cooperative and Associated Electric Cooperative, Inc. (jointly, Basin Electric); Southern Indiana Gas and Electric Company, Inc. (Southern Indiana); Big Rivers Electric Corporation (Big Rivers); Southern Illinois Power Cooperative and Hoosier Energy Rural Electric Cooperative, Inc. (jointly, Southern Illinois); Missouri River; Michigan Public Power Agency and Michigan South Central Power Agency (jointly, Michigan Agencies); Alcoa Inc. and Alcoa Power Generating, Inc. (Alcoa); City of Sioux Falls, South Dakota and Heartland Consumers Power District (jointly, Sioux Falls); Central Iowa Power Cooperative (Central Iowa); Corn Belt Power Cooperative (Corn Belt); Consumers Energy and Detroit Edison, jointly (Consumers); MISO; and Dairyland Power Cooperative (Dairyland).

25. Out-of-time motions to intervene were filed by Westar Energy, Inc. (Westar) on January 23, 2012, and by Columbia, Missouri (Columbia) on January 25, 2012.

26. On January 23, 2012, Missouri River, CMMPA, Southern Illinois (collectively, the Moving Parties) filed a motion requesting that the Commission treat MISO's January 20 Comments as an amendment to the December 30 Filing to be noticed for additional comment (January 23, 2012 Motion).

27. On February 8, 2012, the MISO TOs filed an answer to the protests and comments. In response to the MISO TOs' answer, answers were filed by: Alcoa; Basin Electric; Southern Illinois; Dairyland; Big Rivers; Missouri River; and Michigan Agencies.

28. In support of Filing Parties' proposal, MISO filed additional comments stating that it acknowledges that the Tariff's existing provisions involve a mismatch between regional cost allocation and recovery of upgrade costs with regard to GFAs, because those costs are allocated to GFA loads, as required by the Commission, but such loads are exempted from the corresponding Tariff charges.<sup>47</sup> According to MISO, this results in the "trapping" of those upgrade costs, to the extent that the transmission owners sponsoring the projects cannot directly recover such costs from GFA customers in the manner described by the MVP Order.<sup>48</sup> MISO contends that this is particularly so in the case of project sponsors that are not parties to any or all GFAs that benefit from the upgrades. MISO asserts its belief that it was not the intention of the MVP Order to either relieve GFA loads of their allocated share of the cost of transmission upgrades that benefit them, or to prevent project sponsors from fully recovering their costs.

29. Most protestors claim that the costs associated with transmission upgrades charged under Schedules 26 and 26-A are not "new services" analogous to the costs of setting up and operating MISO charged under Schedules 10 and 17.<sup>49</sup> According to Alcoa, the D.C. Circuit explained that the costs under Schedule 10 are associated with the administrative costs of having an ISO, while the transmission costs are the costs of using the system.<sup>50</sup> Protestors assert that the costs under Schedule 17 are also related to having an independent system operator, i.e., the costs of setting up and operating the MISO energy markets. Therefore, protestors claim that Schedules 10 and 17 relate to new services resulting from a "monumental transformation, with respect to the way that electricity is sold and distributed in the M[ISO] region,"<sup>51</sup> which was the advent and operation of MISO.

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<sup>47</sup> See MISO's January 20 Comments at 4 (citing the MVP Order, 133 FERC ¶ 61,221 at P 4, 49, and 452).

<sup>48</sup> *Id.* at 4.

<sup>49</sup> See Basin Electric at 6-8; Southern Illinois at 6-7; Southern Indiana at 4-6; Missouri River at 8-9; Big Rivers at 6, 9; Michigan Agencies at 3-4; Central Iowa at 7-8; Corn Belt at 7-8; Sioux Falls at 6-10; Alcoa at 9-12; Dairyland at 11-16.

<sup>50</sup> See Alcoa Comments at 9-10 (citing *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1371 (D.C. Cir. 2004)).

<sup>51</sup> See Southern Illinois Comments at 5-6; Big Rivers Comments at 6; Central Iowa Comments at 8; Corn Belt Comments at 8 (citing *East Kentucky*).

30. In contrast, protestors argue that Schedules 26 and 26-A do not relate to any “transformative new services.”<sup>52</sup> Protestors note that despite Filing Parties’ lengthy discussion and description of the MISO planning process, the costs associated with Schedules 26 and 26-A are not transmission planning activities costs. Protestors argue that the costs are simply transmission upgrade costs, which are an input to providing transmission service, but are not services themselves.<sup>53</sup> Protestors explain that as a necessary input of providing reliable and efficient transmission service, the costs of transmission upgrades are included either implicitly or explicitly in all transmission service agreements. Thus, protestors assert that transmission upgrades costs are already contemplated by the GFAs, and Schedule 40 merely adds a new charge for a service that is already being provided.<sup>54</sup>

31. Protestors claim that because costs associated with necessary upgrades are built into the transmission rate charged under GFAs, the Commission cannot approve the pass-through of MTEP projects costs without modifying the GFAs. Protestors assert that modifying the rates for transmission service under the carved-out GFAs requires meeting the *Mobile-Sierra* public interest standard of review and a finding that the public interest requires it to do so.<sup>55</sup> Protestors argue that MISO TOs merely claim that exempting GFA loads from Schedule 26 and 26-A charges will create a disincentive to invest in transmission projects, but have not provided any evidence to support that claim, nor have they shown that any potential cost shifts will be an “excessive burden” for the MISO TOs or non-GFA loads.<sup>56</sup> Thus, protestors claim that MISO TOs have failed to meet the public interest standard. Similarly, some protestors assert that Filing Parties have not shown that modifying any of the GFAs is just and reasonable.<sup>57</sup>

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<sup>52</sup> See Southern Illinois Comments at 7; Alcoa Comments at 10 (citing MVP Rehearing Order, 137 FERC ¶ 61,074 at P 293).

<sup>53</sup> See Southern Illinois Comments at 4-5; Missouri River Comments at 8.

<sup>54</sup> See Basin Electric Comments at 5; Central Iowa Comments at 8; Corn Belt Comments at 8; Southern Illinois Comments at 5; Alcoa Comments at 10; Southern Indiana Comments at 5; Big Rivers Comments at 6; Dairyland Comments at 11-12.

<sup>55</sup> See Michigan Agencies Comments at 7; Basin Electric Comments at 9; Sioux Falls Comments at 10; Dairyland Comments at 17; Southern Illinois Comments at 10; Michigan Agencies Comments at 7; Central Iowa Comments at 5; Corn Belt Comments at 5; Southern Indiana Comments at 8-9; Big Rivers Comments at 4-8.

<sup>56</sup> See Big Rivers Comments at 7-8; Michigan Agencies Comments at 9-10; Dairyland Comments at 7-8; Southern Illinois Comments at 10.

<sup>57</sup> See Big Rivers Comments at 10-11; Michigan Agencies Comments at 9.

32. Other issues raised by some protestors include a discussion of their individual GFAs, and Filing Parties' proposal to file an executed or unexecuted service agreement to permit the assessment of Schedule 40 charges if the GFA customer is not a market participant or a transmission customer. Some protestors assert that, despite Filing Parties' claims, given the nature of their GFA service, MTEP projects will not provide any benefits to them and they should be exempt from proposed Schedule 40 charges.<sup>58</sup> In addition, according to Southern Illinois, the Commission has previously rejected the notion that a public utility can assess charges to a non-customer simply by filing an unexecuted service agreement and has made clear that a utility must actually be providing a service before it can levy charges.<sup>59</sup> Thus, Southern Illinois contends that because MISO does not provide services to Southern Illinois' customers, MISO cannot levy charges on them.

33. Accordingly, some protestors suggest that the Commission could determine that it is the responsibility of the transmission owners that entered into the carved-out GFAs to pick up the costs associated with MTEP-approved projects.<sup>60</sup> According to Alcoa, as the Commission noted in the MVP Order, the GFAs do "not reflect the regional rate design and cost allocation that applies to service taken under the Tariff."<sup>61</sup> Instead, Alcoa asserts, the rates paid under the GFAs reflect a pre-MISO pancaked rate design, where "each [GFA] agreement customer pays separate charges to each transmission owner from whom it takes [GFA] service" and "each transmission owner recovers the costs of the transmission facilities used to provide service to [GFA] agreements."<sup>62</sup> Protestors assert that GFA transmission owners contracted to provide that service for the long term, and therefore, they must be deemed to have known that transmission construction might be required in order to continue to perform it. Specifically, Basin Electric asserts that the Supreme Court has explained that it assumes that "the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who [can] be expected to negotiate a 'just and reasonable' rate

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<sup>58</sup> See Sioux Falls Comments at 7-8; Consumers Comments at 6-8; Michigan Agencies Comments at 6; Southern Indiana Comments at 11-12; Alcoa Comments at 12.

<sup>59</sup> See Southern Illinois Comments at 13 (citing *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337, at P 42 (2003), *order on reh'g*, 110 FERC ¶ 61,032 (2005), *aff'd sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006)).

<sup>60</sup> See Basin Electric Comments at 13; Michigan Agencies Comments at 5-6; Missouri River Comments at 9.

<sup>61</sup> See Alcoa Comments at 11 (citing MVP Order, 133 FERC ¶ 61,221 at P 451).

<sup>62</sup> *Id.*

between the two of them.”<sup>63</sup> Basin Electric contends that carved-out GFA customers should not be required to pay for the TOs’ failure to establish contract rates that adequately recover their costs.

34. Michigan Agencies, Corn Belt, Central Iowa, Basin Electric, Big Rivers, and Southern Illinois request that the Commission summarily reject MISO’s proposed Schedule 40. Dairyland and Alcoa request that the Commission reject MISO’s proposal, or in the alternative, suspend the filing and set it for hearing. Sioux Falls requests that the Commission reject the proposal or evaluate the applicability of Schedule 40 on a contract-by-contract basis. Southern Indiana requests that the Commission suspend the proceeding and set it for hearing and settlement judge procedures in order to determine the extent to which each GFA permits the recovery of MTEP project costs. Southern Indiana also requests that the Commission summarily reject the filing to the extent that it proposes to assess MTEP project costs to customers taking service under carved-out GFAs. Missouri River requests that the Commission reject the proposal without prejudice to (a) a filing by MISO to eliminate the GFA exemption from Schedules 26 and 26-A, and (b) related filings by GFA service providers to collect the costs of the resulting new inputs to the existing GFA services. Consumers Energy requests that the Commission exempt the Ludington GFAs<sup>64</sup> from Schedules 26 and 26-A charges.

35. Finally, several protestors assert that the Commission should deny the MISO TOs’ request for waiver of the Commission’s 60-day prior notice requirement. Protestors argue that the MISO TOs’ rationale that it “coincides with the date that costs for MVP . . . will begin to be charged under Schedule 26-A,” does not constitute a showing of good cause for the waiver.<sup>65</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

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

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<sup>63</sup> Basin Comments at 13.

<sup>64</sup> Consumers Energy and Detroit Edison are parties to the Ludington GFAs, which are GFA Nos. 205, 206, 207, 267, 268, and 269.

<sup>65</sup> See Basin Electric Comments at 15; Southern Indiana Comments at 13; Southern Illinois Comments at 13; Corn Belt Comments at 12; Central Iowa Comments at 12; Dairyland Comments at 24.

37. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), the Commission will grant the late-filed motions to intervene by Westar and Columbia given their interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

38. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers submitted by the MISO TOs, Missouri River, Big Rivers, Southern Illinois, Dairyland, Basin Electric, Michigan Agencies, and Alcoa and will, therefore, reject them.

39. We deny the Moving Parties' January 23, 2012 Motion. We do not consider MISO's January 20, 2012 Comments to have amended the December 30 Filing.

### **B. Substantive Matters**

40. For the reasons discussed below, we will reject Schedule 40, without prejudice to future proposals by Filing Parties to otherwise address any under-collection of transmission expansion and upgrade costs.

41. Despite Filing Parties' assertions to the contrary, we find that Schedules 26 and 26-A do not provide GFA customers a new service. While the Commission found, and the *East Kentucky* court affirmed, that GFA customers were responsible for the costs associated with MISO's administrative, capital, and operating costs under Schedules 10 and 17, we are not persuaded that a similar finding is appropriate here. As noted above, in the Schedule 23 Order, the Commission found that the services at issue in that case represented a "monumental transformation" and were "separate and distinct."<sup>66</sup> The Commission recognizes the benefits inherent in MTEP projects.<sup>67</sup> Nonetheless, we find that the presence of those benefits does not demonstrate the existing of a new service. The proposed Schedule 40 attempts to provide for direct recovery from GFA customers of costs associated with transmission expansion and transmission upgrades. We agree with intervenors' argument that GFAs either implicitly or explicitly require transmission owners to provide efficient and reliable service, and that transmission expansion and upgrades are a necessary component of that service transmission owners have already agreed to provide. Therefore, we conclude that the service covered by Schedules 26 and 26-A and proposed Schedule 40 does not represent a "monumental transformation" or "separate and distinct" service.

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<sup>66</sup> Schedule 23 Order, 110 FERC ¶ 61,339 at P 38.

<sup>67</sup> See, e.g., MVP Order, 133 FERC ¶ 61,221.

42. Because we find that the service provided under Schedules 26 and 26-A does not constitute a new service, Schedule 40 would represent a modification of the GFAs to increase the rates for service already provided in the GFAs. However, Filing Parties have not demonstrated that the resulting rates, i.e., the existing rates in the GFA and the additional charges under proposed Schedule 40, are just and reasonable. Therefore, the Filing Parties have necessarily failed to justify such a modification under the more stringent application of that standard that is associated with the *Mobile-Sierra* doctrine. As a result, we reject the filing in its entirety without prejudice to future proposals by Filing Parties to otherwise address any under-collection of transmission expansion and upgrade costs.

The Commission orders:

Filing Parties' proposed tariff revisions are hereby rejected, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.