

173 FERC ¶ 61,037  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and James P. Danly.

Midcontinent Independent System Operator, Inc.

Docket No. ER20-359-003

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued October 15, 2020)

1. On November 12, 2019, as amended on November 14, 2019 and January 21, 2020, pursuant to section 205 of the Federal Power Act (FPA)<sup>1</sup> and Part 35 of the Commission's regulations,<sup>2</sup> Midcontinent Independent System Operator, Inc. (MISO) submitted proposed revisions to Attachment X of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to implement a new *pro forma* Facilities Service Agreement (FSA).
2. In an order dated April 27, 2020, the Commission accepted the proposed Tariff revisions, as requested.<sup>3</sup>
3. On May 27, 2020, American Wind Energy Association, RWE Renewables Americas, LLC and Savion, LLC (collectively, Rehearing Parties) filed a request for rehearing of the Tariff Order.
4. Pursuant to *Allegheny Defense Project v. FERC*,<sup>4</sup> the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by

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<sup>1</sup> 16 U.S.C. § 824d.

<sup>2</sup> 18 C.F.R. pt. 35 (2020).

<sup>3</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075 (2020) (Tariff Order).

<sup>4</sup> 964 F.3d 1 (D.C. Cir. 2020) (en banc).

section 313(a) of the FPA,<sup>5</sup> we are modifying the discussion in the Tariff Order and continue to reach the same result in this proceeding, as discussed below.<sup>6</sup>

## I. Background

5. MISO's *pro forma* Generator Interconnection Agreement (GIA) in Attachment X of the Tariff describes the schedule for construction, the details of design, and the payment options for any network upgrades constructed for the interconnection customer by the transmission owner with which it directly interconnects. In MISO, an interconnection customer is responsible for 100% of network upgrade costs, with a possible 10% reimbursement for network upgrades that are 345 kV and above. The Tariff provides two options for funding the costs of network upgrades for generator interconnections. Under the generator funding option, the interconnection customer provides up-front funding for network upgrades and the transmission owner refunds the reimbursable portion<sup>7</sup> of the payment, as applicable, to the interconnection customer in the form of a credit to reduce the transmission service charges incurred by the transmission customer with no further financial obligations on the interconnection customer for the cost of network upgrades (the "Generator Up-Front Funding" option).<sup>8</sup>

6. Under the transmission owner funding option contained in Article 11.3 of MISO's *pro forma* GIA, the transmission owner can unilaterally elect to provide the up-front funding for the capital cost of the network upgrades and assign the non-reimbursable portion of the costs of the network upgrades directly to the interconnection customer through a network upgrade charge that recovers a return on and of the transmission owner's cost of capital (the "Transmission Owner Initial Funding" option). The details

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<sup>5</sup> 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

<sup>6</sup> *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Tariff Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

<sup>7</sup> The reimbursable portion would be 10% of the cost of network upgrades 345 kV and above and zero percent of the cost of network upgrades less than 345 kV.

<sup>8</sup> *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076, at P 43 (2011) (*E.ON*), order on reh'g, 142 FERC ¶ 61,048, at P 39 (2013) (*E.ON Rehearing Order*), order on reh'g, 151 FERC ¶ 61,264 (2015).

for repayment of the cost of network upgrades through the network upgrade charge are memorialized in an FSA. Prior to acceptance of the Tariff revisions in the Tariff Order implementing a *pro forma* FSA, the FSA has been a contract negotiated between the parties and individually filed at the Commission.

7. In addition to MISO's *pro forma* GIA, the Commission has accepted a *pro forma* Facilities Construction Agreement (FCA) and *pro forma* Multi-Party Facilities Construction Agreement (MPFCA) for use in the MISO region.<sup>9</sup> The *pro forma* FCA is an agreement for network upgrades on affected systems, i.e., network upgrades constructed for an interconnection customer by a transmission owner other than the transmission owner with which the interconnection customer directly interconnects. The *pro forma* MPFCA is used when multiple interconnection requests cause the need for construction of common network upgrades (network upgrades that are constructed by a transmission owner for more than one interconnection customer) on a directly-connected transmission system or an affected system. The *pro forma* FCA and the *pro forma* MPFCA did not originally include the Transmission Owner Initial Funding option that was contained in Article 11.3 of MISO's *pro forma* GIA.

8. Prior to March 22, 2011, the Tariff contained another funding option, deemed "Option 1" funding, where: (1) the interconnection customer provided up-front funding for network upgrades; (2) the transmission owner provided a 100% refund of the cost of network upgrades to the interconnection customer upon completion of the network upgrades; and (3) the transmission owner assessed the interconnection customer a monthly network upgrade charge to recover the cost of the non-reimbursable portion of the network upgrade costs. The terms implementing the refund to the interconnection customer and subsequent recovery by the transmission owner of the Option 1 funding costs are reflected in a FSA.<sup>10</sup> The Commission found Option 1 funding to be unjust and unreasonable and ordered MISO to remove this funding option from its Tariff.<sup>11</sup> On rehearing, the Commission clarified that its decision directing MISO to remove Option 1 funding from its Tariff will not apply to large generator interconnection agreements (LGIAs) effective prior to March 22, 2011.<sup>12</sup> The Commission subsequently issued a number of orders rejecting attempts by transmission owners to impute a security

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<sup>9</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,301, at P 5 (2009).

<sup>10</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,072, at P 13 (2016) (*White Oak II*).

<sup>11</sup> *See E.ON*, 137 FERC ¶ 61,076 at P 43; *E.ON Rehearing Order*, 142 FERC ¶ 61,048 at P 39.

<sup>12</sup> *E.ON Rehearing Order*, 142 FERC ¶ 61,048 at PP 14, 34.

requirement into an FSA implementing Option 1 pricing given that “the [Tariff] does not require or even contemplate the posting of security under an FSA implementing Option 1 pricing.”<sup>13</sup>

9. On June 18, 2015, the Commission granted in part a complaint filed by Otter Tail Power Company, finding that MISO’s Tariff was unjust and unreasonable because it did not provide the same network upgrade funding options to all interconnection customers whether in a GIA, FCA, or MPFCA.<sup>14</sup> The Commission found that the interconnection customers—not the transmission owners—should be allowed to select the financing mechanism; thus, the Commission determined that Article 11.3 of the *pro forma* GIA may be unjust, unreasonable, and unduly discriminatory and directed MISO to make a compliance filing revising its *pro forma* GIA, *pro forma* FCA, and *pro forma* MPFCA to provide that the transmission owner or affected system operator may elect the Transmission Owner Initial Funding option to fund network upgrades only upon mutual agreement with the interconnection customer.<sup>15</sup>

10. On appeal, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded the Commission’s orders.<sup>16</sup> In its order on remand, the Commission reversed its earlier findings and directed MISO to file Tariff sheets that (1) restore the right of the transmission owner to unilaterally elect the Transmission Owner Initial Funding option for the capital cost of the network upgrades under Article 11.3 of the *pro forma* GIA, and (2) allow the affected system operator under the *pro forma* FCA and the affected system operator or transmission owner under the *pro forma* MPFCA to unilaterally elect the Transmission Owner Initial Funding option for the capital cost of network upgrades.<sup>17</sup> The Commission subsequently denied rehearing of the Ameren Remand Order and accepted MISO’s compliance filing restoring Transmission Owner Initial Funding to the *pro forma* GIA and extending Transmission

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<sup>13</sup> *White Oak II*, 154 FERC ¶ 61,072 at P 13; *Otter Tail Power Co.*, 155 FERC ¶ 61,125, at P 19 (2016) (*Otter Tail*); see also *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,145 (2015) (*White Oak I*). We refer to these orders collectively as the Option 1 Orders.

<sup>14</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,220, at P 47 (2015).

<sup>15</sup> *Id.* PP 48-49; *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,352, at P 65 (2015).

<sup>16</sup> *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 585 (D.C. Cir. 2018) (*Ameren*).

<sup>17</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158, at PP 33-34 (2018) (*Ameren Remand Order*).

Owner Initial Funding to the *pro forma* FCA, and MPFCA, effective prospectively as of August 31, 2018.<sup>18</sup>

## II. Filing

11. In its November 12, 2019 filing (Filing), MISO explained that the proposed *pro forma* FSA would provide a standard agreement for use when a transmission owner or affected system operator elects Transmission Owner Initial Funding.<sup>19</sup> Specifically, MISO stated that the *pro forma* FSA would provide for the interconnection customer to compensate the transmission owner for a return on and of the capital the transmission owner has invested through its initial funding of network upgrades that are required for the interconnection customer to receive interconnection service.<sup>20</sup> MISO also stated that it had proposed revisions to Attachment X of its Tariff and the *pro forma* GIA that were necessary to reflect the addition of, and to effectuate certain provisions of, the proposed *pro forma* FSA.<sup>21</sup>

12. In the *pro forma* FSA, MISO proposed the following key provisions: (1) security in the amount of the network upgrade(s) initial capital cost, which may be reduced *pro rata* over the term of the FSA; (2) a monthly network upgrade charge calculated through a formula rate that is based on the FSA's term and the transmission owner's Attachment O formula rate using data from the previous calendar year; (3) a 20-year default term, unless parties mutually agree to a different term; and (4) breach, default, and cross-default provisions with MISO's *pro forma* GIA.

13. On December 20, 2019, Commission staff issued a letter informing MISO that its filing was deficient and requesting additional information. MISO submitted its response on January 21, 2020 that included revisions to the Filing (Deficiency Response). In the Deficiency Response, MISO proposed language to clarify that the security requirement could not lapse between construction and the FSA. MISO explained that the transmission owner would be required to release security received for each network upgrade's costs

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<sup>18</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233, at PP 37, 150 (2019) (Ameren Compliance Order). The Commission also found that “transmission owners and affected system operators should have the unilateral right to elect the Transmission Owner Initial Funding option for any GIA, FCA, or MPFCA that became effective between June 24, 2015 and August 31, 2018 (i.e., during the interim period).” *Id.* P 125.

<sup>19</sup> Filing, Transmittal Letter at 4.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 4.

under the GIA, FCA, or MPFCA upon the transmission owner's receipt of sufficient replacement security for that network upgrade under the FSA.<sup>22</sup>

### III. Tariff Order

14. The Commission found the *pro forma* FSA to be just and reasonable, and not unduly discriminatory or preferential and therefore accepted it.<sup>23</sup> As relevant here, the Commission found that the proposed security requirement, as revised in the Deficiency Response, was just and reasonable.<sup>24</sup> The Commission found that the security requirement was a reasonable way to protect the transmission owner and transmission service customers from the risk that an interconnection customer will stop making payments under an FSA, as the unpaid portion of any undepreciated costs would otherwise be borne by either the transmission owner or transmission service customers, or assigned to another interconnection customer. The Commission found that the requirement was not duplicative of any other financial security.<sup>25</sup>

### IV. Request for Rehearing

15. The Rehearing Parties argue that no factual difference exists between the security requirements contained in an FSA that applies Option 1 funding, which the Commission previously found to be unjust and unreasonable, and an FSA that applies Transmission Owner Initial Funding once the network upgrades are complete and operational.<sup>26</sup> According to the Rehearing Parties, under both FSAs the transmission owner provides the funds to construct the network upgrades and the interconnection customer must pay the transmission owner under the FSA to provide the transmission owner a return of and on its capital investment. As a result of the similarity between Transmission Owner Initial Funding and Option 1 funding, the Rehearing Parties state that the security requirement under the *pro forma* FSA applying Transmission Owner Initial Funding must be rejected, just as it was rejected under Option 1 funding.<sup>27</sup>

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<sup>22</sup> Deficiency Response at 4-5.

<sup>23</sup> Tariff Order, 171 FERC ¶ 61,075 at P 16.

<sup>24</sup> *Id.* P 32.

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

<sup>26</sup> Request for Rehearing at 4.

<sup>27</sup> *Id.* at 4-5.

16. Similarly, the Rehearing Parties state that, when addressing Option 1 funding in the Option 1 Orders, the Commission rejected the same argument it has now accepted in the Tariff Order – that the security requirement was appropriate to protect the transmission owners from risk of interconnection customers’ failure to make payments under the FSA.<sup>28</sup> The Rehearing Parties acknowledge that the cited precedent did not involve situations where the Tariff in effect at the time included a *pro forma* FSA that contemplated posting security; however, they argue that this distinction does not require different outcomes.<sup>29</sup>

17. The Rehearing Parties state that, under Commission precedent, post-construction security is not needed because transmission owners are adequately protected by default provisions that make future payments due if payments are missed.<sup>30</sup> Thus, the Rehearing Parties state that, at minimum, the posting of security should be limited to the period before construction is completed.<sup>31</sup>

18. Further, the Rehearing Parties suggest that the Tariff provisions require interconnection customers to bear the double burden of simultaneously carrying the long-term liability of payments for the term of the FSA because in the case of “a default, the *pro forma* FSA obligates the interconnection customer to ‘promptly pay to Owner all Payments still owed under [the FSA]’”, while also being required to post security for that same term in the amount still owed under the FSA. Cumulatively, the Rehearing Parties suggest this creates a double burden for a single liability.<sup>32</sup>

## V. Commission Determination

19. We are not persuaded by the Rehearing Parties’ arguments and sustain the result of the Tariff Order, as discussed below.

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<sup>28</sup> *Id.* at 5 (citing *Otter Tail*, 155 FERC ¶ 61,125 at P 20; *White Oak I*, 152 FERC ¶ 61,145 at P 39; *White Oak II*, 154 FERC ¶ 61,072).

<sup>29</sup> *Id.* at 6-7 (citing Tariff Order, 171 FERC ¶ 61,075 at P 33).

<sup>30</sup> *Id.* at 7-10 (citing *White Oak I*, 152 FERC ¶ 61,145 at P 39; *White Oak II*, 154 FERC ¶ 61,072 at P 14).

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.* at 11 (quoting *pro forma* FSA, Section V.b).

20. We continue to find that the security requirement, as revised in the Deficiency Response, is just and reasonable. As noted in the Tariff Order,<sup>33</sup> the posting of financial security is a reasonable way to protect the transmission owner and transmission service customers from the risk that an interconnection customer will stop making payments under an FSA. The security requirement is there to ensure that no unpaid portion of any undepreciated costs is borne by either the transmission owner or transmission service customers, or assigned to other interconnection customers.

21. We are not persuaded by the Rehearing Parties' arguments that no difference exists between the security requirements contained in Option 1 funding and Transmission Owner Initial Funding.<sup>34</sup> Under Option 1 funding, the Tariff required interconnection customers to post security to protect against nonpayment of required milestone payments providing the cost of capital for the network upgrades during construction.<sup>35</sup> While the duty to provide security ended in the Option 1 Orders when construction ended, there was nothing inherent in the completion of construction that caused the obligation to end. Rather, the security requirements were scheduled to end at that stage under the relevant Tariff provisions,<sup>36</sup> and no Tariff provisions required security after construction was completed.<sup>37</sup> By contrast, here the security requirements of the *pro forma* FSA continue until the term of the FSA expires, which tracks the remaining balance on the outstanding principal of the network upgrade construction costs that are owed by the interconnection customer.

22. We are not convinced by the Rehearing Parties' argument that the Tariff security requirements were irrelevant to the Commission's analysis in the Option 1 Orders.<sup>38</sup> The

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<sup>33</sup> Tariff Order, 171 FERC ¶ 61,075 at P 32.

<sup>34</sup> Request for Rehearing at 4-5.

<sup>35</sup> See *White Oak I*, 152 FERC ¶ 61,145 at P 39 (“upon completion of the network upgrades White Oak should have made all of its cash payments that were owed to Ameren, which would have reduced White Oak’s security requirement under Article 11.5 of the LGIA down to zero dollars”); *Otter Tail*, 155 FERC ¶ 61,125 at P 20 (same).

<sup>36</sup> See *White Oak I*, 152 FERC ¶ 61,145 at P 39.

<sup>37</sup> *White Oak II*, 154 FERC ¶ 61,072 at P 13; *Otter Tail*, 155 FERC ¶ 61,125 at P 19. While after construction was completed interconnection customers would have other, different, financial obligations including “the cost of capital as well as the non-capital and financing costs,” the security required by the Tariff was not intended to cover those post-construction obligations. *White Oak II*, 154 FERC ¶ 61,072 at P 14.

<sup>38</sup> See Request for Rehearing at 6-7.

Option 1 Orders directly rely on the fact that the Tariff only required security until the completion of construction as the basis for the finding that post-construction security was not required.<sup>39</sup> Here, Article 11.3 of the *pro forma* GIA does not address security requirements at all, and MISO is appropriately addressing them in the *pro forma* FSA.

23. Finally, we are not convinced by the Rehearing Parties' related arguments that: (1) post-construction security is not needed because transmission owners are adequately protected by default provisions in the *pro forma* FSA and that, on this basis, the Commission must reach the same result that it did in the Option 1 Orders;<sup>40</sup> and (2) the security requirement is unreasonable because it creates a double burden for a single liability by requiring an interconnection customer to make payments for the term of the FSA, and to accelerate those payments in the event of a default, while simultaneously carrying the liability of providing security for those payments.<sup>41</sup> We find it reasonable for an FSA to both contain a long-term payment requirement and also require security to cover those payments; indeed, the purpose of security is to provide recourse where a party is unable to pay.<sup>42</sup> Further, the fact that in the event of default an interconnection customer may also be obligated to pay all amounts under the FSA<sup>43</sup> does not make the security requirement unreasonable, given that a default provision alone may not sufficiently protect the transmission owner from the risk of non-recovery.

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<sup>39</sup> See *White Oak II*, 154 FERC ¶ 61,072 at P 13 (holding “the requirement to post security, like the network upgrade charge, must [ ] be referenced in the Tariff or other agreement even if no *pro forma* version of the FSA exists . . . the [Tariff] does not require or even contemplate the posting of security under an FSA implementing Option 1 pricing”); *Otter Tail*, 155 FERC ¶ 61,125 at P 19 (same).

<sup>40</sup> Request for Rehearing at. at 5-10 (citing *White Oak I*, 152 FERC ¶ 61,145 at P 39; *White Oak II*, 154 FERC ¶ 61,072 at P 14).

<sup>41</sup> *Id.* at 11.

<sup>42</sup> *Cf. Am. Elec. Power Serv. Corp.*, 99 FERC ¶ 61,312, at P 16 (2002) (“The purpose of security is to protect against default and the risk of non-recovery of costs”).

<sup>43</sup> *Id.* (citing Filing, proposed MISO Tariff, Attach. X, app. 14, art. V.b (31.0.0)).

The Commission orders:

In response to the Rehearing Parties' request for rehearing, the Tariff Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.