137 FERC ¶ 61,076
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

E.ON Climate & Renewables North America, LLC — Docket No. EL11-30-000

v.

Midwest Independent Transmission
System Operator, Inc.

ORDER ON COMPLAINT

(Issued Thursday, October 20, 2011)

1. On March 22, 2011, the Midwest Generation Development Group (Development Group)[1] filed a complaint alleging that a provision of Attachment FF (Transmission Expansion Planning Protocol) to the Midwest Independent Transmission System Operator, Inc.'s (MISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) governing the treatment of costs associated with generator interconnection network upgrades (Option 1) is unjust, unreasonable, and unduly discriminatory and should be removed from the Tariff. In this order, we grant the relief requested in the complaint and find that Option 1 is unjust, unreasonable, and unduly discriminatory and direct MISO, in the compliance filing ordered below, to remove Option 1 from its Tariff, effective March 22, 2011, the date that the complaint was filed, and the refund effective date adopted in this proceeding.

I. Background

2. In Order No. 2003, the Commission required all public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to revise their tariffs to adopt *pro forma* Large Generator Interconnection Procedures (LGIP) and a *pro*

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

forma Large Generator Interconnection Agreement (LGIA).[2] The Commission stated that it would continue to apply its existing interconnection pricing policy (i.e., the interconnection customer pays up-front the full cost of network upgrades that would not be needed but for the interconnection, and then receives transmission service credits for the cost of network upgrades once the generating facility commences operation and delivery service begins) to transmission providers that are not independent entities.[3] The Commission stated, however, that it would permit an independent entity, such as a regional transmission organization (RTO) or independent system operator (ISO), to propose "independent entity variations" from the *pro forma* LGIA and *pro forma* LGIP.[4] In particular, the Commission stated that it would continue to afford independent transmission providers flexibility regarding the interconnection pricing policy that each independent entity chooses to adopt, subject to Commission approval. The Commission explained that "when the Transmission Provider is an independent entity, the Commission is much less concerned that all generation owners will not be treated comparably because independence ensures that the Transmission Provider has no incentive to treat [i]nterconnection [c]ustomers differently."[5]

3. In 2006, the Commission conditionally accepted revisions MISO proposed to its Tariff to incorporate the application of the Midwest ISO Transmission Expansion Planning Protocols (MTEP).[6] Among other things, MISO proposed a new attachment to its Tariff, Attachment FF, setting out the process MISO would use to develop its Transmission Expansion Plan including the allocation of costs associated with MTEP projects. Under Attachment FF, the cost of network upgrades required for generator interconnection would be shared equally between the interconnection customer and the transmission owner. Specifically, Attachment FF provided that the interconnection customer was required to fund 100 percent of the cost of network upgrades, but would become eligible for reimbursement of 50 percent of the project costs if the output of the

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[2] *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), *cert. denied*, 552 U.S. 1230 (2008).

[3] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 28, 693-94.

[4] *Id.* P 827.

[5] *Id.* P 701; *see also* Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 587.

[6] *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106 (February 3 Order), *order on reh'g*, 117 FERC ¶ 61,241 (2006).

generator was committed by a contract of at least one year or the generating facility had been designated as a network resource at the time of commercial operation.

4. Under section III.d of Attachment FF, a transmission owner was allowed to select between two options for recovery of the costs of network upgrades after the network upgrades are placed into commercial operation. Under Option 1, the interconnecting Transmission Owner would refund 100 percent of the cost of network upgrades to the interconnection customer and charge the interconnection customer for the non-reimbursable portion through a monthly Network Upgrade Charge over time based on the formula contained in Attachment GG (Network Upgrade Charges).[7] Alternatively, under Option 2, the interconnecting transmission owner would refund only the reimbursable portion to the interconnection customer and would retain the amount the interconnection customer paid to fund the non-reimbursable portion. Under Option 2, the interconnection customer would be assessed no further charges for the network upgrades. Section III.d required that the transmission owner's election between Option 1 and Option 2 must be made on a "non-discriminatory and consistent basis."[8]

5. On October 23, 2009, in Docket No. ER09-1431-000, the Commission accepted additional tariff revisions proposed by MISO to modify an interconnection customer's responsibility for network upgrades.[9] MISO argued that the methodology to collect the non-reimbursable portion of the network upgrade costs imposed disproportionate costs on loads in certain zones. To remedy this issue, MISO revised its Tariff to require an interconnection customer to bear 100 percent of the costs of network upgrades rated below 345 kV and 90 percent of the cost of network upgrades rated at 345 kV and higher once commercial operation is achieved (with a 10 percent reimbursement for network upgrades rated 345 kV or greater to be recovered on a system-wide basis) (interim cost allocation methodology).[10]

6. On December 16, 2010, in Docket No. ER10-1791-000, the Commission conditionally accepted further revisions to MISO's tariff. Among other things, the Commission accepted a proposal to require the transmission owner to notify MISO and

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[7] The Network Upgrade Charge is based on a revenue requirement determined by applying the formula in Attachment GG of MISO's Tariff, which includes a rate of return, income taxes, depreciation expense, operating and maintenance (O&M) expense, Administrative and General Expense, and other direct and indirect costs.

[8] Midwest Independent Transmission System Operator, Inc., Filing, Docket No. ER06-18-000, at 20, Attachment FF, section III.d (filed Oct.7, 2005).

[9] *Midwest Independent Transmission System Operator, Inc.*, 129 FERC ¶ 61,060, at P 8 (2009) (October 23 Order).

[10] *Id.*

the interconnection customer of its election of Option 1 or Option 2 within 15 days after the tender of the final appendices to the LGIA. The Commission also rejected requests to give interconnection customers the right to select Option 1 or Option 2, noting that the Commission had previously accepted the provision as just and reasonable and that neither MISO nor the transmission owners that joined the application had proposed to revise the provisions concerning the transmission owner's ability to elect between the options. The Commission stated that, to the extent that commenters wished to challenge the justness and reasonableness of an accepted tariff provision, the appropriate forum for such a challenge would be a complaint filed under section 206 of the FPA.[11]

II. Complaint

7. The Development Group has filed a complaint arguing that Option 1 is unjust, unreasonable, and unduly discriminatory and should be removed from MISO's Tariff. Accordingly, the Development Group asks the Commission to order MISO to remove Option 1 from Attachment FF of the Tariff, effective March 22, 2011, the date of the complaint.[12]

8. The Development Group claims that the election of Option 1 significantly increases the cost of interconnection.[13] It explains, for example, that Rail Splitter, a 100.5 MW wind project interconnected with the transmission system of Ameren Illinois Company, is responsible for network upgrades totaling $2,745,661.78 under its Amended and Restated Large Generator Interconnection Agreement. But, according to the Development Group, due to the transmission owner's election of Option 1, Rail Splitter will pay $12,635,535.60 over the life of the contract—$9,889,873.82 more than the cost of the network upgrades themselves. The Development Group explains that the present value of these charges is $4,974,351.87, which represents an 81 percent increase in real terms over the actual cost of the network upgrades (assuming a discount rate of 7.5 percent).[14] In addition, it states that Option 1 increases a developer's uncertainty because a transmission owner's Fixed Charge Rate, which is used to calculate Network Upgrade Charges, is recalculated each year based on information provided by the transmission owner and the payment term under Option 1 is not specified in the Tariff.[15]

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[11] *Midwest Independent Transmission System Operator, Inc.*, 133 FERC ¶ 61,221, at P 335 (2010) (MVP Order).

[12] Complaint at 37.

[13] *Id.* at 15-18, Attachment B.

[14] *Id.*, Whitlock Aff. at 2-3.

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

9. The Development Group contends that Option 1 is unjust and unreasonable because the transmission owner is not providing any legitimate service that warrants rate recovery under Option 1.[16] The Development Group contends that Option 1 is contrary to provisions of the *pro forma* LGIA adopted in Order No. 2003 and provisions of MISO's Tariff because Option 1 payments come into play *after* the network upgrades are financed by the interconnection customer, rather than a transmission owner electing to fund the upgrades itself before and in lieu of the interconnection customer.[17] In addition, the Development Group maintains that Option 1 allows the transmission owner to act as if it funded the construction of network upgrades itself and is entitled to recover a rate of return on its investment. The Development Group states that there is no difference in the interconnection service that the interconnection customer receives as a result of the election of Option 1 and that the transmission owner is not providing any necessary or legitimate financing service.[18]

10. The Development Group also maintains that Option 1 is contrary to cost-causation principles (i.e., that "approved rates reflect to some degree the costs actually caused by the customer who must pay them") because the interconnection customer neither causes costs nor reaps benefits that warrant Option 1 pricing.[19] It states that the interconnection customer is not causing any financing costs, and, since the interconnection customer is required to fund the construction of network upgrades up-front, the transmission owner and its other customers are protected against having to pay any costs associated with the construction of network upgrades.[20] The Development Group states that, while the transmission owner may incur O&M costs associated with the network upgrades once they are integrated into the transmission owner's network, the Commission has held that O&M costs associated with interconnection-related network upgrades may not be charged to the interconnection customer.[21] It claims that such costs must be recovered from transmission customers under the transmission provider's tariff rates. It maintains that Option 1 allows a transmission owner to create an artificial cost and to collect

[16] *Id.* at 19.

[17] *Id.* at 19-20 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 22; Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 618; MISO Tariff, *pro forma* GIA, section 11.2).

[18] *Id.* at 20-21.

[19] *Id.* at 21 (citing *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (quoting *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)).

[20] *Id.* at 22-23.

[21] *Id.* at 23 (citing *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,161 (2003); *Duke Energy Corp.*, 95 FERC ¶ 61,279 (2001)).

revenues on an investment originally made by the interconnection customer, without adding assets or incurring risk.[22]

11. In addition, the Development Group claims that Option 1 is unduly discriminatory and undermines comparability by imposing different costs on different groups of interconnection customers based on the transmission owner's election of Option 1 or Option 2. The Development Group states that the purpose of the prohibition on undue discrimination in section 206 of the FPA is to ensure that customers are afforded equal treatment for similar services and that, in this case, there are no differences in the facts, costs, or otherwise that support Option 1 pricing.[23] Moreover, the Development Group states that interconnection customers are similarly situated in that they compete in the same market. In this regard, it explains, Option 1 is analogous to the tariff schedules addressed by the D.C. Circuit in *Dynegy Midwest Generation, Inc. v. FERC* (*Dynegy*).[24] It explains that in *Dynegy*, the court vacated Commission orders accepting a proposal by MISO to allow any transmission owner to elect to compensate all generators connected to its system for reactive power under Schedule 2-A, which stated that generators would not receive any compensation for reactive power produced within the "deadband," as opposed to Schedule 2, which provides for compensation for all reactive power at cost-based rates.[25] According to the Development Group, the court vacated the Commission orders because the evidence indicated that generators in MISO compete across zonal boundaries and the compensation regime would impose a competitive disadvantage on generators located in zones where the transmission owner had elected Schedule 2-A.[26]

12. The Development Group also argues that Option 1 is not implemented by an independent entity and, as such, contrary to Order No. 2003, creates ample opportunities for undue discrimination.[27] They state that Option 1 pricing is entirely subjective, as the choice between Option 1 and Option 2 is solely within the discretion of the transmission owner. They contend that this subjectivity provides transmission owners with the opportunity to frustrate development by imposing costs on rival generators.[28]

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

[23] *Id*. at 27-28 (citing *St. Michaels Municipal Utils. Comm'n v. FPC*, 377 F.2d 912 (4th Cir. 1967); *Cities of Newark, DE v. FERC*, 763 F.2d 533 (3rd Cir. 1985)).

[24] Case No. 09-1306 (D.C. Cir. 2011).

[25] Complaint at 28.

[26] *Id.* at 28-29 (citing *Dynegy*, Case No. 09-1306, slip op. at 7-8).

[27] *Id.* at 31-34.

[28] *Id.* at 33.

III. Notice of Filing and Responsive Pleadings

13. Notice of the complaint was published in the *Federal Register*, 76 Fed. Reg. 18,212 (2011), with answers, interventions, and protests due on or before April 11, 2011.

14. On April 11, 2011, MISO filed an answer to the complaint. Edison Mission Energy (Edison), the MISO Transmission Owners,[29] American Wind Energy Association and Wind on the Wires (together, AWEA and WOW), Electric Power Supply Association (EPSA), American Municipal Power, Inc. (AMP), Acciona Wind Energy USA LLC (Acciona), and BP Energy Company and BP Wind Energy North America, Inc. (together, the BP Companies) filed timely motions to intervene and comments. The PSEG Companies,[30] ATC Management Inc. (on behalf of American Transmission Company LLC), Calpine Corporation, the ITC Companies,[31] Exelon Corporation, Duke Energy Corporation (Duke),[32] and Wisconsin Electric Power Company filed timely motions to intervene. The Illinois Commerce Commission filed a notice of intervention.

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[29] The MISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company and Ameren Transmission Company of Illinois; Big Rivers Electric Corporation; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; 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; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; 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.

[30] For the purpose of this proceeding, the PSEG Companies are Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade, LLC.

[31] The ITC Companies are comprised of International Transmission Company, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC.

[32] On behalf of itself and its affiliates, Duke Energy Indiana, Inc., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., and Duke Energy Business Services, LLC.

15. Consumers Energy Company filed a motion to intervene out-of-time. In addition, the Organization of MISO States (OMS) and CPV Renewable Energy Company, LLC (CPV) each filed motions to intervene out-of-time and comments.

16. On April 26, 2011, the Development Group filed an answer to MISO's answer and MISO Transmission Owners' comments (April 26 Answer). On May 11, 2011, MISO Transmission Owners filed an answer to the April 26 Answer (May 11 Answer). On May 20, 2011, the Development Group filed an answer to the May 11 Answer and the comments filed by OMS and CPV (May 20 Answer).

IV. Discussion

A. Procedural Matters

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

18. 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 of Consumers, OMS, and CPV given the early stage of this proceeding, their respective interests in the proceeding and the absence of undue prejudice or delay.

19. 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 or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the April 26 Answer, the May 11 Answer, or the May 20 Answer and will, therefore, reject them.

B. Substantive Matters

1. MISO Answer

20. MISO argues that Option 1 is a Commission-approved repayment mechanism for costs related to interconnection service. MISO asserts that while the Development Group takes issue with the fact that an interconnection customer is required to pay a monthly Network Upgrade Charge and may pay more over time, Option 1 represents an independent entity variation that has been accepted by the Commission and, as a result, the complaint represents a collateral attack on prior Commission orders accepting Option 1.[33] Although MISO acknowledges that the Commission did not specifically address Option 1 in the February 3 Order accepting Attachment FF, it argues that this does not

[33] MISO Answer at 3-6.

make Option 1 less valid.[34] MISO notes that, in the MVP Order, the Commission rejected a proposal to permit the interconnection customer to elect between Option 1 and Option 2 and explained that Option 1 had been accepted and was not at issue in that proceeding.[35] MISO further asserts that the complaint can be dismissed on the basis that members of the Development Group have entered into service agreements implementing Option 1 pricing without contesting Option 1.[36]

21. MISO argues that the Development Group misreads references in Order No. 2003 and MISO's *pro forma* LGIA to the transmission owner's option to fund network upgrades in the first instance as artificially limiting the repayment methodology that may be used under the independent entity variation. MISO states that the Development Group overlooks the fact that the Commission has previously approved other independent entity variations for cost allocation in different RTOs and different repayment methodologies among MISO's transmission owners, which demonstrates that different just and reasonable repayment alternatives may co-exist in various regions of MISO.[37]

22. Additionally, MISO states that Option 1 is consistent with Order No. 2003 and cost causation principles because interconnection customers benefit from network upgrades and Option 1 ensures that interconnection customers make efficient, cost-effective siting decisions.[38] MISO asserts that Option 1 implements the cost causation principles articulated in Order No. 2003 by ensuring that the transmission owner and its native load customers will not be any worse off due to the addition of a new generator, which is of particular concern in wind-rich regions that lack robust transmission infrastructure.[39] Moreover, MISO states that Option 1 is consistent with broader cost causation principles because Attachment GG's detailed accounting mechanism, which is based on Attachment N (Recovery of Costs Associated with New Facilities) of the Tariff, ensures that the costs allocated to a particular interconnection customer are roughly

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[34] *Id.* at 5 (citing February 3 Order, 114 FERC ¶ 61,106).

[35] *Id.* at 5-6 (citing MVP Order, 133 FERC ¶ 61,221 at P 335).

[36] *Id.* at n.12 (citing *CAlifornians for Renewable Energy, Inc. v. Pacific Gas and Electric Co.*, 134 FERC ¶ 61,060, at P 59-60 (2011) (*CAlifornians for Renewable Energy*)).

[37] *Id.* at 8-9 (citing February 3 Order, 114 FERC ¶ 61,106 at P 62, 65-66; *ITC Midwest, LLC and Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,150, at P 19 (2008); *American Transmission Co., LLC (ATC) and Midwest Indep. Transmission Sys. Operator*, 120 FERC ¶ 61,221, at P 17 (2007)).

[38] *Id.* at 11.

[39] *Id.* at 11-13.

commensurate with the customer's benefits.[40] Further, MISO argues that the cases cited by the Development Group in support of the proposition that one may not assign O&M charges for network upgrades to an interconnection customer are not applicable here because they concern the prohibition on "and" pricing and the Commission has already found that Attachment FF, including Option 1, does not violate this prohibition.[41]

23. MISO further argues that the Development Group is mistaken in asserting that a transmission owner's ratepayers are held harmless under Option 2 because no transmission owner claims harm when it uses Option 2, and that, as a result, Option 1 is an overcharge. MISO states that the election of Option 2 does not represent an under-recovery.[42]

24. MISO also maintains that the discretion afforded to transmission owners does not create opportunities for undue discrimination because transmission owners are required to exercise their discretion in a non-discriminatory and consistent manner.[43] Additionally, MISO contends that differences in repayment among transmission owners do not undermine comparability because alternative reimbursement provisions already co-exist within MISO and, more generally, the options for payment and repayment in MISO are based on the needs of different regions and can be evaluated by interconnection customers in siting and financing decisions. MISO also maintains that this case can be distinguished from *Dynegy* because Attachment FF does not permit a transmission owner to choose between two rate schedules for the same service, but addresses the repayment mechanism for network upgrades.[44]

2. Comments Supporting the Complaint

25. CPV states that it supports the complaint and notes that it is in the process of developing a project, CPV Ashley Renewable Energy Company LLC (Ashley), which will be adversely affected by the election of Option 1. In particular, CPV explains that MISO intends to assign Ashley $80.5 million in network upgrades, which will increase to $134 million on a net present value basis as a result of the interconnecting transmission owner's election of Option 1.[45]

[40] *Id.* at 13-14.

[41] *Id.* at 10 (citing February 3 Order, 114 FERC ¶ 61,106 at P 62).

[42] *Id.* at 14.

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

[44] *Id.* at 19.

[45] CPV Comments at 2-4.

26. Several parties argue that Option 1 imposes significant and excessive costs on generators. Edison, the BP Companies, Acciona, and AWEA and WOW state that the additional costs imposed on a generator under Option 1 are not justified by any benefit received by the interconnection customer and represent a windfall to the transmission owner.[46] EPSA states that it agrees with the Development Group that the transmission owner is not providing any legitimate service that warrants Option 1 pricing and that Option 1 violates cost causation principles because the interconnection customer is not causing costs to be incurred nor reaping benefits from the transmission owner's election of Option 1.[47] AMP states that Option 1 unnecessarily increases an interconnection customer's costs and that, at the very least, the Commission should direct MISO to revise its Tariff so that it is the interconnection customer that chooses between Option 1 and Option 2.[48]

27. A number of parties agree with the Development Group's argument that Option 1 is unduly discriminatory.[49] Acciona and Edison argue that the situation addressed in the complaint is analogous to the situation at issue in *Dynegy*.[50] Edison adds that giving a transmission owner, a non-independent entity, the discretion to select either Option 1 or Option 2 creates an unacceptable opportunity for undue discrimination.[51] Similarly, EPSA contends that giving a transmission owner the choice between Option 1 and Option 2 is discriminatory and that, even assuming there is some need that justifies Option 1, the option should only be exercised when both the transmission owner and the interconnection customer agree on the payment plan.[52]

28. AWEA and WOW claim that Option 1 is contrary to Commission initiatives to foster competition because it provides generators subject to Option 2 pricing with a cost advantage compared to a generator subject to Option 1 pricing, as explained in the complaint. AWEA and WOW argue that Option 1 has an adverse impact on the

[46] Edison Comments at 5-7; BP Companies Comments at 3-4; Acciona Comments at 4-5; AWEA and WOW Comments at 5-8.

[47] EPSA Comments at 6-7.

[48] AMP Comments at 5-6.

[49] Acciona Comments at 7-8; Edison Comments at 9-11; AWEA and WOW Comments at 8.

[50] Acciona Comments at 7-8; Edison Comments at 9-11.

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

[52] EPSA Comments at 7-8.

development of all resources, including renewables resources, and that it represents an unjust barrier to development.[53]

3. Comments Opposing the Complaint

29. The MISO Transmission Owners claim that the Development Group has not shown that Option 1 is unjust, unreasonable, unduly discriminatory, or preferential. They state that no party challenged Option 1 when it was proposed and the fact that interconnection customers may have more network upgrade costs under the interim cost allocation methodology does not amount to a changed circumstance that justifies the Development Group's challenge now.[54]

30. The MISO Transmission Owners and OMS maintain that Option 1 remains just and reasonable because it protects ratepayers from having to pay for system improvements that are properly assigned to the interconnection customers. According to OMS and the MISO Transmission Owners, absent the assignment of the costs collected under Option 1 to the interconnection customer, the transmission owner would either recover these costs from transmission customers through the transmission owner's Attachment O rate or, along with its shareholders, have to forego recovery of the costs itself.[55] They state that the impact of these costs, which are becoming increasingly large, would be especially felt in zones that have a high degree of generation relative to their load and in which generation is being built to serve customers elsewhere.[56]

31. The MISO Transmission Owners argue that the fact that an interconnection customer is required to provide an up-front prepayment proves nothing, and any implication that a transmission owner that elects Option 1 is somehow double-recovering the cost of network upgrades or otherwise recovering something inappropriate is incorrect. The MISO Transmission Owners note that, under Option 1, a transmission owner is required to repay the interconnection customer 100 percent of the amounts advanced to it by an interconnection customer, including interest. They also state that the costs that are recovered under Option 1 are the costs of service once a facility has gone into service, "which are not recovered under the GIA." They assert that the Development Group concedes that O&M is a legitimate cost of providing service that will be required once the network upgrades are used to provide service and that depreciation and taxes are also costs of providing service that can legitimately be recovered. Further, MISO

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[53] AWEA and WOW Comments at 8-9.

[54] MISO Transmission Owners Protest at 12-15.

[55] *Id.* at 15, Gudeman Aff. ¶¶ 10-12.

[56] *Id.* at 15-17, 19-20, Gudeman Aff. ¶¶ 10-12; OMS Comments at 5-6.

Transmission Owners assert that Attachment O establishes a revenue credit for costs recovered under Attachment GG, which protects against any over-recovery of costs.[57]

32. The MISO Transmission Owners contend that the ability of a transmission owner to select between Option 1 and Option 2 is not unduly discriminatory. They state that the Development Group has not provided any evidence that transmission owners have been electing Option 1 on a discriminatory basis. They maintain that the Development Group's own evidence, in particular the Facilities Service Agreements identified by the Development Group, shows that Option 1 is not being applied on a discriminatory basis. They further assert that there is no evidence that the different contract lengths under the Facilities Service Agreements complainants identify have been unfairly imposed on any interconnection customer. Additionally, they note that the Commission has previously found that different reimbursement and cost allocation mechanisms under Attachment FF for customers in different zones is just and reasonable.[58]

33. The MISO Transmission Owners state that giving a transmission owner the ability to choose between Option 1 and Option 2 is not inconsistent with the Commission's approval of these options under the independent entity standard. According to the MISO Transmission Owners, application of the independent entity standard was warranted because MISO proposed the options. In addition, the MISO Transmission Owners state that transmission owners are required to choose between Option 1 and Option 2 on a non-discriminatory and consistent basis and that MISO oversees this choice as part of its duties in enforcing the provisions of its Tariff and administering the interconnection process.[59]

34. The MISO Transmission Owners argue that the fact that Option 1 may result in interconnection customers being assessed higher costs than they would be assessed under Option 2 proves nothing. They maintain that the costs charged under Option 1 are the just and reasonable costs of providing service; the only issue is whether these costs are recovered from the interconnection customer or from the transmission owner and its transmission customers. They also state that, contrary to the Development Group's assertions, a transmission owner bears the risk under Option 1 that the interconnection customer will stop paying its monthly charge and that this risk merits recovery of a return.[60] They aver that the cases that the Development Group relies upon for the

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[57] MISO Transmission Owners Protest at 21-22.

[58] *Id.* at 16-18 (citing *Int'l Transmission Co.*, 120 FERC ¶ 61,220, at P 35 (2007) (*ITC*); *ATC*, 120 FERC ¶ 61,221 at P 38; *ITC Midwest, LLC*, 124 FERC ¶ 61,150 at P 19).

[59] *Id.* at 18-19.

[60] *Id.* at 22-23.

proposition that an interconnection customer should not be assessed O&M or other costs are inapplicable here because in *PJM* there was no approved tariff mechanism for the assignment of such costs and *Duke Energy Corp.* preceded the issuance of Order No. 2003 and did not involve an independent RTO.[61] They note that while the Development Group claims that the incremental costs arising from Option 1 will frustrate the development of new generation in MISO, the Commission has previously found that network upgrades are generally a small part of an interconnection customer's total costs and are not the determinative factor in whether a facility is built.[62]

35. The MISO Transmission Owners further contend that the Development Group has failed to provide a just and reasonable alternative to the use of Option 1. They state that the elimination of Option 1 would shift the costs of operating and maintaining network upgrades to transmission customers, which would have a particularly harmful and disproportionate impact in zones that have high amounts of generation relative to load. They note that similar concerns led to the Commission's acceptance of the interim cost allocation methodology in Docket No. ER09-1431-000. They also note that it is possible that a relevant state commission may disallow cost recovery from the transmission owner's retail customers if it views these costs as excessive or incurred to benefit other load, which further exposes the transmission owner to these costs.[63]

4. <u>Commission Determination</u>

36. We agree with the Development Group that Option 1 is unjust, unreasonable, and unduly discriminatory, and that it should, therefore, be removed from the Tariff.

37. Although this part of the MISO Tariff refers to only two options, Option 1 and Option 2, the transmission owners in MISO actually have three options under their tariff. Specifically, under the *pro forma* LGIA adopted in Order No. 2003 and included in MISO's Tariff, the interconnection customer is required to provide the funding for network upgrades up-front, unless the transmission owner elects to fund them.[64] Thus, the third option is that the transmission owner can elect to fund the upgrades from the start. Of these three options, we find that it is unjust and unreasonable to require an interconnection customer to fund the construction of network upgrades up-front and then permit the transmission owner to elect to repay this amount and charge the interconnection customer for the transmission owner's capital costs and income tax

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

[62] *Id.* at 23 (citing *ITC*, 120 FERC ¶ 61,220 at P 18; *ATC*, 120 FERC ¶ 61,221 at P 20).

[63] *Id.* at 24-25.

[64] MISO Tariff, Attachment X, *pro forma* GIA, section 11.3.

allowance over time. That option essentially allows transmission owners to avoid many of the risks and costs associated with financing a new construction project, while retaining benefits as if they did incur some of those risks and costs. While a transmission owner may finance the construction of the network upgrades itself and include the associated costs in its embedded transmission rate, under Option 1, the interconnection customer must first obtain the financing necessary to fund the construction of network upgrades up-front (and bears the financing costs up-front), and then essentially pay for the transmission owner to refinance such costs and bear the transmission owner's capital costs and income tax allowance over a prescribed time period (e.g., 30 years). Based on the evidence provided by the Development Group, the election of Option 1 by a transmission owner increases the costs that are directly assigned to the interconnection customer, but there is no difference in the interconnection service provided. We find that it is unjust and unreasonable to require the interconnection customer to bear the burden of funding the network upgrades up-front but then be repaid these costs and be subjected to a monthly Network Upgrade Charge reflecting the transmission owner's capital costs and income tax allowance, which unreasonably increases the interconnection customer's costs over time–solely at the discretion of the transmission owner.

38. Further, we agree with the Development Group that permitting the transmission owner to select between Option 1 and Option 2 is inconsistent with Order Nos. 2003 and 2003-A. In Order Nos. 2003 and 2003-A, the Commission stated that it would afford independent transmission providers, such as RTOs, flexibility when choosing an interconnection pricing policy. The Commission reasoned that, when the transmission provider is an independent entity, it has no incentive to treat interconnection customers differently. The Commission stated:

> The Commission remains concerned that, when the Transmission Provider is not independent and has an interest in frustrating rival generators, the implementation of participant funding, including the "but for" pricing approach, creates opportunities for undue discrimination . . . [A] number of aspects of the "but for" approach are subjective, and a Transmission Provider that is not an independent entity has the ability and incentive to exploit this subjectivity to its own advantage. For example, such a Transmission Provider has an incentive to find that a disproportionate share of the costs of expansions needed to serve its own customers is attributable to competing Interconnection Customers. The Commission would find *any policy that creates opportunities for such discriminatory behavior to be unacceptable*.[65]

[65] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 696 (emphasis added).

In this case, the election of Option 1 is not left to the independent transmission provider, i.e., to MISO, but instead rests within the sole discretion of each transmission owner. We believe that this creates unacceptable opportunities for undue discrimination by affording a transmission owner the discretion to increase the costs of interconnection service by assigning both increased capital costs, as well as non-capital costs (including O&M), to particular interconnecting generators, but not others, and is contrary to the Commission's rationale in permitting independent entities to propose variations from the *pro forma* policies adopted in Order No. 2003.[66]

39. While MISO and the MISO Transmission Owners argue that the fact that the Tariff requires that each election by a transmission owner must be made on a "non-discriminatory and consistent basis" remedies any concerns about undue discrimination, we believe that the presence of this language alone in this context is insufficient to protect against the possibility of undue discrimination.[67] In addition, we are not convinced that the fact that a transmission owner makes its selection during the interconnection process protects against undue discrimination. Although the transmission owner is required to notify MISO and the interconnection customer of whether it has selected Option 1 or Option 2 within 15 days after the tender of the final LGIA appendices, it is ultimately the transmission owner -- not MISO -- that is making a choice that has a significant financial effect on the customer. And even if MISO were to be involved in some way with the choice, MISO does not have the authority to over-rule the choice that is granted to the transmission owner by the Tariff. Moreover, MISO is not a party to the service agreements addressing repayment under Option 1.[68] And while MISO points to agreements that apply Option 1 to both affiliated and non-affiliated generators, the fact remains that the Tariff gives the transmission owner the sole discretion to choose between Option 1 and Option 2, and, thereby, creates opportunities for undue discrimination.

40. Because we find that Option 1 is unjust and unreasonable, and that affording transmission owners a choice between repayment options creates opportunities for undue discrimination, we will require MISO to remove Option 1 from the Tariff. We find that, in contrast, Option 2 represents a just and reasonable alternative, as we agree with the Development Group that Option 2 generally follows the approach that was provided by the Commission in Order No. 2003. Further, while MISO and the MISO Transmission Owners argue that Option 1 is necessary to protect the transmission owner and its customers, as the evidence in this proceeding indicates, such costs are reduced at the

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[66] We conclude that Option 1 is unjust and unreasonable and contrary to Order Nos. 2003 and 2003-A, therefore, we see no need to address *Dynegy*.

[67] MISO Answer at 17; MISO Transmission Owners Protest at 18.

[68] MISO Answer at 17-18.

expense of interconnection customers who already incurred the risk of financing the network upgrades at the election of the transmission owner. The Commission is not required to accept a tariff that creates opportunities for undue discrimination even if the tariff is arguably consistent with Order No. 2003-A.

41. Notwithstanding the arguments of MISO and the MISO Transmission Owners, we find that the complaint is not a collateral attack on prior Commission orders. As the Commission has previously stated, "[c]ollateral attacks on final orders and relitigation of applicable precedent, especially by parties that were active in the earlier cases, impede the finality and repose in agency decisions that are essential to administrative efficiency, and are therefore strongly discouraged."[69] Here, however, as MISO itself acknowledges,[70] the order accepting Attachment FF did not specifically address Option 1[71] and the entities comprising the Development Group were not parties to that proceeding. Therefore, the complaint is not an impermissible collateral attack on the February 3 Order. Further, while MISO argues that the Commission's decision in the MVP Order precludes the Development Group from challenging Option 1 here, in that case the Commission, in fact, found that the merits of allowing a transmission owner to elect between Option 1 and Option 2 was beyond the scope of that proceeding and stated that the proper mechanism for such a challenge was to file a complaint under section 206 of the FPA, as the Development Group has done here.[72] MISO's reliance on *CAlifornians for Renewable Energy* for the proposition that the complaint should be dismissed, because members of the Development Group did not contest certain service agreements implementing Option 1, is similarly unavailing. In that case, the Commission dismissed a complaint because the complainant had failed to support the allegations raised, as required under the Commission's Rules of Practice and Procedure, and that is not the case here.[73]

42. Accordingly, we find that Option 1 should be removed from the Tariff. We will direct MISO to submit a compliance filing, within 30 days of the date of this order, revising its Tariff to remove Option 1. To the extent that MISO believes that the

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[69] *See, e.g.*, *Southern Co. Servs., Inc.*, 129 FERC ¶ 61,253, at P 37 (2009).

[70] MISO Answer at 5, n.15.

[71] *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *see also Integrys Energy Servs., Inc. v. New Brunswick Power Gen. Corp.*, 127 FERC ¶ 61,232, at P 23 n.27 (2009).

[72] MVP Order, 133 FERC ¶ 61,221 at P 335.

[73] *CAlifornians for Renewable Energy*, 134 FERC ¶ 61,060 at P 54-64.

elimination of Option 1 raises concerns about the impact of certain costs on particular transmission owners and their customers, MISO may file a proposal under section 205 of the FPA to address such concerns.[74]

43. In cases where, as here, the Commission institutes a proceeding on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,[75] we will set the refund effective at the earliest date possible, i.e., the date of the filing of the complaint, which is March 22, 2011. Accordingly, we will direct that the removal of Option 1 be made effective on March 22, 2011.

The Commission orders:

(A) The complaint is hereby granted, effective as of the date of the complaint, as discussed in the body of this order.

(B) MISO is hereby directed to submit a compliance filing, within 30 days of the date of this order, removing Option 1 from its Tariff.

(C) The refund effective date in Docket No. EL11-30-000, established pursuant to section 206 of the Federal Power Act, will be March 22, 2011.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[74] *See supra* P 5.

[75] *See, e.g., Seminole Elec. Coop., Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).