

144 FERC ¶ 61,033  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Jeffers South, LLC

v.

Docket Nos. EL10-86-002  
EL10-86-003

Midwest Independent Transmission  
System Operator, Inc.

ORDER ON INITIAL DECISION AND REHEARING

(Issued July 18, 2013)

1. This case is before the Commission on exceptions to the April 16, 2012 Initial Decision<sup>1</sup> issued in these proceedings. The central question presented is whether the Midwest Independent Transmission System Operator, Inc. (MISO)<sup>2</sup> violated its obligation with respect to the study of network upgrades that are required to accommodate the interconnection of the Jeffers South, LLC (Jeffers South) generation facility (Jeffers South Project) when it concluded that Jeffers South was obligated to fund construction of a facility referred to below as the Dotson-New Ulm Line. In this order,

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<sup>1</sup> *Jeffers South, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 63,002 (2012) (Initial Decision).

<sup>2</sup> Effective April 26, 2013, MISO changed its name from “Midwest Independent Transmission System Operator, Inc.” to “Midcontinent Independent System Operator, Inc.”

we reverse the Initial Decision and grant the relief requested in the complaint. We also deny MISO's request for rehearing of the earlier Rehearing Order in this proceeding.<sup>3</sup>

## **I. Background**

2. Jeffers South is a Minnesota limited liability company owned by a group of 57 local landowners and farmers and by Outland Renewable Energy, LLC, a Minnesota-based firm that focuses on developing, owning, operating, and maintaining commercial renewable energy projects in partnership with landowners, rural communities, and municipalities.

3. In May 2005, Summit Wind LLC (Summit Wind), the predecessor in interest to Jeffers South<sup>4</sup> and sometimes referred to in this litigation by the name of its representative, Wind Energy Developers,<sup>5</sup> submitted an interconnection request to MISO. Summit Wind sought to interconnect its 130 megawatt (MW) wind powered generation facility<sup>6</sup> to transmission facilities that at the time were owned by Interstate Power and Light Company (IP&L).<sup>7</sup>

4. MISO evaluated the interconnection request as part of its 2006 Group 4 System Impact Study. Wind Energy Developers and the transmission owner with which it proposed to interconnect, IP&L, rejected the 2006 Group 4 System Impact Study. Wind Energy Developers then commissioned its own study, the 2006 Jeffers South Study.<sup>8</sup> The transmission owners whose systems were impacted by the interconnection request rejected the 2006 Jeffers South Study and commissioned their own study, the 2006

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<sup>3</sup> *Jeffers South, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 134 FERC ¶ 61,013 (2011) (Initial Order), *reh'g granted in part and denied in part*, 138 FERC ¶ 61,149 (2012) (Rehearing Order).

<sup>4</sup> On July 1, 2009, Summit Wind transferred all of its interests in the underlying generation project to Jeffers South.

<sup>5</sup> Initial Decision, 139 FERC ¶ 63,002 at P 38.

<sup>6</sup> The original interconnection application was for 150 MW. During the study process, however, Summit Wind reduced its request to 130 MW in an attempt to reduce network upgrade costs. Initial Order, 134 FERC ¶ 61,013 at n.2.

<sup>7</sup> ITC Midwest acquired the transmission facilities of IP&L on December 20, 2007. *ITC Holdings Corp.*, 121 FERC ¶ 61,229 (2007).

<sup>8</sup> This study is referred to in the Initial Decision as the "2006 Wind Energy Developers Alternative Study." To avoid confusion, we refer to it here as the "2006 Jeffers South Study."

Transmission Owners Joint Study. The 2006 Transmission Owners Joint Study included a new 161 kV line running from a new Cottonwood Substation to an existing substation owned by Great River Energy (Great River) near Dotson, Minnesota (Dotson Substation).<sup>9</sup> It was anticipated that this line would interconnect with a new transmission line planned by Great River, a 161 kV line running from the Dotson Substation to New Ulm, Minnesota (Dotson-New Ulm Line).

5. On September 14, 2007, following the completion of the required interconnection studies and extensive negotiations, MISO filed in Docket No. ER07-1375-000 an unexecuted Large Generator Interconnection Agreement among Summit Wind as interconnection customer, IP&L as transmission owner, and itself as transmission provider (Interconnection Agreement). The Interconnection Agreement identified network upgrades designed to provide two outlets for the Jeffers South Project. The Interconnection Agreement provided for the upgrade of existing IP&L transmission facilities and the construction of a new Cottonwood Substation to the south of the Jeffers South Project in order to provide a southern outlet. It also provided for facilities to create a northern outlet for the output of the Jeffers South Project.<sup>10</sup>

6. In addition, on December 10, 2007, MISO filed in Docket No. ER08-320-000 an unexecuted Facilities Construction Agreement among Summit Wind, Great River, and MISO. The Facilities Construction Agreement provided for the construction of certain network upgrades on Great River's system to accommodate the requested interconnection of the Jeffers South Project. The Facilities Construction Agreement identified an upgrade to the Dotson Substation from a 69 kV substation to a 69/161 kV substation, which was allegedly necessary to accommodate a new Cottonwood County to Dotson Corner 161 kV transmission line. The 2006 Transmission Owners Joint Study, which included the Dotson-New Ulm Line, formed the basis for the upgrades and facilities contemplated by the Interconnection Agreement and the Facilities Construction Agreement.<sup>11</sup>

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<sup>9</sup> The original interconnection request asked for a 161 kV point of interconnection at the existing Storden Substation, which was being operated at 69 kV. However, due to the need for a 69 kV source for load located at the South Storden Substation, the point of interconnection was moved to a new 161 kV substation constructed directly adjacent to the Storden Substation, i.e., the Cottonwood Substation. *See* Jeffers South, Complaint, Docket No. EL10-86-000, at Ex. B-4 (filed Sept. 1, 2010).

<sup>10</sup> Initial Order, 134 FERC ¶ 61,013 at P 4.

<sup>11</sup> *Id.* n.27, PP 51, 125, 128.

7. MISO filed the Interconnection Agreement and the Facilities Construction Agreement unexecuted because Summit Wind contested its cost responsibility for the network upgrades under both agreements. Specifically, Summit Wind argued that the network upgrades to the IP&L system identified by the Interconnection Agreement were designed to provide general system benefits and were not required to interconnect the Jeffers South Project within the meaning of the “but for” standard.<sup>12</sup> Summit Wind likewise faulted the Facilities Construction Agreement for including upgrades that Summit Wind said were not required under the “but for” standard. MISO contended that the identified upgrades were needed not only to connect the Jeffers South Project, but also to ensure regional reliability once such facilities are connected. MISO also contended that Summit Wind had agreed to use the costs determined from the facilities study that was based on the 2006 Transmission Owners Joint Study.<sup>13</sup> On February 8, 2008, the Commission issued an order consolidating Docket Nos. ER07-1375-000 and

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<sup>12</sup> MISO has adopted the language of the *pro forma* Large Generator Interconnection Agreement adopted in Order No. 2003. *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). *Compare* Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at Appendix C § 1 (defining network upgrades as “the additions, modifications, and upgrades to the Transmission Provider’s Transmission System *required* at or beyond the point at which the Interconnection Customer interconnects to the Transmission Provider’s Transmission System to accommodate the interconnection of the Large Generating Facility to the Transmission Provider’s Transmission System” (emphasis added)), *with* Tariff, Attachment X § 1 (defining network upgrades as the “additions, modifications, and upgrades to the Transmission System *required* at or beyond the point at which the Interconnection Facilities connect to the Transmission System or Distribution System, as applicable, to accommodate the interconnection of the Generating Facility to the Transmission System” (emphasis added)). *See also id.* § 8.4 (stating that the Interconnection Facilities Study must specify and estimate the cost of the *required* equipment and construction work needed to physically and electrically connect the Interconnection Facilities to the Transmission System (emphasis added)).

<sup>13</sup> Initial Order, 134 FERC ¶ 61,013 at P 6; Initial Decision, 139 FERC ¶ 63,002 at P 54.

ER08-320-000 and setting the Interconnection Agreement and Facilities Construction Agreement for hearing and settlement judge procedures.<sup>14</sup>

8. In 2009, Summit Wind, ITC Midwest LLC (ITC Midwest) (the successor to IP&L), Great River, and MISO jointly filed a settlement agreement (Settlement Agreement) to resolve all issues in dispute in the proceeding. The Commission approved the uncontested Settlement Agreement,<sup>15</sup> which provides, among other things, that: (1) Summit Wind will be entitled to 100 percent reimbursement for the network upgrade costs it funds under the Interconnection Agreement; (2) revised suspension procedures applicable under the MISO queue reforms accepted in Docket No. ER08-1169-000 shall not be applied to the project, and Summit Wind shall be deemed to have exercised its suspension right on the dates the Interconnection Agreement and Facilities Construction Agreement were filed; (3) Summit Wind shall notify ITC Midwest and MISO of its desire to end the suspension period, after which Summit Wind will update the parties on the projected in-service date and any modifications to the Jeffers South Project, and MISO will use the information to determine whether additional system impact and facilities studies are required for interconnection, with Summit Wind bearing the costs of any additional studies; and (4) the Interconnection Agreement and Facilities Construction Agreement will be revised to reflect changes described in the Settlement Agreement, as well as any changes to the currently identified network upgrades required for interconnection.

9. Soon after the Settlement Agreement was approved, Great River stated at a meeting held on September 18, 2009 attended by representatives of Great River, Summit Wind's parent, Outland Energy, Excel Engineering, Inc. (Excel), ITC Midwest, and MISO, that it no longer intended to construct the Dotson-New Ulm Line. Jeffers South and MISO executed a restudy agreement on October 19, 2009 (Restudy Agreement), and Excel performed two restudies of the Jeffers South Project, one commissioned by Jeffers South (2009 Jeffers South Restudy) and the other commissioned by MISO (2010 MISO Restudy).<sup>16</sup>

10. The 2010 MISO Restudy considered three different outlet studies for the Jeffers South Project: (1) the Dotson-New Ulm Line and a single 161 kV line from Cottonwood to Heron Lake; (2) a 161 kV line from Cottonwood to Franklin that MISO found to be longer and more expensive than the Dotson-New Ulm Line, again with a single 161 kV line from Cottonwood to Heron Lake; and (3) two 161 kV lines from Cottonwood to

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<sup>14</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,113 (2008).

<sup>15</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 128 FERC ¶ 61,121 (2009).

<sup>16</sup> Initial Order, 134 FERC ¶ 61,013 at P 8.

Heron Lake, the option favored by Jeffers South. MISO concluded that choosing the third option would be an impermissible material modification of the interconnection request under the Interconnection Agreement, and that the Dotson-New Ulm Line was preferable to the second option for cost reasons.<sup>17</sup>

11. On September 1, 2010, Jeffers South filed a complaint in Docket No. EL10-86-000 alleging that MISO had violated its obligation regarding the study of network upgrades required to accommodate the Jeffers South Project. Specifically, Jeffers South argued that MISO violated its obligation under the “but for” standard, as interpreted in *Community Wind*,<sup>18</sup> to identify and quantify the least-cost option when determining the network upgrades necessary to interconnect the Jeffers South Project. Jeffers South explained that Great River’s decision not to construct the Dotson-New Ulm Line prompted restudy of the Jeffers South Project. Jeffers South stated that the study that it commissioned identified a number of alternative options that do not involve construction of the Dotson-New Ulm Line, and that most of the alternatives cost approximately \$14 million or less.<sup>19</sup>

12. Jeffers South stated that the 2010 MISO Restudy retains the previous two-outlet interconnection plan and assigns the costs of the Dotson-New Ulm Line (approximately \$43 million) to Jeffers South, raising its total cost responsibility for network upgrades to approximately \$81 million. Jeffers South argued that MISO was not necessarily required to select the least-cost option when determining what network upgrades should be constructed to accommodate a requested interconnection, but the least-cost option must nevertheless be identified and quantified during the study process to establish the maximum costs that may be allocated to the interconnection customer.<sup>20</sup>

13. On January 7, 2011, the Commission issued an order finding that MISO had not violated the “but for” standard by failing to identify and quantify the least-cost option to interconnect the Jeffers South Project. The Commission stated that it clarified in *Community Wind II* that in the context of MISO’s tariff, the “but for” standard is a cost allocation principle that limits the cost responsibility of an interconnection customer, but the Commission had never stated that MISO must identify and quantify the least-cost option during the study process. The Commission found that Jeffers South’s

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<sup>17</sup> See P 26 *infra*.

<sup>18</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,019 (2009) (*Community Wind I*), order on reh’g, 131 FERC ¶ 61,165 (*Community Wind II*), order on reh’g, 133 FERC ¶ 61,011 (2010) (together, *Community Wind*).

<sup>19</sup> Initial Order, 134 FERC ¶ 61,013 at P 9.

<sup>20</sup> *Id.* PP 9, 11.

complaint otherwise raised issues of material fact, which included, but were not limited to: (1) whether the 2010 MISO Restudy was performed in a manner that was consistent with the various agreements between the parties, such as the Settlement Agreement and the Restudy Agreement; and (2) whether the Dotson-New Ulm Line would not be necessary but for the interconnection of the Jeffers South Project. The Commission therefore established hearing and settlement judge procedures.<sup>21</sup>

14. A hearing took place on December 12, 2011. The Presiding Judge issued the Initial Decision on April 16, 2012.

15. On February 29, 2012, the Commission issued the Rehearing Order in response to Jeffers South's request for rehearing of the Initial Order. In the Rehearing Order, the Commission rejected Jeffers South's request for clarification of the "but for" standard. It noted that in *Community Wind*, the Commission "found that the 'but for' standard, in the context of Midwest ISO's tariff, limits an interconnection customer's cost responsibility to that portion of the chosen upgrade that would not be needed but for the interconnection of the interconnection customer," but it also found that "what is necessary for the interconnection of a customer is ultimately a factual question."<sup>22</sup> The Commission stated that in this case it had set this factual question for hearing.

16. In the Rehearing Order, the Commission also granted clarification on Jeffers South's suspension status under the Interconnection Agreement and the Facilities Construction Agreement.<sup>23</sup> The Commission found that, based on the record evidence, the Jeffers South Project is not in suspension under the terms of the Interconnection Agreement and the MISO tariff. MISO had placed the Jeffers South Project in suspension on the grounds that Jeffers South had failed to fund a restudy, and, according to MISO, this was consistent with MISO practice. The Commission found that this practice was not in accord with the terms of the MISO tariff or the Interconnection Agreement, and the decision to put the Jeffers South Project in suspension was left to Jeffers South's discretion.<sup>24</sup>

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<sup>21</sup> *Id.* PP 33-34.

<sup>22</sup> Rehearing Order, 138 FERC ¶ 61,149 at P 18.

<sup>23</sup> Section 5.16 of the Interconnection Agreement gives Jeffers South the right to suspend work on the interconnection facilities upon written notice to MISO. Section 5.16 allows a suspension of up to three years, after which the Interconnection Agreement is deemed terminated. Section 3.1.2 of the Facilities Construction Agreement contains similar provisions.

<sup>24</sup> Rehearing Order, 138 FERC ¶ 61,149 at P 19.

17. On March 30, 2012, MISO filed a request for rehearing of the Rehearing Order. MISO states that while the Commission found in the Rehearing Order that the Jeffers South Project was not in suspension because MISO, rather than Jeffers South, placed the project in suspension, evidence submitted at the hearing supports a different conclusion. MISO states that this evidence provides a basis on which the Presiding Judge could conclude that Jeffers South provided notice of suspension and that its suspension time has run out. MISO asks that the Commission reverse the Rehearing Order in part or clarify that the Rehearing Order does not preclude the Presiding Judge from making an alternative determination based on the record evidence produced at hearing.

18. Jeffers South filed an answer to MISO's request for rehearing of the Rehearing Order. In its answer, Jeffers South states that the Commission made a determination regarding suspension on the merits in the Rehearing Order, and it would be procedurally inappropriate for the Presiding Judge to consider the matter further.

## **II. Discussion**

### **A. Procedural Matters**

19. With respect to MISO's rehearing request, we note that the Commission does not allow rehearing of an order denying rehearing.<sup>25</sup> Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.<sup>26</sup> Because the Commission made findings in the Rehearing Order regarding the suspension of the Jeffers South Project, and because MISO's rehearing request addresses those findings, we will consider the request here.

20. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2012), prohibits an answer to a request for rehearing. Accordingly, we will reject Jeffers South's answer to MISO's rehearing request.

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<sup>25</sup> See, e.g., *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, 112 FERC ¶ 61,153 (2005); *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

<sup>26</sup> See *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423 (1st Cir. 2001).

## **B. Substantive Matters**

### **1. Presiding Judge's Findings**

21. The Presiding Judge found that Jeffers South had not carried its burden under section 206 of the Federal Power Act<sup>27</sup> and Rule 206 of the Commission's Rules of Practice and Procedure<sup>28</sup> to show that MISO's actions in this matter were unjust, unreasonable, unduly discriminatory or preferential. Among other things, the Presiding Judge found that Jeffers South did not prove that: (1) MISO's Large Generator Interconnection Procedures (Interconnection Procedures), the Settlement Agreement, or the Restudy Agreement required, or even allowed, MISO to rely on a system impact study conducted outside of MISO processes; (2) MISO's use of the 2006 Transmission Owners Joint Study to develop the facilities study for the Jeffers South Project was not consistent with provisions of the Interconnection Procedures; or (3) Jeffers South was misled into choosing to interconnect the Jeffers South Project at Storden, and it thus should be allowed to change the Generation Facility point of interconnection to Heron Lake.<sup>29</sup> The Presiding Judge stated that the 2010 MISO Restudy and other aspects of the processing of the Jeffers South Project interconnection request were consistent with governing rules and procedure.<sup>30</sup>

22. The Presiding Judge found that Jeffers South did not prove that MISO failed to follow the requirements of the Interconnection Procedures, the Settlement Agreement, or the Restudy Agreement in conducting the 2010 MISO Restudy. The Presiding Judge stated that Section 2.0 of the Restudy Agreement specifies that an Optional Interconnection Study (i.e., the 2010 MISO Restudy) was to be performed consistent with Section 10.0 of the Interconnection Procedures. Section 3.0 of the Restudy Agreement specifies that the scope of the Optional Interconnection Study is to be subject to the assumptions set forth in Appendix A to the Restudy Agreement. Appendix A of the Restudy Agreement references Section II.1(c) of the Settlement Agreement and specifies that the purpose of the restudy was to determine the extent of network upgrades required to accommodate interconnection of the Jeffers South Project. The Settlement Agreement provides that Jeffers South's predecessor, Summit Wind, was to update ITC Midwest and MISO regarding the projected date on which service was expected to begin and any modifications to the Jeffers South Project. Then, based on the information provided by Summit Wind and on any changes to higher-queued interconnection projects, MISO was

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<sup>27</sup> 16 U.S.C. § 824e (2006).

<sup>28</sup> 18 C.F.R. § 385.206 (2012).

<sup>29</sup> Initial Decision, 139 FERC ¶ 63,002 at P 125.

<sup>30</sup> *Id.* P 125.

to determine whether and to what extent additional system impact and facilities studies regarding the Jeffers South Project would be required.<sup>31</sup>

23. The Presiding Judge noted that the processing of the interconnection request for the Jeffers South Project was not without challenges, a number of which were caused by Jeffers South itself or by a predecessor of Jeffers South. The Presiding Judge stated that a few of the circumstances contributing to the challenges include using an alternative proposal based on the suggestion of Jeffers South predecessor, Wind Energy Developers; having transmission owners develop a follow-up plan based on the alternative proposal; having an earlier interconnection customer's decisions repudiated by a successor; and having a project remain in suspension for a substantial amount of time.<sup>32</sup>

24. The Presiding Judge stated that despite Jeffers South's objections to use of the 2006 Transmission Owners Joint Study, which includes the Dotson-to-New Ulm Line, as the basis for the Jeffers South Project facilities study, its predecessor Wind Energy Developers had no such objections. And while Jeffers South prefers to use the 2006 Group 4 System Impact Study as a basis for a facilities study, the Presiding Judge noted that Wind Energy Developers and the transmission owner to whose line Jeffers South Project proposed to interconnect rejected that study. Wind Energy Developers then commissioned its own study, the 2006 Jeffers South Study. The transmission owners rejected the 2006 Jeffers South Study and commissioned their own study, the 2006 Transmission Owners Joint Study. The Presiding Judge concluded that Jeffers South is bound by the decisions of its predecessor(s).<sup>33</sup>

25. The Presiding Judge stated that Jeffers South did not prove that MISO should have based the Jeffers South Facilities Study on the 2009 Jeffers South Restudy. The Presiding Judge stated that the 2009 Jeffers South Restudy was performed outside of the MISO process. Although interconnection customers may perform their own studies, the Presiding Judge stated that those studies have to be reviewed by MISO for compliance with the MISO process. However, MISO may not use the interconnection customer-performed studies, or even parts of them, if they are not consistent with the rules that bind MISO. The Presiding Judge stated that MISO's review of the 2009 Jeffers South Restudy revealed that the study contained problems common to interconnection customer-performed studies, including: using assumptions that favored Jeffers South, the interconnection customer performing the study; not considering impact on other projects in the queue; not including peer review; not using realistic cost estimates; and otherwise

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<sup>31</sup> *Id.* P 126.

<sup>32</sup> *Id.* P 127.

<sup>33</sup> *Id.* P 128.

not addressing MISO process requirements. The Presiding Judge stated that, in addition, Commission rules assign final responsibility for managing the queue, and NERC rules assign coordinating the evaluation of new connections to the Bulk Electric System, to the Transmission Provider. The Presiding Judge stated that MISO has no power to bargain away its regulatory responsibility to determine the network upgrades needed to accommodate the interconnection of the Jeffers South Project in either the Settlement Agreement or Restudy Agreement.<sup>34</sup>

26. The Presiding Judge also stated that Jeffers South did not prove that the material modification standard contained in the MISO tariff is not implicated if the 2006 Group 4 System Impact Study were used to develop the facilities study, if the northern outlet line were eliminated from the 2010 MISO Restudy, or if the interconnection point for the Jeffers South Project was moved to Heron Lake. The Presiding Judge stated that the material modification standard “is offended if a proposed change would materially impact the cost and/or timing of a lower-queued project.”<sup>35</sup> The Presiding Judge stated that MISO demonstrated that Jeffers South’s proposed changes would negatively impact lower-queued projects. According to the Presiding Judge, Jeffers South wanted MISO to adopt the third of the three options considered in the 2010 MISO Restudy.<sup>36</sup> This option eliminated the northern outlet line to which a lower-queued project would interconnect, and Jeffers South had requested that it be included in the restudy. The 2006 Transmission Owners Joint Study and the 2006 Jeffers South Study were similar in relevant provisions. The Presiding Judge stated that the Jeffers South Project Facilities Study, based on the upgrades in the 2006 Transmission Owners Joint Study, was completed in February 2007 and, in accord with the Interconnection Procedures process, the upgrades in that study were incorporated into the appendices of the Interconnection Agreement for the Jeffers South Project and were relied on by three lower-queued projects during the course of the litigation that ultimately led to the Settlement Agreement. As a result, the Presiding Judge stated that two projects would be negatively affected, and a third project may be affected if the third option were adopted.<sup>37</sup>

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<sup>34</sup> *Id.* P 129.

<sup>35</sup> *Id.* P 130 (citing Ex. MSO-29 at § 1 (Material Modification), § 4.4.4 (Modifications)).

<sup>36</sup> As noted above, the three options were: (1) the Dotson-New Ulm Line and a single 161 kV line from Cottonwood to Heron Lake; (2) a 161 kV line from Cottonwood to Franklin that MISO found to be longer and more expensive than the Dotson-New Ulm Line, again with a single 161 kV line from Cottonwood to Heron Lake; and (3) two 161 kV lines from Cottonwood to Heron Lake, the option favored by Jeffers South.

<sup>37</sup> Initial Decision, 139 FERC ¶ 63,002 at P 130.

27. The Presiding Judge further stated that MISO's tariff affords it a measure of discretion when determining facilities needed to interconnect a generator. The choice does not have to be the "least cost" alternative, but it does have to be reasonable. The Presiding Judge stated that Jeffers South's cost responsibility for network upgrades is limited to the portion of the network upgrades that would not be needed but for the interconnection of that interconnection customer's generator. The Presiding Judge stated that the ITC Midwest system is not robust, a fact readily available to potential interconnection customers, and that interconnection could reasonably trigger the need for network upgrades. The Presiding Judge stated that sometimes the upgrades needed to mitigate an interconnecting generator's contribution to load also mitigate the rest of the overload, and that network upgrades commonly provide benefits beyond just interconnection of the interconnecting generator. The Presiding Judge stated that the evidence here is that the Jeffers South Project would tax the system unless the upgrades set forth in the 2006 Transmission Owners Joint Study were added to the system. The Presiding Judge stated that to connect the Jeffers South Project reliably and efficiently, as MISO is required to do, the upgrades in the 2010 MISO Restudy are required. The Presiding Judge stated that those upgrades are the upgrades Jeffers South's predecessor, Wind Energy Developers, requested in order to interconnect to the Jeffers South Project.<sup>38</sup>

28. The Presiding Judge stated that Jeffers South did not prove that the Settlement Agreement should be set aside due to fraud or misrepresentation. The Presiding Judge stated that the record indicates that Great River decided to forego building the Dotson-to-New Ulm Line at some point in time before the Settlement Agreement was executed in September 2008, perhaps as early as April of that year. The Presiding Judge stated that Great River is not a party to this litigation, and Jeffers South's guesses about what MISO and ITC Midwest employees knew, when they knew it, and their intent to deceive Jeffers South do not amount to proof. According to the Presiding Judge, Jeffers South would have been in suspension at the time Great River made its decision; MISO does not, as a practice, evaluate the effect of changes on suspended projects; and MISO is credible in its assertion that it did not do so in this case. In addition, the Presiding Judge stated that Jeffers South, as a business entity, had the responsibility for keeping informed of possible changes occurring while the Jeffers South Project was in suspension. The Presiding Judge further stated that there is no evidence that MISO guaranteed that Great River would fund the line.<sup>39</sup>

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<sup>38</sup> *Id.* P 131.

<sup>39</sup> *Id.* P 133.

29. The Presiding Judge concluded that Jeffers South is not entitled to any relief.

## **2. Jeffers South Brief On Exceptions**

30. Jeffers South argues that the Presiding Judge erred in concluding that Jeffers South failed to demonstrate that MISO failed to follow the Settlement Agreement and Restudy Agreement. According to Jeffers South, the Presiding Judge did not address the primary issue of whether the plain meaning of the Settlement Agreement and the Restudy Agreement was that the restudy would determine only the network upgrades needed to interconnect the Jeffers South Project, taking into account only changes to the Jeffers South Project itself and changes to higher-queued projects in order to reflect the condition of the transmission system at the time of restudy.

31. Jeffers South asserts that the Settlement Agreement, Restudy Agreement, and Interconnection Procedures do not permit any assumption prior to conducting the study that the interconnection customer must build certain upgrades. According to Jeffers South, the Presiding Judge ignored the plain language of these agreements in favor of MISO's arguments that: (1) the term "material modification" is broader than the definition in the MISO tariff, and the term includes changes to an interconnection plan developed by MISO; and (2) because MISO assumed the implementation of a plan based on the 2006 Transmission Owners Joint Study, not using that plan would materially affect the cost and timing of the interconnection of three lower-queued projects.<sup>40</sup>

32. Jeffers South argues that the Presiding Judge erred by ignoring the definition of a material modification contained in the Interconnection Procedures. Jeffers South maintains that under the explicit terms of the Interconnection Procedures, a modification must be requested by the interconnection customer and must be a change to the information provided by the interconnection customer in its interconnection application. In this case, Jeffers South argues that neither factor applies because the change at issue relates to Great River's decision not to construct the Dotson-New Ulm Line and not to any decision by Jeffers South to change its project or any information provided in the request.<sup>41</sup>

33. Jeffers South adds that, even if a change from the disputed and contested interconnection plan based on the 2006 Transmission Owners Joint Study was considered to be a modification, the Presiding Judge erred by concluding that MISO showed that such a modification would have a material adverse effect on any lower-queued projects. Jeffers South argues that MISO's claim that three lower-queued projects – whose

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<sup>40</sup> Jeffers South Brief on Exceptions at 4-5.

<sup>41</sup> *Id.* at 5.

completed restudies were years away – would be materially and adversely affected is undercut by MISO’s own evidence and is completely unsupported in light of the tariff changes accepted in Docket No. ER12-309-000.<sup>42</sup> Jeffers South states that as a result of those changes, all three lower-queued projects will now be subject to new interconnection procedures.<sup>43</sup>

34. Jeffers South asserts that even if the material modification standard applied here, it would not resolve the issue of whether the costs of the network upgrades in the interconnection plan based on the 2006 Transmission Owners Joint Study may be allocated to Jeffers South. Jeffers South argues that it may only be allocated the costs of the network upgrades that would not be required but for the interconnection of its project. For this reason, even if the material modification standard prevents modification of the proposed interconnection plan, MISO must determine what facilities are required for the interconnection and limit Jeffers South’s allocation of network cost upgrades on that basis. Jeffers South also states that MISO is “‘identifying changes to the planned interconnection’ (i.e., adding the Dotson-New Ulm line),”<sup>44</sup> but according to Jeffers South, section 4.4 of the Interconnection Procedures (Modifications) specifies that MISO

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<sup>42</sup> The Commission approved reforms to the MISO interconnection queue in Docket No. ER12-309-000. Jeffers South argues that MISO’s case hinges on its position on material modifications and the assertion that three projects in Definitive Planning Phase Cycle 3/DPP Cycle 5 would be adversely affected if the interconnection plan MISO favors were not adopted. Jeffers South states that because the queue reforms changes adopted in Docket No. ER12-309 have eliminated Definitive Planning Phase Cycle 3/Definitive Planning Phase Cycle 5, the three projects that MISO states would be harmed will now be subject to the new interconnection procedures. Jeffers South maintains that as a result, there is no basis on which to conclude that those projects might be harmed. Jeffers South Brief on Exceptions at 6, n.14. MISO argues in response that the tariff changes in Docket No. ER12-309 do not eliminate the material modification standard. It states that while some projects may remain in the System Planning and Analysis phase, lower-queued projects are still impacted by uncertainty of higher-queued projects, such as the Jeffers South Project. MISO states that irrespective of the changes in ER12-309-000, with the upgrades sought by Jeffers, the harmed generators would attempt to connect to a system devoid of a line that Jeffers South had originally sought to have built. MISO Brief Opposing Exceptions at 11.

<sup>43</sup> Jeffers South Brief on Exceptions at 6, nn.13-14.

<sup>44</sup> *Id.* at 6 (quoting Interconnection Procedures section 4.4).

can do this only if interconnection costs are improved, (2) benefits, including reliability of the interconnection, are improved, and (3) the interconnection customer consents.<sup>45</sup>

35. Jeffers South contends that the Presiding Judge also erred in concluding that the network upgrades MISO selected in the 2010 MISO Restudy were required and satisfy the “but for” standard. Jeffers South states that, contrary to the Presiding Judge’s assertions, there is no evidence supporting the conclusion that the upgrades identified in the 2010 MISO Restudy were the only set of upgrades that would reliably and efficiently connect Jeffers South’s project. According to Jeffers South, the 2006 Group 4 System Impact Study and Option 3 of the 2010 MISO Restudy set forth interconnection plans that would reliably and efficiently interconnect Jeffers South’s project. MISO, however, did not explore alternatives because it was focused solely on the 2006 Transmission Owners Joint Study. Jeffers South states that the record, particularly the 2006 Group 4 System Impact Study and Option 3 of the 2010 MISO Restudy, established that it was contrary to the tariff and not reasonable to impose \$81 million of upgrades on Jeffers South for a plan designed to address ethanol plant loads, load growth, and transmission service requests of others, all of which vanished.<sup>46</sup> Jeffers South adds that when MISO proposed using the 2006 Transmission Owners Joint Study, MISO agreed that the costs allocable to Jeffers South would never exceed the amount that Jeffers South would have been allocated under what it refers to as the Stand-Alone Plan, i.e., based on the 2006 Group 4 System Impact Study, which did not include the Dotson-New Ulm Line.<sup>47</sup>

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<sup>45</sup> *Id.* Section 4.4 of the Interconnection Procedures reads, in relevant part, as follows:

... during the course and prior to the completion of the Interconnection Studies, the Interconnection Customer, Transmission Owner or Transmission Provider may identify changes to the planned interconnection that may improve the costs and benefits (including reliability) of the interconnection, and the ability of the proposed change to accommodate the Interconnection Request. To the extent the identified changes are acceptable to the Transmission Provider, Transmission Owner and Interconnection Customer, such acceptance not to be unreasonably withheld, Transmission Provider shall modify the Point of Interconnection and/or configuration in accordance with such changes and proceed with any restudies necessary to do so . . . .

<sup>46</sup> Jeffers South Brief on Exceptions at 7-8.

<sup>47</sup> *Id.* at 8.

36. Jeffers South claims that the Presiding Judge erred by concluding that Jeffers South's predecessor agreed, within the meaning of section 4.4 of the Interconnection Procedures (Modifications), to the 2006 Transmission Owners Joint Study. First, Jeffers South states that the Presiding Judge erred in concluding that a rejected customer-sponsored interconnection was evidence of Jeffers South's agreement to use the 2006 Transmission Owners Joint Study. Second, Jeffers South contends that the Presiding Judge erred in concluding that the email presented as evidence of agreement constituted a sufficient agreement under section 4.4.4 of the Interconnection Procedures in the absence of agreement as to cost allocation.<sup>48</sup> Third, Jeffers South states that the Presiding Judge erroneously failed to treat Great River's decision not to build the Dotson-New Ulm Line as the termination of the alleged agreement under section 4.4.4. Jeffers South asks the Commission to clarify that in order to constitute an agreement sufficient for the purposes of section 4.4.4 of the Interconnection Procedures, the Transmission Provider, affected Transmission Owners, and the interconnection customer must all agree to the alternate plan and the cost allocation of the plan. Jeffers South asserts that one ambiguous email without any agreement on costs is insufficient to constitute an agreement under section 4.4.4. Further, according to Jeffers South, if one party is permitted to withdraw, then the agreement should be considered terminated as a matter of law.<sup>49</sup>

37. Jeffers South states that when MISO informed it that the network upgrades for the Jeffers South Project would be based on the interconnection plan based on the 2006 Transmission Owners Joint Study, MISO stated that Great River and Xcel would be constructing at their own cost substantial portions of the upgrades. Jeffers South also states that MISO stated that Jeffers South's cost responsibility would not exceed the cost that Jeffers South would have paid under the Stand-Alone Plan, which did not include the Dotson-New Ulm Line.<sup>50</sup>

38. Jeffers South argues that the Presiding Judge made both factual and legal errors in finding that the Settlement Agreement should not be voided. Jeffers South states that the Presiding Judge based her decision, in part, on the conclusion that Jeffers South would have been in suspension at the time Great River decided not to proceed and that MISO does not evaluate the effect of changes on suspended projects. Jeffers South states that it was not in suspension at that time.<sup>51</sup> It also states that while the Presiding Judge concluded that MISO's planning process was publicly available, and it therefore was up

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<sup>48</sup> *Id.* at 9 (citing Ex. MSO-18).

<sup>49</sup> *Id.* at 8-9. *See also* tariff language from section 4.4.4 of the Interconnection Procedures in Ex. MSO-29.

<sup>50</sup> Jeffers South Brief on Exceptions at 1-2.

<sup>51</sup> *Id.* at 9 (citing Rehearing Order, 138 FERC ¶ 61,149).

to Jeffers South to find out about Great River's decision, there is no evidence in the record indicating that information on Great River's decision was publicly available. Moreover, according to Jeffers South, under applicable law it is more appropriate for the party making the representation to bear the risk than the person that is misled.<sup>52</sup> Jeffers South thus maintains that it was entitled to rely on MISO's previous assertions regarding the upgrades and Great River's plans without investigating their truthfulness.<sup>53</sup>

### **3. MISO Brief Opposing Exceptions**

39. MISO argues that the Presiding Judge appropriately found that Jeffers South did not show any error in the MISO study process or that the material modification standard was not relevant. MISO states that there is ample evidence in the record that the 2010 MISO Restudy was performed consistent with the Interconnection Procedures, the Settlement Agreement, and the Restudy Agreement. MISO states that, contrary to Jeffers South's assertions, the Settlement Agreement and the Restudy Agreement do not require MISO to ignore the material modification standard or to provide for a restudy beyond what MISO's process allows, especially one that ignores the effect on lower-queued customers.<sup>54</sup> MISO explains that for purposes of the 2010 MISO Restudy, the description of the "required" network upgrades simply reflects the typical reference to Network Upgrades as those "required" in the Interconnection Procedures and does not impose an obligation to study outside of that process. According to MISO, it is instead the unusual circumstance of a change in transmission owner ownership and related reimbursement rules in Jeffers South's favor that contributed to the Settlement Agreement.<sup>55</sup>

40. MISO argues that the Presiding Judge appropriately found that the material modification standard applied to prevent Jeffers South's proposed change in its point of interconnection.<sup>56</sup> MISO also states that it found Jeffers South's proposed alternatives to be material modifications, and this is sufficient to support a material modification

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<sup>52</sup> *Id.* at 10 (citing Restatement (Second) of Contracts, § 172, cmt b (1981) and cases holding that reliance on representations is unjustified only if doing so, or failing to discover the truth, amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing).

<sup>53</sup> *Id.* at 9-10.

<sup>54</sup> MISO Brief Opposing Exceptions at 9.

<sup>55</sup> *Id.* at 9-10.

<sup>56</sup> *Id.* at 10 (citing *Southwest Power Pool*, 135 FERC ¶ 61,186 (2011)).

determination under Commission precedent.<sup>57</sup> MISO adds that the Presiding Judge considered MISO's evidence of the changes Jeffers South proposed and correctly found that the changes would cause harm to lower-queued projects. MISO further asserts that the recent changes to MISO's queue procedures accepted in Docket No. ER12-309-000 do not eliminate studies or eliminate the impact that Jeffers South's proposed modifications would have on the cost or timing of other projects.<sup>58</sup>

41. MISO states that the evidence and testimony it provided demonstrate: (1) that at least three lower-queued projects after Jeffers South, which have submitted requests to interconnect to the Dotson-New Ulm Line or nearby, will be adversely affected if the line is not built; (2) the adverse effect that the Jeffers South Project will have on lower-queued projects in the Definitive Planning Phase Cycle 3 study; (3) that the Definitive Planning Phase Cycle 3 study references the Jeffers South Project and its effect on one of the three lower-queued projects; and (4) that MISO properly rejected alternatives as material modifications. MISO notes, in particular, that the Minnesota Definitive Planning Phase Cycle 3 study clearly indicates that a change to the Jeffers South Project would directly impact at least one lower-queued project, G769.<sup>59</sup> MISO notes Jeffers South's statement that evidence in the record demonstrates that an alternative that does not include the northeast outlet for the Jeffers South Project will leave at least one other lower-queued project, G759, in the position of having to construct the line to which it intends to interconnect.<sup>60</sup>

42. MISO cites paragraph 320 of Order No. 2003-A (Paragraph 320) as supporting the proposition that all projects face some risk that a higher-queued project may withdraw and that certain costs may fall to the lower-queued project,<sup>61</sup> and it maintains that the material modification standard prevents this risk from becoming a constant and unmanageable risk that one project may hold the remainder of the interconnection queue hostage by constantly making modifications.<sup>62</sup> MISO asserts that there is no evidence

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<sup>57</sup> *Id.* at 10-11 (citing *Montgomery Great Falls Energy Partners v. NorthWestern Corp.*, 123 FERC ¶ 61,181, at P 58 n.50 (2008)).

<sup>58</sup> *Id.* at 11.

<sup>59</sup> *Id.* at 12-13.

<sup>60</sup> *Id.* at 13. MISO states that this evidence is contained in Exhibit MSO-11.

<sup>61</sup> *Id.* at 13, n.64. Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 320.

<sup>62</sup> MISO Brief Opposing Exceptions at 13.

supporting Jeffers South's view that this harm has ceased to exist or that its proposals no longer constitute material modifications.<sup>63</sup>

43. Finally, MISO argues that Commission precedent, in particular Paragraph 320, establishes that Jeffers South bore the risk of increased costs, including costs that would result if Great River chose not to construct the Dotson-New Ulm Line.<sup>64</sup> It maintains that the Commission stated in Paragraph 320 that "the Commission cannot protect [interconnection] customers from all risk,"<sup>65</sup> and Jeffers South took the risk when it was in suspension under the Settlement Agreement that changes in circumstances, such as changes in Great River's plans, would have unfavorable consequences for Jeffers South.<sup>66</sup>

#### **4. Jeffers South Motion to Reopen the Record**

44. On January 23, 2013, Jeffers South filed a motion to reopen the record. Jeffers South states in its motion that two of the three projects below the Jeffers South Project in the queue have withdrawn from the queue. Jeffers South also states that evidence submitted by MISO shows that the third project would not benefit from the upgrades that are in dispute because that project would not be required to reimburse Jeffers South under the Shared Network Upgrade policy.

45. MISO filed an answer to Jeffers South's motion to reopen the record. In its answer, MISO argues that the Commission should deny the motion because: (1) the Initial Decision has appropriately denied the complaint and rejected many of the assertions that Jeffers South makes in the motion; (2) Jeffers South did not meet its burden of showing that the motion is appropriate; and (3) the MISO process provides a just and reasonable alternative for Jeffers South to submit a new interconnection request.

#### **5. Commission Determination**

46. We reverse the Initial Decision. The central question presented here is whether MISO violated its obligation with respect to the study of network upgrades that are required to accommodate the interconnection of the Jeffers South Project when it concluded that Jeffers South was obligated to fund construction of the Dotson-New Ulm

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<sup>63</sup> *Id.* at 14.

<sup>64</sup> *Id.* at 32-33, n.171.

<sup>65</sup> *Id.* n.105.

<sup>66</sup> *Id.* at 32-33, n.171.

Line. The resolution of this issue turns on the question of whether the Dotson-New Ulm Line was unnecessary but for the need to interconnect the Jeffers South Project.

47. We find that the Jeffers South Project was only one of a number of considerations used to justify construction of the Dotson-New Ulm Line, and as a result it is not possible to conclude that the line would be unnecessary but for the Jeffers South interconnection request. Once this is shown to be the case, there is no basis for concluding that section 4.4 of the MISO Interconnection Procedures (Modifications) is applicable here. MISO treats Paragraph 320 as authorizing the application of these provisions, but as discussed below, that paragraph explicitly limits an interconnection customer's risk to that of funding network upgrades that were the responsibility of a higher-queued interconnection customer that drops out of the queue. Great River was, of course, not an interconnection customer, and Paragraph 320 therefore does not sanction assigning to Jeffers South the costs of network upgrades that Great River planned for its own purposes (and not simply for the interconnection of the Jeffers South Project) but subsequently abandoned. MISO's arguments to the contrary improperly expand the scope of network upgrades that an interconnection customer must construct as the result of an interconnection request, and, as discussed below, they do so in a way that parallels other MISO arguments that the Commission rejected in *Community Wind II*.<sup>67</sup>

48. In its order setting this matter for hearing, the Commission found that Jeffers South's complaint raised issues of material fact that could not be resolved based upon the record as it existed at that point. The Commission stated that

[t]hese issues include, but are not limited to, whether the [2010 MISO Restudy] was performed in a manner consistent with the various agreements between the parties, such as the Settlement Agreement and the restudy agreement, and whether the Dotson-New Ulm Line would not be necessary but for the interconnection of the [Jeffers South Project].<sup>68</sup>

49. These two issues are interrelated. Whether performance of the 2010 MISO Restudy was consistent with the agreements mentioned depends on how those agreements are interpreted. Principles of contract interpretation specify that the agreements should not be interpreted to allow a result that is inconsistent with the legal requirements of the "but for" standard prescribed in the MISO tariff for purposes of cost

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<sup>67</sup> 131 FERC ¶ 61,165 (2010).

<sup>68</sup> Order on Complaint, 134 FERC ¶ 61,013 at P 34.

allocation.<sup>69</sup> Consequently, as discussed below, we find that MISO has no basis to allocate to Jeffers South the cost of the Dotson-New Ulm Line.

**a. The “But For” Standard**

50. We begin our analysis with the question of whether the Dotson-New Ulm Line would not be necessary but for the interconnection of the Jeffers South Project. The Presiding Judge found that the “but for” standard had been satisfied in this case based on the following analysis:

The ITC Midwest System is not robust, a fact readily available to potential interconnection customers. Thus, interconnection could reasonably trigger the need for network upgrades. Sometimes the upgrades needed to mitigate an interconnecting generator’s contribution to load also mitigate the rest of the overload. Network upgrades commonly provide benefits beyond just interconnection of the interconnecting generator. The evidence here is that [the Jeffers South Project] would tax the system unless the upgrades set forth in the 2006 Transmission Owners Joint Study were added to the system.<sup>70</sup>

51. While the Jeffers South Project created a need for network upgrades, and while network upgrades built to fulfill an interconnection request can provide benefits beyond just interconnection of the interconnecting generator, we see no basis in the record for concluding that because the Jeffers South Project would trigger the need for network upgrades, it triggered the need for *all* the upgrades described in the 2010 MISO Restudy, which in turn relied upon assumptions in the 2006 Transmission Owners Joint Study. On the contrary, as explained below, the 2006 Transmission Owners Joint Study shows that the transmission owners, in particular Great River, affirmatively sought construction of the Dotson-New Ulm Line and the benefits it would provide and that the line was part of

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<sup>69</sup> *Washington Capitols Basketball Club v. Barry*, 419 F.2d 472, 478 (9th Cir. 1969) (stating that “parties to a contract are deemed to have intended a lawful rather than an unlawful act”); *United States v. Sacramento Municipal Utility District*, 652 F.2d 1341, 1346 (9th Cir. 1981) (stating that “ambiguously worded contracts should not be interpreted to render them illegal if a legal construction is plausible”); Restatement (Second) of Contracts § 203 (1981) (stating that “an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect”).

<sup>70</sup> Initial Decision, 139 FERC ¶ 63,002 at P 131.

their own comprehensive transmission system plan. Indeed, MISO has acknowledged that this was the case.<sup>71</sup> The benefits in question were not simply incidental to the Jeffers South interconnection request, and they therefore cannot be seen as illustrating the proposition that “[n]etwork upgrades commonly provide benefits beyond just interconnection of the interconnecting generator.”

52. The 2006 Transmission Owners Joint Study was considerably more than a system impact study done for the Jeffers South Project. It was commissioned as part of a larger “[Great River] sponsored vision study.”<sup>72</sup> The study states that it was “developed based on the plans developed in the vision study performed by Excel Engineering for a large wind generator near Storden [i.e., the Jeffers South Project]”<sup>73</sup> and that it was also undertaken to pursue other goals, viz., to “facilitate better overall system performance,” and to address “other deficiencies in the region including providing the City of New Ulm network transmission service and Mankato area load serving issues.”<sup>74</sup> The basic conclusion of the 2006 Transmission Owners Joint Study was that:

[t]he proposed 161/115 kV line from Heron Lake to South Storden to Storden to Dotson to New Ulm to Ft. Ridgely provides excellent voltage support for the new ethanol plants [expected to be online in 2008/09] and also provides better generation deliverability as compared to a second 161 kV line to Lakefield Junction. This plan also provides a new 115 kV source at New Ulm allowing reliable service to the entire New Ulm load, [sic.] In addition, this plan will support future transmission expansion to support load growth and possible new ethanol plants between Mankato through St. James.<sup>75</sup>

53. The points noted above show that the Dotson-New Ulm Line was, among other things, an element of a comprehensive plan that at the time was deemed necessary improve overall system performance and to ensure that load could be served. Even if the Jeffers South Project would “tax the system” unless upgrades set forth in the 2006

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<sup>71</sup> See MISO Answer to Complaint at 18 n.32 (referring to “[t]he upgrades on the [Great River] system” as “part of the overall coordinated plan. . .”).

<sup>72</sup> Ex. JS-11, Ex. 2 at 5. The 2006 Transmission Owners Joint Study is unpaginated. The citations here take the title page as page 1.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 6.

Transmission Owners Joint Study were constructed, the study shows that a number of other unrelated anticipated developments would also tax the system unless upgrades set forth in the study were added to the system. We thus cannot conclude that the Dotson-New Ulm Line would not be necessary but for the interconnection of the Jeffers South Project; rather, the 2006 Transmission Owners Joint Study indicates that the Dotson-New Ulm Line would not be necessary but for a number of other significant developments.

54. Other evidence in the record confirms this point. The Facilities Construction Agreement among Summit Wind, Great River, and MISO states that it was entered into “for the purpose of facilitating the interconnection of the Generating Facility [i.e., the Jeffers South Project] by the construction of necessary Network Upgrades to the Transmission Owner Transmission System.”<sup>76</sup> The agreement defines “Network Upgrades” as “the necessary upgrades to the Transmission Owner transmission system that *would not have been required but for* the interconnection of the Facility.”<sup>77</sup> It also states that “Network Upgrades are identified in Appendix A.”<sup>78</sup> Appendix A to the Facilities Construction Agreement does not include the Dotson-New Ulm Line among the Network Upgrades, which implies that the Dotson-New Ulm Line is not an upgrade that “would not have been required but for” the interconnection of the Jeffers South Project.

55. The Commission stated in *Community Wind II* that MISO may determine through its study process that a large upgrade should be built because it will address both interconnection customers and other system-wide needs. In that case, however, the cost responsibility of interconnection customers “remains limited to the cost of the facilities that would not be needed but for” the interconnection.<sup>79</sup> Appendix A to the Facilities Construction Agreement appears to comport with this guidance. It states:

Transmission Owner Network Upgrades, *resulting from a coordinated transmission plan* among the Transmission Owner [i.e., Great River], Interstate Power and Light and Northern States Power include upgrades to the existing Dotson Corners Substation. The purpose of this project is to add a 161kV outlet at the 69kV Dotson Corners Substation in order to accommodate the proposed new 161 kV Cottonwood County to Dotson Corners transmission line. Dotson Corners

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<sup>76</sup> Facilities Construction Agreement, attached to Ex. JS-13 at Original Tariff Sheet No. 2 (Facilities Construction Agreement).

<sup>77</sup> *Id.* at Original Tariff Sheet No. 5 (emphasis supplied).

<sup>78</sup> *Id.* (emphasis supplied).

<sup>79</sup> *Community Wind II*, 131 FERC ¶ 61,165 at P 22.

Substation would become a 161 kV/69 kV transmission substation with a 6 position ring bus on the 161 kV portion. Two positions would be used for 161 kV/69 kV transformers, one position for the Cottonwood county transmission line, one position for the New Ulm Transmission line and two positions for future transmission lines. Initially, 4 161 kV breakers will be installed. The 69 kV portion has three existing transmission lines and one location for a future transmission line. The future position will be used for the new Cobden transmission line. A 69 kV bus tie breaker will also be installed along with 69 kV low side transformer breakers. *Of all of these Transmission Owner Facilities the Interconnection Customer will be responsible for funding Network Upgrade costs associated with the 161 kV Cottonwood County transmission line outlet at the Dotson Corner Substation.*<sup>80</sup>

Appendix A goes on to say that “[t]he Interconnection Customer is not responsible for the 161 kV New Ulm Line or the 69 kV Cobden Line. . . .”<sup>81</sup> This is necessarily the case because those lines are part of what the 2006 Transmission Owners Joint Study describes as a “coordinated transmission plan” among transmission owners specified in the study.

56. We find that all of this is more than sufficient to demonstrate that assigning responsibility for the Dotson-New Ulm Line to Jeffers South does not satisfy the “but for” standard. This is particularly so in light of the Commission’s findings in *Community Wind II* that

[MISO] may determine through its study process that a large upgrade . . . should be built because it will both accommodate the interconnection of a group of projects and address other system-wide needs. However, the cost responsibility of a group of interconnection customers remains limited to the cost of the facilities that would not be needed but for the interconnection of the group.<sup>82</sup>

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<sup>80</sup> Facilities Construction Agreement at Original Tariff Sheet No. 33-34 (emphasis supplied).

<sup>81</sup> *Id.* at Original Tariff Sheet No. 34.

<sup>82</sup> *Community Wind II*, 131 FERC ¶ 61,165 at P 22.

**b. The Material Modification Standard and Paragraph 320**

57. While the “but for” standard represents a threshold issue in this proceeding, its importance is superseded in the Initial Decision through the adoption of MISO’s argument that in contesting responsibility for the network upgrades specified in the 2006 Transmission Owners Joint Study, Jeffers South seeks to make an impermissible material modification to its interconnection request. MISO bases this position on its interpretation of section 4.4 of the MISO Interconnection Procedures, an interpretation that relies heavily on MISO’s reading of Paragraph 320 of Order No. 2003-A. This reading fails to consider all of the elements of Paragraph 320 and is incorrect as a consequence.

58. The Interconnection Procedures define a material modification as a modification that would have “a material impact on the cost or timing of any Interconnection Request with a later queue priority date.”<sup>83</sup> The MISO Interconnection Procedures in effect at the time the events in dispute here occurred allowed certain modifications to an interconnection request prior to the return of the executed Interconnection System Impact Study Agreement to the Transmission Provider.<sup>84</sup> These procedures also allowed certain modifications to an interconnection request prior to the return of the executed Interconnection Facilities Study Agreement to the Transmission Provider.<sup>85</sup> Other modifications would be dealt with through a process that allows the interconnection customer to submit them to the Transmission Provider ten days prior to the deadline for submitting the applicable executed Study Agreement. The Interconnection Provider was to evaluate them to determine whether the modification constitutes a material modification. The procedures specify that any change to an interconnection point, other than certain changes that are not relevant here, constitutes a material modification.

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<sup>83</sup> Ex. MSO-29 at § 1 (*see* Substitute Third Revised Sheet 1703).

<sup>84</sup> *Id.* § 4.4.1. These modifications are listed as (a) a decrease of up to 60 percent of electrical output (MW) of electrical output of the proposed project; (b) modifying the technical parameters associated with the Generating Facility technology or the Generating Facility step-up transformer impedance characteristics; and (c) modifying the interconnection configuration.

<sup>85</sup> *Id.* § 4.4.2. These modifications are listed as (a) additional 15 percent decrease of electrical output (MW), and (b) Generating Facility technical parameters associated with modifications to Generating Facility technology and transformer impedances; provided, however, the incremental costs associated with those modifications are the responsibility of the requesting Interconnection Customer.

59. MISO argued at the hearing, and the Presiding Judge agreed, that a modification to the Jeffers South interconnection request that involved elimination of the Dotson-New Ulm Line would qualify as a material modification because it would have a material impact on three lower-queued projects that sought to interconnect to or near that line.<sup>86</sup>

60. MISO treats Paragraph 320 as providing justification for finding that in objecting to responsibility for the Dotson-New Ulm Line, Jeffers South is proposing to make an impermissible material modification. It does this by arguing that Paragraph 320 establishes that responsibility for the Dotson-New Ulm Line was a business risk that Jeffers South is required to bear. However, we find that Paragraph 320 does not apply to the specific facts at issue in this proceeding.

61. Paragraph 320 responds to requests for rehearing or clarification of Order No. 2003 concerning responsibility for upgrades when a higher-queued project drops out of the queue. To address these requests, the Commission stated:

... we clarify that the Interconnection Customer is responsible (and later may receive credits) for funding the cost of (1) all Network Upgrades (other than those already in the Transmission Provider's current expansion plan) that must be constructed to support that Interconnection Customer's In-Service Date, (2) all Network Upgrades that are the ultimate responsibility of higher queued Interconnection Customers, the construction of which must be accelerated to meet the Interconnection Customer's In-Service Date, and (3) *Network Upgrades that originally were the responsibility of a higher queued Interconnection Customer that then dropped out of the queue, if these Network Upgrades are necessary to support the interconnection of the Interconnection Customer's Generating Facility.* ... We recognize that this third category creates uncertainty for the Interconnection Customer, since it may cause the Interconnection Customer's initial funding requirements to increase above initial estimates. Nevertheless, *with the withdrawal of the higher queued Interconnection Customer*, such costs become a legitimate component of the Interconnection Customer's initial funding requirement. This is simply a business risk that Interconnection Customers must face; the Commission cannot protect them from all uncertainty. To help the

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<sup>86</sup> See Initial Decision, 139 FERC ¶ 63,002 at PP 64-66.

Interconnection Customer manage this uncertainty, *we are directing the Transmission Provider to provide an estimate of the Interconnection Customer's maximum possible funding exposure, if higher queued generating facilities drop out when the Transmission Provider tenders the draft LGIA.* The Transmission Provider shall provide an estimate of the costs of any Network Upgrades that were assumed in the Interconnection Studies for the Interconnection Customer that are an obligation of an entity other than the Interconnection Customer and that have not yet been constructed.<sup>87</sup>

62. MISO states that Paragraph 320 recognizes that lower-queued projects bear some risk that higher-queued projects will drop out of the queue, but “the Material Modification standard prevents this risk from becoming a constant and unmanageable risk that one project may ‘hold hostage the remainder of the interconnection queue by continually making modifications.’”<sup>88</sup> While we agree that Paragraph 320 seeks to control interconnection customer risk, its provisions show that MISO’s use of the material modification standard for this purpose here requires Jeffers South to bear a risk that Paragraph 320 does not contemplate.

63. Clause (1) of the first sentence of Paragraph 320 makes an interconnection customer responsible for funding “all Network Upgrades (other than those already in the Transmission Provider’s current expansion plan) that must be constructed to support that Interconnection Customer’s In-Service Date. . . .” The Facilities Construction Agreement confirms that the 2006 Transmission Owners Joint Study deals with network upgrades that fall within the parenthetical exception in Clause (1), in that it describes them as upgrades “resulting from a coordinated transmission plan” among the transmission owners.<sup>89</sup> As noted above, MISO has acknowledged that the upgrades to be constructed by Great River, including the Dotson-New Ulm Line, were part of a transmission owner expansion plan; it described them earlier in this proceeding as currently “upgrades [that] are no longer part of the [Great River] transmission plan.”<sup>90</sup> In

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<sup>87</sup> Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at P 320 (emphasis supplied).

<sup>88</sup> MISO Brief Opposing Exceptions at 13 (referencing Paragraph 320 and quoting language from P 128 of Order No. 2003-A that describes the issue raised on rehearing that P 320 was intended to address).

<sup>89</sup> Facilities Construction Agreement at Original Tariff Sheet No. 33.

<sup>90</sup> MISO Answer to Complaint at 17.

short, the Dotson-New Ulm Line falls within the exemption described in parentheses in clause (1).

64. MISO argued in its answer to the complaint in the instant proceeding that Paragraph 320 exempts interconnection customers from responsibility for facilities that are “already in the Transmission Provider’s *current* expansion plan” and that because the upgrades contested in this proceeding, i.e., those involved in the Dotson-New Ulm Line, “are no longer part of the [Great River] transmission plan, the obligation to fund these upgrades falls to Jeffers South.”<sup>91</sup> But facilities planned by transmission owners for their own purposes – i.e., facilities that are necessary for reasons other than an interconnection request – do not become unnecessary but for that interconnection request when they are dropped from the transmission plan. While we stated in the Initial Order that the MISO tariff “affords MISO discretion when determining what facilities should be built in order to accommodate the interconnection of a project or group of projects,”<sup>92</sup> that discretion is not so great that it permits MISO to transform network upgrades that were planned for multiple purposes, including the Jeffers South Project, into network upgrades that are unnecessary but for that project. We therefore reject MISO’s interpretation of the exemption in Paragraph 320.

65. MISO contends that “the obligation to fund [the upgrades] falls to Jeffers South”<sup>93</sup> because the Commission stated in Paragraph 320 that it “cannot protect interconnection customers from all risk, particularly, from the actions of other parties.”<sup>94</sup> However, this statement is not intended to permit the transfer of all cost responsibility for such a network upgrade without a determination of the costs of that facility required but for the lower-queued customer.

66. Clause (3) of the first sentence of P 320 states that an Interconnection Customer is responsible for “Network Upgrades that originally *were the responsibility of a higher queued Interconnection Customer that then dropped out of the queue*, if these Network Upgrades are necessary to support the interconnection of the Interconnection Customer’s Generating Facility. . . .”<sup>95</sup> In this instance, the Dotson-New Ulm Line was not a network upgrade that was the responsibility of a higher-queued interconnection customer that dropped out of the queue, but a network upgrade that had been in the transmission

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<sup>91</sup> MISO Answer to Complaint at 17 (emphasis supplied by MISO).

<sup>92</sup> Initial Order, 134 FERC ¶ 61,013 at P 33.

<sup>93</sup> MISO Answer to Complaint at 17.

<sup>94</sup> *Id.* at 14-15 n.26.

<sup>95</sup> Emphasis supplied.

expansion plan that was cancelled. The Commission did not address in Paragraph 320 what would occur when an interconnection customer is subject to restudy, and a network upgrade that had been in the transmission expansion plan was cancelled. In any event, consistent with our transmission pricing policy and its “but for” standard, assigning the interconnection customer responsibility for the abandoned transmission owner upgrades would require a determination that the upgrades are needed to interconnect the interconnection customer.

67. MISO’s argument contains an additional complexity that makes it even less tenable. While it maintains that Paragraph 320 supports imposing on Jeffers South the risk that it would have to fund the Dotson-New Ulm Line because the Commission stated there that it cannot protect interconnection customers from all risk, MISO finds the proximate cause for Jeffers South’s obligation to fund the line not in the fact that Great River dropped out, but rather in the claim that Jeffers South’s failure to fund the construction of the line would lead to an impermissible material modification of Jeffers South’s interconnection request. This argument, which is adopted in the Initial Decision, brings the material modification provisions of the MISO tariff into direct conflict with the “but for” standard. This argument must fail because “in the context of MISO’s Tariff, the ‘but for’ standard is a cost allocation principle that *limits* the cost responsibility of an interconnection customer or a group of interconnection customers.”<sup>96</sup> The effect of MISO’s use of the material modification provisions of section 4.4 is to raise Jeffers South’s cost responsibility beyond the limit that the “but for” standard allows in this case. This is inconsistent with the limits on interconnection customer cost responsibility that the Commission has established.

68. Paragraph 320 states that an Interconnection Customer is responsible for “Network Upgrades that originally were the responsibility of a higher-queued Interconnection Customer that then dropped out of the queue, *if these Network Upgrades are necessary to support the interconnection of the Interconnection Customer’s Generating Facility.*”<sup>97</sup> We have already noted that Great River was not an interconnection customer, and that the Dotson-New Ulm Line was planned for multiple reasons. The question then becomes whether the network upgrades in dispute are necessary to support interconnection of the Jeffers South Project. MISO argued that they were necessary based on the following statement:

The impact on lower queued projects exists *regardless* of who funds a line that is needed to interconnect [the Jeffers South Project]. When [the Dotson-New Ulm Line] was not funded

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<sup>96</sup> Initial Order, 134 FERC ¶ 61,013 at P 33 (emphasis supplied).

<sup>97</sup> Emphasis supplied.

by [Great River], it became the responsibility of [Jeffers South] because the plan agreed to by Jeffers South was contingent upon this line and when the [2010 MISO Restudy] demonstrated that such a line was still needed, the restudy reaffirmed Jeffers South's responsibility for this line.<sup>98</sup>

But we see no basis in the record to conclude that the 2010 MISO Restudy, which relied upon assumptions in the 2006 Transmission Owners Joint Study, demonstrated that the Dotson-New Ulm Line was “still needed” in the sense that it was needed because of the interconnection request of Jeffers South and that it would not be needed but for that request.

69. The 2010 MISO Restudy considered three different outlet studies for the Jeffers South Project: (1) the Dotson-New Ulm Line; (2) a Cottonwood-Franklin line; and (3) a Cottonwood-Huron Lake-Lakefield line. The 2010 MISO Restudy showed that each of the three options studied “provided satisfactory generation outlet” for the Jeffers South Project. It concluded that option (1) was preferable to option (2) because the latter involved a longer and more expensive line. With respect to option (3), which Jeffers South favored, the 2010 MISO Restudy stated:

Option 3 is considered a material modification due to the fact that later queued projects are depending on the Cottonwood County to Dotson Corner 161 kV line and this configuration would also aggravate the existing stability constraint by eliminating a parallel path which directs more power to the Lakefield Junction Substation therefore increasing the flow on the Lakefield-Wilmarth 345 kV line.

70. The latter point concerning aggravation of existing stability constraints is in dispute,<sup>99</sup> and the Initial Decision makes no findings with respect to it. MISO has not addressed this matter in the various briefs that it has filed in this proceeding. It thus appears that MISO based the conclusion that the Dotson-New Ulm Line is “still needed” on the proposition that not constructing it would lead to a material modification of the Jeffers South interconnection request. However, as noted above, this use of the material modification requirements of the Interconnection Procedures improperly expands the meaning of network upgrades that would not be “needed” or “necessary” but for an

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<sup>98</sup> Midwest ISO Hearing Initial Brief 15-16 (emphasis by Midwest ISO).

<sup>99</sup> See Ex. JS-6 at 31 (statement by Jeffers South witness Thomas Melone maintaining there is no evidence showing that an existing stability constraint would be aggravated and that whatever the stability constraint may have been, it no longer exists).

interconnection request. In other words, the Dotson-New Ulm line does not become unnecessary but for the need to interconnect the Jeffers South Project because not constructing it would have a material adverse effect on lower-queued projects.

71. Network upgrades do not satisfy the “but for” standard for an interconnection request simply because a transmission owner that needed them changes its mind and an interconnection customer’s failure to fund them has a material adverse effect on interconnection customers further down the queue. In this case, the proximate cause of this material adverse effect is Great River’s decision that it no longer needed the Dotson-New Ulm Line, not Jeffers South’s refusal to fund the line because it has no obligation to fund network upgrades unless they would be unnecessary but for its interconnection request. To say that the material modification requirements of the MISO Interconnection Procedures require Jeffers South to fund the Dotson-New Ulm Line expands the meaning of “needed” or “necessary” beyond what the “but for” standard allows.

72. MISO’s use of the material modification requirements for purposes of the “but for” standard here parallels MISO’s use of its planning process and the term “Good Utility Practice” to establish interconnection customer cost responsibility that the Commission rejected in *Community Wind II*. In that proceeding, MISO argued that Community Wind, a developer of a 30 MW wind generation facility, should be responsible for 2.5 percent of the cost of the 230-mile, 345-kV Brookings Line, or an estimated \$15 million, because the Brookings Line was a known contingency for Community Wind’s interconnection project and for others in the same group study.<sup>100</sup> The Commission rejected the allocation on the grounds that MISO had allocated the cost of the Brookings Line to Community Wind and 18 other projects without showing “that the Brookings Line would not have been built but for the interconnection of these generation projects.”<sup>101</sup> On rehearing, MISO argued that under its Interconnection Procedures, the equipment required to interconnect projects is based on the MISO study process and Good Utility Practice.<sup>102</sup> However, the Commission disagreed that the requirements of the planning process and Good Utility Practice “should be interpreted as expanding the meaning of ‘required’ for the purpose of the definition of network upgrades.”<sup>103</sup>

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<sup>100</sup> *Community Wind I*, 129 FERC ¶ 61,019 at PP 5-7.

<sup>101</sup> *Id.* P 24.

<sup>102</sup> *Community Wind II*, 131 FERC ¶ 61,165 at P 14.

<sup>103</sup> *Id.* P 20.

73. In this proceeding, MISO similarly seeks to use the material modification requirements of its Interconnection Procedures to expand the meaning of required network upgrades. Similar to our finding in *Community Wind*, we find that the material modification requirements of the Interconnection Procedures cannot be interpreted as expanding the scope of network upgrades that would not be necessary but for an interconnection request.

74. We also disagree that there is any basis to conclude that Jeffers South consented to the possibility of being allocated the costs of the Dotson-New Ulm Line. MISO and the Presiding Judge argue, and we agree, that Jeffers South's predecessor consented to MISO's use of the 2006 Transmission Owners Joint Study for purposes of a system impact study for the Jeffers South Project. But we do not find, as they did, that such consent can result in Jeffers South becoming responsible for everything in the plan despite the limitations created by the "but for" standard.

75. The 2006 Transmission Owners Joint Study was much more than a plan for the interconnection of the Jeffers South Project. It was, as described above, part of a larger vision study sponsored by Great River, and it was undertaken for purposes that went well beyond interconnecting the Jeffers South Project. These purposes included facilitating overall system performance and addressing a number of regional deficiencies.<sup>104</sup> Nothing in the record suggests that in consenting to use the 2006 Transmission Owners Joint Study as a system impact study for the Jeffers South Project, Jeffers South's predecessor also consented to become responsible for the cost of facilities other than those that would be unnecessary but for the interconnection of the Jeffers South Project.

76. As a result of our conclusions here, we deny Jeffers South's motion to reopen the record. Rule 716(c) of the Commission's Rules of Practice and Procedure allows the Commission to reopen the record after an initial decision has been rendered if the Commission "has reason to believe that reopening of a proceeding is warranted by any changes in conditions of fact or of law or by the public interest. . . ."<sup>105</sup> Jeffers South seeks to include in the record information that it sees to the issue of whether granting its complaint would have a material adverse effect on lower-queued projects. However, the material modification provisions of the Interconnection Agreement do not affect our action on the complaint here, and we thus do not need to consider the current status of the interconnection queue in taking this action. Reopening the record to admit evidence concerning lower-queued projects is therefore not warranted for purposes of acting on Jeffers South's complaint.

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<sup>104</sup> See P 52 *supra*.

<sup>105</sup> 18 C.F.R. § 385.716(c) (2012).

77. In light of our finding that MISO has not satisfied the “but for” standard with regard to the Dotson-New Ulm Line, we recognize that it is likely that MISO will find it necessary to restudy Jeffers South’s interconnection request to identify the upgrades required for interconnection. To the extent that restudy is required, such restudy should follow the procedures and timeline defined in Attachment X of the MISO tariff, consistent with the Settlement Agreement. Given the duration of this proceeding, we find it appropriate that MISO must consider configurations consistent with a “but for” analysis and which take into account the existing interconnection queue. The evidence that Jeffers South has sought to include in the record is thus relevant for restudy purposes.

78. We note in this connection that information on MISO’s website<sup>106</sup> indicates that two of the three lower-queued projects which MISO maintained would be materially adversely impacted if the network upgrades in dispute here were not built by Jeffers South (Projects G769 and H018) have since withdrawn from the queue. In addition, according to MISO’s website, the third project (Project G759) is currently in the System Planning and Analysis Phase of the queue. Pursuant to section 7.3 (Scope of Interconnection System Impact Study) of MISO’s Interconnection Procedures, results of system impact studies performed in the System Planning and Analysis Phase of the queue do not form the basis for other interconnection studies.<sup>107</sup> Therefore, the potential of harm to Project G759, which is in a separate phase of the queue from the Jeffers South Project, is unsupported.

79. We also clarify that in accordance with Attachment X, Jeffers South must provide MISO with a deposit equal to MISO’s good faith estimate of the cost of any restudy performed.

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<sup>106</sup> See MISO’s Interconnection Queue search function located on its website available at <https://www.midwestiso.org/Planning/GeneratorInterconnection/Pages/InterconnectionQueue.aspx>.

<sup>107</sup> See *Midwest Indep. Trans. Sys. Operator, Inc.* 138 FERC ¶ 61,233, at P 12 & n.19 (2012). Under MISO's Tariff, an interconnection customer is permitted to remain in the System Planning and Analysis Phase indefinitely, so long as the interconnection customer refreshes its study once every 18 months. The result of studies performed in the System Planning and Analysis phase do *not* form the basis for interconnection studies performed in the Definitive Planning Phase.

### **III. Request for Rehearing of the Rehearing Order**

#### **A. MISO Rehearing Request**

80. In the Rehearing Order issued on February 29, 2012, the Commission granted Jeffers South's request for clarification of its then-current suspension rights under the Interconnection Agreement. MISO seeks rehearing of the Rehearing Order on this point.

81. The Commission found in the Rehearing Order that the Jeffers South Project was not, at that time, in suspension under the terms of the Interconnection Agreement and the MISO tariff. MISO had asserted that it placed the Jeffers South Project into suspension for failing to fund a restudy, but the Commission found that this practice was not in accord with the terms of MISO's tariff or the Interconnection Agreement. Instead, Section 5.16.1 of the Interconnection Agreement gave Jeffers South the right to suspend its project by submitting written notice to MISO and the relevant Transmission Owner. It did not provide for suspension of a project for failure to pay study costs, but rather left suspension to Jeffers South's discretion. The Commission also found that the provisions of MISO's tariff concerning an interconnection customer's obligation for study costs do not indicate that failure to provide funding for a study or restudy will result in the suspension of a project.<sup>108</sup>

82. MISO states in its rehearing request that the Commission's finding in the Rehearing Order was based on evidence in MISO's initial answer to Jeffers South's Complaint without consideration of evidence that was provided later at the hearing.<sup>109</sup> MISO states that specific evidence it submitted at the hearing in this proceeding shows that Jeffers South provided notice of suspension and that Jeffers South no longer has any remaining suspension time.<sup>110</sup> It asks that the Commission reverse the Rehearing Order in part or clarify that the order does not preclude the Presiding Judge from making an alternative determination based on the record evidence produced at hearing.

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<sup>108</sup> Rehearing Order, 138 FERC ¶ 61,149 at P 19.

<sup>109</sup> MISO Rehearing Request at 1.

<sup>110</sup> *Id.* n.13.

## **B. Commission Determination**

83. We deny MISO's request for rehearing of the Rehearing Order.<sup>111</sup> MISO argues that the evidence it presents shows that the Commission reached an incorrect conclusion in the Rehearing Order, but it does not explain how the evidence supports this conclusion. In addition, the Commission has found that introduction of new evidence and claims at the rehearing stage is disruptive to the administrative process, because it has the effect of creating a moving target for parties seeking a final administrative decision and for the Commission, which is seeking to issue such a decision.<sup>112</sup> While the Commission can accept new evidence in a rehearing request if it is "based on matters not available for consideration by the Commission at the time of the final decision or order,"<sup>113</sup> the evidence that MISO presents was available at the time Jeffers South sought rehearing of the Initial Order.

84. We will, however, consider the question of Jeffers South's remaining suspension time as part of our review of the Initial Decision. While the Initial Decision does not address this issue, MISO requested in its answer to Jeffers South's motion to reopen the record that we determine whether Jeffers South has any remaining suspension rights.<sup>114</sup> Doing so here will assist in the final resolution of this dispute.

85. Section 5.16 of the Interconnection Agreement gives Jeffers South the right to suspend work on the interconnection facilities upon written notice to MISO. Section 5.16 allows a suspension of up to three years, after which the Interconnection Agreement is deemed terminated. Section 3.1.2 of the Facilities Construction Agreement contains similar provisions. As noted above,<sup>115</sup> the Settlement Agreement specifies that Jeffers South's predecessor in interest, Summit Wind, would be deemed to have exercised its suspension right on the dates the Interconnection Agreement and Facilities Construction Agreement were filed with the Commission. Summit Wind was to notify ITC Midwest

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<sup>111</sup> We do not address MISO's request for clarification that the Rehearing Order does not preclude the Presiding Judge from reaching other conclusions based on the record evidence produced at hearing, as that matter is now moot.

<sup>112</sup> *Baltimore Gas and Electric Co.*, 123 FERC ¶ 61,262, at P 10 (2008) (stating "[t]he Commission looks with disfavor on parties raising issues for the first time on rehearing"); *accord Boralex Livermore Falls L.P.*, 123 FERC ¶ 61,279, at P 23 (2008).

<sup>113</sup> 18 C.F.R. § 385.713(c)(3) (2012); *TransCanada Alaska Pipeline System*, 67 FERC ¶ 61,175, at 61,531(1994).

<sup>114</sup> MISO Answer to Motion to Reopen Record at 11.

<sup>115</sup> *Supra* P 8.

and MISO of its desire to end the suspension period, after which time it would update the parties on the projected in-service date and any modifications to the Jeffers South Project. The Interconnection Agreement was filed on September 14, 2007, and the Facilities Construction Agreement was filed on December 10, 2007. The Settlement Agreement provided that Jeffers South would notify the parties of the end of its suspension within 45 days of the effective date of the settlement. The settlement became effective on August 3, 2009.<sup>116</sup> MISO has stated that it received a notice of the end of suspension by a letter dated September 17, 2009.<sup>117</sup>

86. Jeffers South makes two arguments regarding its remaining suspension time. First, it argues that the Commission should set aside the Settlement Agreement, and if it does so, Jeffers South would have three years of suspension time remaining. Jeffers South argues that it would not have executed the Settlement Agreement if MISO or Great River had disclosed the fact that Great River had abandoned construction of the Dotson-to-New Ulm Line.<sup>118</sup> Jeffers South states that it was induced to sign the Settlement Agreement as a result of misrepresentations that occurred during the negotiation of that agreement. Jeffers South states that it understood that Great River's commitment to fund and construct the Dotson-to-New Ulm Line was essential to the foundation of the settlement while it was under consideration at the Commission. Jeffers South also maintains that it is undisputed that Great River advised Xcel and MISO that it was cancelling the Dotson-to-New Ulm Line no later than October 2008, which was approximately eight months before execution of the Settlement Agreement.<sup>119</sup> Jeffers South states that it had no reason to question the continued validity of MISO's statements, and it argues that as a matter of law, a party is not barred from relief even if it could have avoided the mistake caused by a misstatement through the exercise of reasonable care.<sup>120</sup>

87. Secondly, Jeffers South argues that if the Settlement Agreement is not set aside, it still has suspension time remaining. According to Jeffers South, if the Settlement Agreement is not set aside, the Jeffers South Project would have been in suspension from

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<sup>116</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 128 FERC ¶ 61,121 (2009).

<sup>117</sup> MISO Answer to Complaint at 20.

<sup>118</sup> Initial Decision, 139 FERC ¶ 63,002 at P 92; Jeffers South Initial Brief at 14.

<sup>119</sup> *Id.* P 92.

<sup>120</sup> *Id.* P 93.

September 14, 2007, to August 3, 2009. Jeffers South states that in this case, it would have 407 days of suspension time remaining.<sup>121</sup>

88. MISO disputes these arguments. It maintains that it did not misrepresent anything to Jeffers South because it did not represent that Great River had guaranteed to fund the Dotson-New Ulm Line. MISO disagrees that it should have informed Jeffers South about Great River's intentions because MISO does not evaluate the effect of changes on suspended projects. In addition, MISO states that Great River's decision regarding the Dotson-New Ulm Line was publicly available information.<sup>122</sup> MISO argues that any silence on its part cannot be considered to be material or fraudulent. It states that Great River's financing was not material to the settlement, and there was no fraud because the Settlement Agreement contemplates a restudy under MISO's process and does not address specific upgrades. Finally, MISO argues that Jeffers South was not justified in relying on MISO's silence. MISO states that it did not have a relationship with Jeffers South that imposed a duty on it to keep Jeffers South informed during its suspension. According to MISO, Jeffers South was responsible for coordinating with Great River.

89. With respect to suspension itself, MISO maintains that Jeffers South's three-year suspension time has now elapsed, and the Jeffers South Project is not entitled to additional suspension time.<sup>123</sup> However, it also states that under "the most generous reading of the record, the Commission could find that [Jeffers South] has used 885 days of total suspension time under the under the [Interconnection Agreement] . . . and 798 days under the [Facilities Construction Agreement] . . . ."<sup>124</sup> MISO reaches this conclusion, in part, by assuming that the Jeffers South Project exited suspension immediately after the Settlement Agreement was executed, i.e., on August 4, 2009. This results in the use of 690 days under the Interconnection Agreement and 603 days under the Facilities Construction Agreement.<sup>125</sup>

90. In addition, MISO maintains that the record in this proceeding indicates that on September 9, 2010 Jeffers South requested that MISO place the Jeffers South Project in suspension if MISO considered that to be necessary to maintain the project's queue

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<sup>121</sup> Jeffers South Protest to Motion to Terminate Filed in Docket No. ER13-701-000 at 11, n.16.

<sup>122</sup> Initial Decision, 139 FERC ¶ 63,002 at P 115.

<sup>123</sup> MISO Initial Brief at 13.

<sup>124</sup> MISO Brief Opposing Exceptions at 28.

<sup>125</sup> *Id.* at 28.

position,<sup>126</sup> and Jeffers South made an additional suspension request in an email to MISO on September 28, 2010.<sup>127</sup> MISO states that Jeffers South sought to revoke its suspension request in a letter dated April 11, 2011.<sup>128</sup> According to MISO, this results in an additional 195 days of suspension under the Interconnection Agreement and the Facilities Construction Agreement, resulting in a total of 885 suspension days under the Interconnection Agreement and 798 suspension days under the Facilities Construction Agreement.<sup>129</sup> MISO concludes that under this analysis, of the total of 1095 suspension days under each agreement, Jeffers South has 210 days remaining under the Interconnection Agreement and 297 remaining under the Facilities Construction Agreement.<sup>130</sup>

91. We disagree with Jeffers South that the Settlement Agreement should be set aside. Jeffers South states that non-disclosure of the fact that Great River would not construct the Dotson-New Ulm Line was a material misrepresentation, and if the fact had been disclosed, the Settlement Agreement would not have been signed.<sup>131</sup> However, as Jeffers South notes, for non-disclosure to constitute a material misrepresentation, the party failing to make the disclosure must know that “disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract. . . .”<sup>132</sup> It may be that if MISO had informed Jeffers South that Great River would not construct the Dotson-New Ulm Line and that Jeffers South would now be responsible for it, Jeffers South would not have entered into the Settlement Agreement. But this does not mean that MISO’s failure to do this constitutes misrepresentation. Nothing in the record suggests that MISO knew that disclosing Great River’s change in plans would have corrected a mistaken basic assumption that Jeffers South was making.

92. As we read Jeffers South’s pleadings, its basic assumption was that it would not be responsible for the construction of the Dotson-New Ulm Line, not simply that Great River would build it. While Jeffers South was mistaken about Great River’s plans, Jeffers South was not mistaken in its assumption regarding responsibility for the Dotson-New Ulm Line. Thus disclosure of Great River’s change in plans by MISO would not

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<sup>126</sup> MISO Request for Rehearing of Rehearing Order at 5, n.13.

<sup>127</sup> MISO Answer Filed in Docket No. EL10-86-001 on Feb. 22, 2011 at 6.

<sup>128</sup> MISO Brief Opposing Exceptions at 27, n.137 and 143.

<sup>129</sup> *Id.* at 28.

<sup>130</sup> *Id.*

<sup>131</sup> *See* Jeffers South Initial Brief at 14.

<sup>132</sup> *Id.* at 15 (quoting Restatement (Second) of Contracts §161(b)).

have corrected a mistaken basic assumption, which means that Jeffers South lacks an essential element of a misrepresentation claim. Consequently, we reject Jeffers South's argument that the Settlement Agreement should be set aside on grounds of misrepresentation.

93. We therefore find that the suspension period that occurred under the Settlement Agreement should be deducted from the allotted three years of suspension time for the Jeffers South Project. Taking September 17, 2009, the date of Jeffers South's notification to MISO, as the date that Jeffers South ended suspension, we deem the suspension period to be September 14, 2007 through September 17, 2009 in the case of the Interconnection Agreement, and December 10, 2007 through September 17, 2009 under the Facilities Construction Agreement.

94. On the other hand, we disagree with MISO that Jeffers South should be charged with suspension time beyond that accrued in connection with the Settlement Agreement. The two suspension requests Jeffers South made in September 2010 were in response to MISO's request that Jeffers South fund a restudy of the earlier facilities study (based on the 2006 Transmission Owners Joint Study). Such a restudy was to be based on the 2010 MISO Restudy, which Jeffers South was contesting and which we have subsequently found in this order to be inconsistent with the "but for" standard. MISO informed Jeffers South that it intended to place the Jeffers South Project in suspension on September 30, 2010, if it did not receive the funds for the restudy.<sup>133</sup>

95. On September 9, 2010, Jeffers South specified that MISO should place the Jeffers South Project in suspension if MISO considered this necessary to maintain the project's queue position.<sup>134</sup> However, the Commission found in the Rehearing Order that failure to pay study costs was not grounds to place a project in suspension under the MISO tariff or Jeffers South's LGIA.<sup>135</sup> Placing the Jeffers South Project in suspension at the time therefore was not necessary to preserve the project's place in the queue. These facts are sufficient for us to find that Jeffers South's September 9, 2010 suspension request should not be deemed to have placed the Jeffers South Project in suspension.

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<sup>133</sup> MISO Answer to Complaint at 36.

<sup>134</sup> MISO Brief Opposing Exceptions at 28, n.148.

<sup>135</sup> Rehearing Order, 138 FERC ¶ 61,149 at P 19.

96. MISO describes the second request, made on September 28, 2010, as apparently invoked to delay a payment to fund the restudy of the Facilities Study,<sup>136</sup> and this appears to us to be a reasonable assessment of the situation. While MISO must be able to process interconnection requests in an orderly fashion, and while we recognize that it was seeking to do this in the case at hand, the specific facts of this case justify permitting Jeffers South to revoke the request. In particular, the facilities study would have proceeded on the basis of assumptions that we have found here to be invalid and inconsistent with MISO's tariff, which means that MISO's request for funds also was inconsistent with its tariff. And as noted above, failure to pay study costs is not grounds to place a project in suspension. We find that it is not just and reasonable to require Jeffers South to accrue additional suspension time under these circumstances.

97. We therefore find that the Jeffers South Project has been in suspension for 735 of the 1095 days allowable under the Interconnection Agreement and for 648 days of the 1095 days allowable under the Facilities Construction Agreement.

The Commission orders:

(A) The Initial Decision is reversed, as discussed in the body of this order.

(B) MISO's request for rehearing of the Rehearing Order is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>136</sup> MISO Answer Filed in Docket No. EL10-86-001 on Feb. 22, 2011 at 6.