

151 FERC ¶ 61,220
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Midcontinent Independent System
Operator, Inc.

Docket Nos. ER14-2464-002

Otter Tail Power Company

EL15-36-000

v.

Midcontinent Independent System
Operator, Inc.

Midcontinent Independent System
Operator, Inc.

EL15-68-000
(not consolidated)

ORDER DENYING REHEARING, GRANTING IN PART AND DENYING IN PART
COMPLAINT, AND INSTITUTING SECTION 206 PROCEEDING

(Issued June 18, 2015)

1. On December 12, 2014, in Docket Nos. ER14-2464-000 and ER14-2464-001, the Commission issued an order conditionally accepting an unexecuted non-conforming Facilities Construction Agreement (FCA) among Border Winds Energy, LLC (Border Winds) as interconnection customer; Otter Tail Power Company (Otter Tail) as transmission owner; and Midcontinent Independent System Operator, Inc. (MISO) as transmission provider (Border Winds FCA), subject to the removal of provisions that deviate from MISO's *pro forma* FCA.¹ On January 12, 2015, in Docket No. ER14-2464-002, MISO and Otter Tail each filed a request for rehearing of the Border Winds FCA Order. In this order, we deny the requests for rehearing.

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,224 (2014) (Border Winds FCA Order).

2. On January 12, 2015, in Docket No. EL15-36-000, Otter Tail filed a complaint, pursuant to sections 206 and 306 of the Federal Power Act (FPA),² alleging that MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) is unjust and unreasonable to the extent that the *pro forma* FCA contained therein does not permit an affected system operator the same right to elect to provide the initial funding for network upgrades that is given to directly-connected transmission owners under MISO's *pro forma* Generator Interconnection Agreement (GIA).³ In this order, we grant in part and deny in part Otter Tail's complaint. We also find that MISO's *pro forma* GIA may similarly be unjust, unreasonable, unduly discriminatory or preferential because it provides opportunities for undue discrimination and for increasing costs to interconnection customers where there is no increase in service, given that interconnection customers within MISO are held responsible for network upgrade costs and do not receive credits that reimburse them for those costs. Accordingly, we institute a proceeding to examine MISO's *pro forma* FCA, GIA, and Multi-Party Facilities Construction Agreement (MPFCA) pursuant to section 206 of the FPA in Docket No. EL15-68-000, as discussed more fully below.

I. Background

3. MISO's *pro forma* GIA governs the network upgrades constructed for the interconnection customer by the transmission owner with which it directly interconnects. In October 2009, the Commission accepted MISO's proposal for cost responsibility for network upgrades as set forth in revised Attachment FF of its Tariff.⁴ As such, under the existing Tariff, an interconnection customer is responsible for 100 percent of network upgrade costs, with a possible 10 percent reimbursement for projects that are 345 kV and

² 16 U.S.C. §§ 824e, 825e (2012).

³ Otter Tail January 12, 2015 Complaint and Request for Fast-Track Processing, Docket No. EL15-36-000, at 1 (filed Jan. 12, 2015) (Otter Tail Complaint).

⁴ Attachment FF (Transmission Planning Expansion Protocol) of the MISO Tariff describes the process to be used by MISO to develop the MISO Transmission Expansion Plan, which facilitates the expansion of and/or modification to MISO's transmission system.

above.⁵ This is referred to herein as MISO's Interconnection Customer Funding Policy. At that time, MISO's Tariff provided three alternatives for funding the costs of network upgrades for generator interconnections. Attachment FF of the Tariff described two of these alternatives (Option 1 and Option 2), which were incorporated into MISO's *pro forma* GIA by reference, while Article 11.3 in MISO's *pro forma* GIA⁶ contemplated a third.

4. Under Option 1: (1) the interconnection customer provided up-front funding for network upgrades; (2) the transmission owner provided a 100 percent refund of the cost of network upgrades to the interconnection customer upon completion of the network upgrades; and (3) the transmission owner assessed the interconnection customer a monthly network upgrade charge to recover the cost of the non-reimbursable portion of the network upgrade costs over time and based on a formula contained in Attachment GG⁷ of the MISO Tariff. The charge was established through a separate facilities service agreement (FSA).

5. Under Option 2: (1) the interconnection customer provides up-front funding for network upgrades and (2) the transmission owner refunds the reimbursable portion of the payment, as applicable, to the interconnection customer in the form of a credit to reduce the transmission service charges incurred by the transmission customer with no further financial obligations on the interconnection customer for the cost of upgrades.

⁵ *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 8 (2009). The Commission allows flexibility as to the specifics of interconnection pricing policies for transmission providers that are independent entities, and MISO's proposal was accepted by the Commission as an independent entity variation from the Commission-approved *pro forma* Large Generator Interconnection Agreement (LGIA). *Id.* P 50.

⁶ MISO's *pro forma* GIA is located in Appendix 6 to Attachment X of the MISO Tariff (Generator Interconnection Procedures).

⁷ Attachment GG (Network Upgrade Charge) of the MISO Tariff includes in the calculation of the network upgrade charge a return on capital investment, income taxes, depreciation expense, operating and maintenance expense (O&M), administrative and general expense, and other direct and indirect costs.

6. Under a third alternative set forth in Article 11.3 of MISO's *pro forma* GIA, the transmission owner can unilaterally elect to provide the up-front funding for the capital cost of the network upgrades.⁸ MISO's existing *pro forma* GIA at Article 11.3 reads as follows:

Transmission Owner shall provide Transmission Provider and Interconnection Customer with written notice pursuant to Article 15 if Transmission Owner elects to fund the capital for the Network Upgrades and Transmission Owner's System Protection Facilities; otherwise, such facilities, if any, shall be solely funded by Interconnection Customer.

The transmission owner could unilaterally elect any of the three options to fund the costs of network upgrades for generator interconnections.

7. On October 20, 2011, the Commission responded to a complaint filed in March 2011 by ordering the removal of Option 1 from MISO's Attachment FF, finding that this option increased the costs directly assigned to the interconnection customer with no corresponding increase in service compared to other funding options.⁹ The Commission found that it was unjust and unreasonable to require an interconnection customer to provide up-front funding for network upgrades and then permit the transmission owner to

⁸ This option was originally identified in Order No. 2003. *See Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 720 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at PP 618, 658 (Order No. 2003-A), *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) (Order No. 2003-C), *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). The option in the *pro forma* LGIA established by Order No. 2003 differs from the option in MISO's Tariff. Specifically, under Article 11.3 of the Order No. 2003 *pro forma* LGIA, a transmission owner electing to initially fund network upgrades would provide the up-front funding for the capital cost of the network upgrades, and then recover the costs of the network upgrades through its transmission rates charged to *all* transmission customers. In contrast, in MISO, a transmission owner electing to initially fund network upgrades would assign the non-reimbursable portion of the costs of the network upgrades directly to the interconnection customer through a network upgrade charge, and would not provide credits to reimburse the interconnection customer for projects under 345 kV.

⁹ *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076, at P 34 (2011) (*E.ON*), *order on reh'g*, 142 FERC ¶ 61,048, at P 34 (2013).

repay the amount and charge the interconnection customer for the transmission owner's capital costs and income tax allowance.¹⁰ The Commission also found that leaving the election of Option 1 to the sole discretion of a transmission owner "creates unacceptable opportunities for undue discrimination by affording a transmission owner the discretion to increase the costs of interconnection service by assigning both increased capital costs, as well as non-capital costs . . . to particular interconnecting generators, but not others."¹¹ The Commission noted that a third option (described below) was still available under MISO's *pro forma* GIA as an alternative to Option 2.¹²

8. In 2013, the Commission was presented for the first time with MISO's implementation of the transmission owner's election under Article 11.3 of MISO's *pro forma* GIA to initially fund network upgrades whose costs are directly assigned to the interconnecting customer under MISO's Interconnection Customer Funding Policy.¹³ In *Hoopeston*, the Commission found that it is just and reasonable and not unduly discriminatory for the transmission owner electing to initially fund network upgrades under MISO's *pro forma* GIA to recover the capital costs for network upgrades through a network upgrade charge assessed to the interconnection customer, established using the formula in Attachment GG and consistent with MISO's Interconnection Customer Funding Policy.¹⁴ However, consistent with its findings in *E.ON*, the Commission found that it is unduly discriminatory for a transmission owner to recover costs other than the return of and on the capital costs of the network upgrades (such as O&M, taxes other than income taxes, and general and common plant costs) from an interconnection customer under this option, because an interconnection customer charged under Option 2 would only be required to pay for the capital costs of the network upgrades. Therefore, the Commission directed MISO to revise the GIA at issue in that case so that the network upgrade charge does not include the recovery of costs other than the return of and on the capital costs of the network upgrades.¹⁵

¹⁰ *E.ON*, 137 FERC ¶ 61,076 at P 37.

¹¹ *Id.* P 38.

¹² *Id.* P 37.

¹³ *Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,111 (2013) (*Hoopeston*), *aff'd on reh'g*, 149 FERC ¶ 61,099 (2014).

¹⁴ *Hoopeston*, 145 FERC ¶ 61,111 at P 41.

¹⁵ Thus, in *Hoopeston*, the Commission sought to make the types of costs to be recovered pursuant to Article 11.3, when the transmission owner elects to initially fund the network upgrades, comparable with the costs recovered under Option 2.

9. In addition to MISO's *pro forma* GIA, the Commission has also accepted MISO's *pro forma* FCA and *pro forma* MPFCA.¹⁶ The *pro forma* FCA is an agreement for network upgrades on affected systems, or network upgrades constructed for an interconnection customer by a transmission owner other than the transmission owner with which it directly interconnects. This indirectly-connected transmission owner is known as the affected system operator under the FCA. The *pro forma* MPFCA is used when multiple interconnection requests cause the need for construction of common network upgrades (upgrades that are constructed by a transmission owner for more than one interconnection customer) on a directly-connected transmission system or the transmission system of an affected system operator. The *pro forma* FCA and *pro forma* MPFCA are appendices to MISO's generator interconnection procedures and, as with the *pro forma* GIA, these agreements reference MISO's Interconnection Customer Funding Policy and the network upgrade cost recovery provisions in Attachment FF of MISO's Tariff. However, the *pro forma* FCA and the *pro forma* MPFCA do not include the unilateral initial funding option contained in Article 11.3 of MISO's *pro forma* GIA.

II. Border Winds Facilities Construction Agreement Proceeding, Docket No. ER14-2464

A. MISO's Filing

10. On July 18, 2014, as amended on October 14, 2014, MISO, pursuant to section 205 of the FPA,¹⁷ submitted for filing the unexecuted non-conforming Border Winds FCA. MISO stated that the unexecuted Border Winds FCA generally conformed to the *pro forma* FCA, with the exception of non-conforming language in section 3.2.1 that provided Otter Tail (as the affected system operator) with the option to elect to provide the initial funding for the network upgrades.¹⁸ MISO argued that the non-conforming language was just and reasonable because an affected system operator under MISO's *pro forma* FCA is similarly situated to a directly-connected transmission owner under MISO's *pro forma* GIA, and the two entities should have the same rights and obligations regarding funding and recovery options for network upgrades.¹⁹ MISO proposed a mechanism to recover Otter Tail's capital costs for the network upgrades using an annual

¹⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,301, at P 5 (2009).

¹⁷ 16 U.S.C. § 824d (2012).

¹⁸ MISO Border Winds FCA Filing, Docket No. ER14-2464-000, Transmittal Letter at 2 (filed July 18, 2014) (MISO Border Winds FCA Filing).

¹⁹ *Id.* at 3.

fixed charge rate of 15.8 percent, based on Otter Tail's currently effective rates set forth in Attachment GG²⁰ of MISO's Tariff, to derive a network upgrade charge that would be assessed to the interconnection customer over 20 years pursuant to a separate FSA.²¹ The Border Winds FCA was submitted unexecuted because Border Winds disagreed with the addition of the non-conforming language allowing Otter Tail to elect to initially fund network upgrades.

B. The Border Winds FCA Order

11. On December 12, 2014, the Commission conditionally accepted the unexecuted Border Winds FCA, to become effective July 19, 2014, as requested, subject to removal of the non-conforming language that would have provided Otter Tail the unilateral right to elect to initially fund the network upgrades and subsequently assess a network upgrade charge.²² The Commission noted that a transmission provider seeking Commission acceptance of a non-conforming agreement bears a high burden to justify and explain that the non-conforming aspects of the agreement are not merely consistent with or superior to the *pro forma* provisions of the agreement, but that they are necessary.²³ The Commission found that MISO did not assert any specific reliability concerns, novel legal issues, or other unique factors to justify the proposed non-conforming provisions in the Border Winds FCA, as it found that the initial funding option was an issue that was not novel or unique to the Border Winds interconnection.²⁴ The Commission therefore directed MISO to revise the Border Winds FCA to conform to MISO's *pro forma* FCA and remove provisions from the appendices to the Border Winds FCA that implemented the initial funding option. The Commission also required MISO to report the executed revised Border Winds FCA in its electric quarterly reports and submit an informational filing to notify the Commission of the agreement's execution.²⁵

²⁰ The formula rate in Attachment GG includes in the calculation of the network upgrade charge a return on capital investment, income taxes, and depreciation expense.

²¹ MISO Border Winds FCA Filing, Transmittal Letter at 2.

²² Border Winds FCA Order, 149 FERC ¶ 61,224 at PP 1, 22.

²³ *Id.* P 24.

²⁴ *Id.* P 25.

²⁵ *Id.* P 26.

C. Requests for Rehearing

12. MISO filed a request for rehearing and clarification of the Border Winds FCA Order in Docket No. ER14-2464-002. Otter Tail filed a request for rehearing of the Border Winds FCA Order, request for stay and interim relief, and request for expedited action and shortened answer period in Docket No. ER14-2464-002.

13. MISO states that the Border Winds FCA Order can be interpreted two ways, either that: (1) the Commission rejected MISO's non-conforming edits as unnecessary, but will permit the initial funding option in the Border Winds FCA because the use of this option is not novel or unique to this particular interconnection (and the Commission would generally permit this option in FCAs); or (2) the Commission rejected the initial funding option.²⁶ MISO requests that, if the Border Winds FCA Order did reject the initial funding option, the Commission should clarify whether it is rejecting that option for all FCAs, absent a change to the MISO *pro forma* FCA.²⁷ MISO states that, in the past, the Commission has accepted GIAs with non-conforming deviations and directed MISO to include such non-conforming provisions in the *pro forma* GIA so that they are clearly available to all parties on a transparent basis.²⁸ MISO claims that the Commission could use the same approach here and accept the proposed non-conforming provisions in this FCA and allow MISO to modify its *pro forma* FCA to ensure that this option is available to all parties on a consistent basis.²⁹ MISO states that it does not anticipate that parties will execute the Border Winds FCA until they receive the requested clarification.

14. Otter Tail asserts that the Border Winds FCA Order: (1) fails to address whether the comparability principle requires the Commission to allow the transmission owner to elect to initially fund network upgrades under MISO's *pro forma* FCA, just as they are allowed in MISO's *pro forma* GIA; (2) fails to recognize that Otter Tail's particular situation justifies acceptance of the non-conforming FCA; (3) errs by effectively rejecting a proposed non-conforming FCA and ordering the replacement of it with a *pro forma* FCA without instituting a proceeding under FPA section 206; and (4) discriminates

²⁶ MISO Request for Rehearing and Clarification, Docket No. ER14-2464-002, at 5-6 (filed Jan. 12, 2015).

²⁷ *Id.* at 5.

²⁸ *Id.* at 6 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61,306, at PP 4-5 (2006)).

²⁹ *Id.* at 7.

against Otter Tail by rejecting the Border Winds FCA, when the Commission has accepted non-conforming FCAs in the past under similar circumstances.³⁰

15. Otter Tail states that the principle of comparability requires that similarly situated entities receive similar treatment, and argues that this principle was incorporated into generator interconnection policies through the Order No. 2003 proceedings.³¹ Otter Tail states that the Commission explained in Order No. 2003-A that “[w]ith regard to the pricing of Network Upgrades on Affected Systems,’ the Commission’s ‘interconnection pricing policy as it applies to an Affected System Operator that is not independent *should be consistent* with the policy [it] adopt[ed] for the non-independent Transmission Provider.’”³² Additionally, Otter Tail asserts that neither the Order No. 2003 *pro forma* LGIA nor MISO’s *pro forma* GIA expressly prohibit initial funding by an affected system operator of network upgrades on its transmission system, and further notes that MISO has expressly offered to modify its own *pro forma* FCA to explicitly allow such initial funding.³³ Otter Tail argues that affected system operators are similarly situated to directly-connected transmission owners, and that the Commission erred by failing to accept the non-confirming provision in the Border Winds FCA giving Otter Tail the same right to elect to initially fund network upgrades that is given to transmission owners in MISO’s *pro forma* GIA.³⁴

16. Otter Tail contends that it did show that a novel legal issue or other unique factor warrants the acceptance of the non-conforming Border Winds FCA.³⁵ Otter Tail states that the Border Winds FCA is the first filing where an affected system operator has requested to provide the initial funding for network upgrades necessary to facilitate the generator interconnection, and argues that this presents a novel legal issue of the application of the initial funding option to an FCA, as well as a unique factual

³⁰ Otter Tail Request for Rehearing, Docket No. ER14-2464-002, at 1-2 (filed Jan. 12, 2015).

³¹ *Id.* at 12-13.

³² *Id.* at 13 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 636 (emphasis added)). Otter Tail notes that the reference to “non-independent” refers to vertically-integrated utilities like Otter Tail.

³³ *Id.* at 14.

³⁴ *Id.* at 13-14.

³⁵ *Id.* at 15.

circumstance.³⁶ Furthermore, Otter Tail argues that the proposed non-conforming provisions are more than merely consistent with or superior to the *pro forma* provisions of MISO's FCA because the comparability principle requires the addition of the initial funding option to the FCA.³⁷ Otter Tail argues that the Commission has discriminated against Otter Tail by rejecting its non-conforming provisions when, in the past, the Commission has accepted non-conforming provisions when the agreement provides for the transmission owner's election to initially fund upgrades under terms not contemplated in the *pro forma* agreement, and has accepted this option under MISO's *pro forma* GIA.³⁸ Otter Tail also states that the Commission has accepted non-conforming provisions in a GIA when the agreement requests a type of interconnection not contemplated by a *pro forma* GIA,³⁹ or the agreement involves a non-jurisdictional municipal utility.⁴⁰ Otter Tail argues that the Commission's decision to reject the non-conforming provisions of the Border Winds FCA fails to acknowledge, much less differentiate, the Commission's prior acceptance of non-conforming agreements without novel legal issues or factual circumstances.⁴¹

17. Otter Tail claims that the Commission does not have the authority to reject a proposed non-conforming FCA and order it to be replaced with a *pro forma* FCA without instituting an FPA section 206 proceeding.⁴² Otter Tail explains that the courts have made clear that the Commission bears the burden under section 206 of the FPA whenever

³⁶ *Id.* at 16-17.

³⁷ *Id.* at 17.

³⁸ *Id.* at 20-21 (citing *Southern California Edison Co.*, 133 FERC ¶ 61,200, at P 35 (2010); *Southern California Edison Co.*, 133 FERC ¶ 61,019, at PP 5, 37 (2010); *Southern California Edison Co.*, 132 FERC ¶ 61,150, at P 30 (2010)).

³⁹ *Id.* at 16 (citing *New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,180, at P 9 (2012); *New York Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,264, at P 14 (2011); *Southwest Power Pool, Inc.*, 134 FERC ¶ 61,224, at P 12 (2011)).

⁴⁰ *Id.* (citing *Southwest Power Pool, Inc.*, 146 FERC ¶ 61,073, at P 10 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,199, at P 6 (2010)).

⁴¹ *Id.* at 21 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 120 FERC ¶ 61,066, at P 35 (2007) (*Endeavor*)).

⁴² *Id.* at 18.

it moves beyond rejection of a proposed rate to the task of redesigning it,⁴³ and argues that the Commission went beyond rejecting proposed modifications to the MISO *pro forma* FCA when it imposed its own rates by ordering the use of the *pro forma* FCA. Otter Tail argues that directing MISO to secure an executed FCA is out of MISO's control and is tantamount to taking away from MISO, Otter Tail, and Border Winds the liberty of contract, and amounts to dictating redesign of the FCA rather than allowing for MISO to remove the rejected language and proceed with an alternate route for moving forward with the Border Winds FCA.⁴⁴ Otter Tail states that if the Commission does not grant rehearing it should allow MISO, Otter Tail, and Border Winds to attempt to negotiate an executed *pro forma* FCA, or, in the alternative, file an unexecuted *pro forma* FCA. Further, Otter Tail claims that in the past, when the Commission has rejected a non-conforming interconnection agreement, it has allowed parties to refile a new FCA rather than forcing them to execute an agreement.⁴⁵

18. Otter Tail requests a stay of the Border Winds FCA Order and other interim relief as may be necessary to ensure that the Border Winds FCA as filed is in effect from July 18, 2014 until the Commission accepts the agreement on rehearing or a replacement agreement is finalized.⁴⁶ Otter Tail explains that the stay is necessary to work through several practical issues that would affect the schedule for construction of the network upgrades that are the subject of the Border Winds FCA, which include: (1) how to compensate Otter Tail for its funding of the project to date; (2) how and when to transition to Option 2-style funding; and (3) how to address its financial exposure in the event that the Border Winds FCA is terminated while the effect of the Border Winds FCA Order is uncertain.⁴⁷ Otter Tail requests a shortened answer period of five days for its request for stay and interim relief.⁴⁸

⁴³ *Id.* (citing *Wisconsin Pub. Serv. Corp.*, 120 FERC ¶ 61,269, at P 91 (2007); *W. Res. v. FERC*, 9 F.3d 1568, 1579 (D.C. Cir. 1993); *Atl. City Elec. Co. v. FERC*, 295 F.3d, 1, 10 (D.C. Cir. 2002)).

⁴⁴ *Id.* at 19.

⁴⁵ *Id.* at 19-20 (citing *Endeavor*, 120 FERC ¶ 61,066 at P 35).

⁴⁶ *Id.* at 22-23.

⁴⁷ *Id.* at 22.

⁴⁸ *Id.* at 23.

19. Border Winds and the American Wind Energy Association (AWEA) filed answers to the requests for rehearing in Docket No. ER14-2464-002.

D. Discussion

1. Procedural Issues

20. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2014), prohibits an answer to a request for rehearing. Therefore, we reject the answers of Border Winds and AWEA.

2. Substantive Issues

21. In response to MISO's request for clarification, we clarify that, in the Border Winds FCA Order, the Commission rejected the use of the initial funding option in the Border Winds FCA; MISO is required to remove the non-conforming language from the agreement and revise the agreement to conform to MISO's *pro forma* FCA. Thus, the revised Border Winds FCA will not provide Otter Tail with the option to elect to provide the initial funding for network upgrades, consistent with MISO's *pro forma* FCA. We further clarify that this holding is specific to the Border Winds FCA.

22. We deny the requests for rehearing of the Border Winds FCA Order. As noted in the Border Winds FCA Order, although the Commission has encouraged the use of *pro forma* agreements because a *pro forma* agreement minimizes opportunities for undue discrimination,⁴⁹ the Commission recognizes that agreements that do not conform to *pro forma* agreements may be necessary in situations with specific reliability concerns, novel legal issues, or other unique factors. The Commission has stated that a transmission provider seeking Commission acceptance of a non-conforming agreement bears a high burden to justify that the non-conforming aspects of the agreement are not merely "consistent with or superior to" a *pro forma* agreement, but are in fact *necessary*.⁵⁰

23. We find that MISO's proposed non-conforming deviations merely reflect Otter Tail's preference to elect to initially fund network upgrades, an option that is not available to Otter Tail under MISO's *pro forma* FCA. MISO and Otter Tail did not show that this particular interconnection, or the network upgrades necessary to facilitate the interconnection, involves any unique factual or technical characteristics, novel legal

⁴⁹ Border Winds FCA Order, 149 FERC ¶ 61,224 at PP 23-24 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at PP 11, 12).

⁵⁰ *Id.* P 24 (citing *PJM Interconnection, L.L.C.*, 111 FERC ¶ 61,163 (2005)).

issues, or particular reliability concerns that would distinguish this interconnection from others and require deviations from the *pro forma* FCA. Although Otter Tail asserts that the non-conforming provisions are superior to the *pro forma* FCA from Otter Tail's perspective, Otter Tail does not meet the high burden to justify its proposed deviations as necessary. Border Winds, the interconnection customer that is obligated to pay for network upgrades under MISO's Interconnection Customer Funding Policy, opposed the addition of the non-conforming language, which provides evidence that the non-conforming deviations were not in fact necessary for this interconnection and distinguishes the Border Winds FCA proceeding from the other proceedings cited to by the parties. Otter Tail has not demonstrated how the underlying interconnection requires a cost recovery mechanism other than that which is provided in the *pro forma* FCA.⁵¹ Because the Border Winds FCA did not meet the Commission's standard for deviations from a *pro forma* agreement, we affirm the Commission's rejection of these non-conforming deviations from MISO's *pro forma* FCA.⁵²

24. We disagree with Otter Tail's assertion that the Commission erred in failing to address its comparability argument and that the comparability principle requires acceptance of the Border Winds FCA. The issue in the Border Winds FCA Order was whether MISO's proposed deviations from the *pro forma* FCA met the Commission's standards for non-conforming deviations. The Commission properly found that MISO and Otter Tail did not meet their high burden to justify the non-conforming language proposed in the Border Winds FCA. The issue of comparability does not present a novel legal issue or unique circumstance specific to this interconnection; rather, the addition of the initial funding option to the Border Winds FCA would confer benefits specifically and solely to Otter Tail.⁵³ MISO and Otter Tail failed to show that the non-conforming

⁵¹ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 141 FERC ¶ 61,203, at P 13 (2012) (finding that the filing parties did not demonstrate how the location of the interconnection underlying an FCA requires a non-conforming cost recovery mechanism).

⁵² We also disagree with Otter Tail's assertion that the Commission failed to acknowledge and follow its prior precedent accepting non-conforming provisions. Otter Tail Request for Rehearing at 16, 20-21. Each case presents different factual circumstances, and in those cases, unlike here, the parties met their burden to show that there were unique circumstances of the interconnection that required non-conforming provisions.

⁵³ A novel legal issue might exist, for example, where a *pro forma* agreement would be inconsistent with state law. See *Southwest Power Pool*, 146 FERC ¶ 61,073, at PP 8-10 (2014); *Midwest Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,199, at P 6 (2010).

provision is necessary to reflect extraordinary circumstances associated with this interconnection. If affected system operators should be afforded the same option available to transmission owners under MISO's *pro forma* GIA, these benefits should be made available to all affected system operators in a transparent, non-discriminatory manner so that MISO cannot favor Otter Tail over other affected system operators in an unduly discriminatory manner.⁵⁴

25. Moreover, we deny MISO's suggestion to accept the proposed non-conforming provisions in the Border Winds FCA and allow MISO to modify its *pro forma* FCA to ensure that this option is available to all parties, as that suggestion would have us apply non-conforming language in an unexecuted FCA over the objection of the interconnection customer, and then apply that same non-conforming language to all interconnection customers in MISO FCAs, without any process for the impacted customers. We note that, in the cases where the Commission conditioned acceptance of non-conforming provisions on MISO filing changes to the *pro forma* agreement, the non-conforming provisions provided additional service opportunities that would not otherwise be available, and they did not harm or adversely impact any customers.⁵⁵ We affirm the Commission's conditional acceptance of the non-conforming Border Winds FCA, subject to MISO filing a revised Border Winds FCA that retains the provisions of the *pro forma* FCA, consistent with Commission precedent.⁵⁶

26. We disagree with Otter Tail's assertion here that the Commission must institute a proceeding under section 206 of the FPA, because, Otter Tail argues, in rejecting the non-conforming Border Winds FCA and imposing the *pro forma* FCA language, the Commission was actually redesigning a rate. Otter Tail's argument, if accepted, would undercut the purpose of a *pro forma* agreement. MISO's *pro forma* FCA serves as a way to minimize undue discrimination and eliminate the need for parties to negotiate the individual terms of each agreement. As the Commission has stated, if parties want to negotiate provisions that deviate from the *pro forma* agreement, that agreement must be filed for Commission approval under section 205 of the FPA, and the transmission provider bears the high burden to justify that the non-conforming provisions are

⁵⁴ See *MidAmerican Energy Co.*, 116 FERC ¶ 61,018, at P 12 (2006); *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,257, at PP 23-24 (2006).

⁵⁵ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61,009 (2006).

⁵⁶ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 141 FERC ¶ 61,203, at P 16 (2012) (conditionally accepting a non-conforming FCA, subject to MISO filing a revised FCA that retains the provisions of the *pro forma* FCA); *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,223, at P 15 (2011).

necessary due to specific reliability concerns, novel legal issues, or other unique factors.⁵⁷ The Commission determined in the Border Winds FCA Order that MISO did not meet this burden because it did not show that the non-conforming provisions of the Border Winds FCA were necessary; therefore, the Commission ordered MISO to revise the Border Winds FCA to conform to MISO's *pro forma* FCA.⁵⁸ Thus, the Commission did not redesign any rate or impose a new rate, but only required the Border Winds FCA to remain consistent with MISO's Commission-approved *pro forma* Tariff language. Furthermore, we disagree with Otter Tail's argument that the Commission is denying the parties to the Border Winds FCA the liberty to contract. The agreement was filed unexecuted because the interconnection customer determined that negotiations were at impasse regarding inclusion of the non-conforming language. Because the Commission found that Otter Tail did not justify the inclusion of the non-conforming language, there is no longer any obstruction to executing the FCA once it is revised to apply the standard funding mechanism, consistent with MISO's *pro forma* FCA.

27. We deny Otter Tail's request for a stay and interim relief. In order to ensure finality in Commission proceedings, the Commission typically does not stay its orders.⁵⁹ When evaluating a request for stay of an order, the Commission considers: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing a stay

⁵⁷ See *PJM Interconnection, LLC*, 111 FERC ¶ 61,163 (2005).

⁵⁸ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 149 FERC ¶ 61,224, at PP 24-26 (2014). The Commission has in several prior cases made similar determinations rejecting non-conforming agreements and imposing the *pro forma* language. See, e.g., *Southwest Power Pool, Inc.*, 132 FERC ¶ 61,159 (2010) (rejecting a non-conforming meter agent agreement and directing the transmission provider to revise the agreement to conform to the *pro forma* meter agent agreement); *MidAmerican Energy Co.*, 116 FERC ¶ 61,018 (2006) (rejecting non-conforming deviations including stylistic changes, clarifying phrases, and modifications to insurance provisions; rejecting deviations that were requested by the customer; and rejecting deviations that the customer asserted were necessary to reflect the positions of the parties); *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,421 (2005) (rejecting deviations to correct mistakes in the *pro forma* agreement); *PJM Interconnection, LLC*, 111 FERC ¶ 61,163 (2005) (rejecting a one-sided indemnification provision and changes corresponding to a cancelled agreement).

⁵⁹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,142, at PP 17-18 (2005).

will substantially harm other parties; and (3) whether a stay is in the public interest.⁶⁰ Moreover, the Commission has found that irreparable injury must be more than unfavorable circumstances, loss or loss of profits.⁶¹ Otter Tail has not met the burden to show that it will suffer irreparable injury without a stay and that a stay is in the public interest. As affirmed, the Border Winds FCA Order rejects the proposed initial funding option in the Border Winds FCA, and as a result, the parties should be in a position as if Border Winds funded the upgrades from the start. Thus, there is no question as to when to transition to Option 2 funding, and there remains no uncertainty as to the effect of the Border Winds FCA Order. Furthermore, Border Winds has provided a source for the payment for the network upgrades associated with the Border Winds FCA in the form of security posted in a cash-funded escrow account on July 17, 2014.⁶²

III. Otter Tail Complaint Proceeding, Docket No. EL15-36-000

A. Otter Tail Complaint

28. On January 12, 2015, Otter Tail filed a complaint, pursuant to sections 206 and 306 of the FPA,⁶³ alleging that MISO's Tariff is unjust and unreasonable to the extent that the *pro forma* FCA contained therein does not permit an affected system operator to elect to provide the initial funding for network upgrades, a right which is provided to directly-connected transmission owners under MISO's *pro forma* GIA.⁶⁴ Otter Tail requests that the Commission direct MISO to revise the Tariff to include a provision in the *pro forma* FCA that permits an affected system operator to elect to initially fund network upgrades. Otter Tail also requests fast-track processing of the complaint to allow Otter Tail to elect to initially fund the network upgrades associated with upcoming indirect interconnections between new generation sources and the Otter Tail transmission system.⁶⁵

⁶⁰ *See, e.g., Ameren Servs. Co.*, 127 FERC ¶ 61,121, at P 44 (2009); *Town of Norwood v. National Grid*, 115 FERC ¶ 61,396 (2006).

⁶¹ *Olympic Pipe Line Co.*, 102 FERC ¶ 61,055, at P 17 (2003).

⁶² MISO Border Winds FCA Filing, Tab B, Appendix A to the FCA, Table 1.

⁶³ 16 U.S.C. §§ 824e, 825e (2012).

⁶⁴ Otter Tail Complaint at 1.

⁶⁵ *Id.* at 1, 23.

29. Otter Tail argues that there is no meaningful distinction between an affected system operator under an FCA and a transmission owner under a GIA, because an affected system operator is simply a transmission owner that is not directly connected to the interconnection customer. Otter Tail claims that the Commission's principle of comparability, which requires that similarly situated parties be treated equally, requires that affected system operators and directly-connected transmission owners be afforded the same rights under the MISO Tariff.⁶⁶ Otter Tail states that "the cornerstone of the Commission's comparability principle is section 205(b) of the FPA, which prohibits undue discrimination,"⁶⁷ and that the Commission has stated that the protection against undue discrimination prohibits the dissimilar treatment of similarly situated entities.⁶⁸

30. Otter Tail states that the Commission has recognized since Order No. 2003 that affected system operators and directly connected transmission owners perform similar functions and are equally necessary to the interconnection process.⁶⁹ Otter Tail references Order No. 2003 to support its position. Specifically, Otter Tail cites to Order 2003-A, where the Commission stated: "[w]ith regard to the pricing of Network Upgrades on Affected Systems, the Commission concludes . . . that our interconnection pricing policy as it applies to an Affected System Operator that is not independent should be consistent with the policy we adopt for the non-independent Transmission Provider."⁷⁰ Otter Tail also references Order No. 2003-C, where the Commission noted its policy of "treating a non-independent Affected System Operator the same as a non-independent Transmission Provider because both have the same incentive to frustrate the development of new, competitive generation."⁷¹

⁶⁶ *Id.* at 10 (citing *Southern California Elec. & Gas Co.*, 143 FERC ¶ 61,058, at P 48 (2013) ("The comparability principle requires public utility transmission providers . . . to develop a transmission system plan that meets the specific service requests of their transmission customers and otherwise treats similarly-situated customers . . . comparably in transmission system planning."), *order on reh'g*, 147 FERC ¶ 61,126 (2014); *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,161, at P 63 (2009)).

⁶⁷ *Id.* (quoting 16 U.S.C. § 824d(b) (2012)).

⁶⁸ *Id.* at 10-11 (citing *Western Grid Dev. LLC*, 133 FERC ¶ 61,029, at P 17 (2010)).

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 11-12 (quoting Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 636).

⁷¹ *Id.* at 12 (quoting Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 at P 13).

31. Otter Tail submitted with its complaint the affidavit of Mr. Dean Pawlowski, which Otter Tail argues demonstrates that there is no technical or engineering reason to treat network upgrades made in response to direct generator interconnections any differently than network upgrades made in response to indirect impacts from generator interconnections.⁷² Otter Tail states that the Pawlowski Affidavit illustrates that, when funding and constructing network upgrades to facilitate the integration of new generation sources to its transmission system, regardless of whether a generator directly or indirectly connects with the transmission system, Otter Tail must conduct the same facilities studies, complete similar engineering and procurement tasks, and pay for similar services and materials.⁷³ The Pawlowski Affidavit explains that Otter Tail does not prioritize network upgrades for direct interconnections over those needed to respond to indirect impacts.⁷⁴ Otter Tail thus argues that it treats and responds to direct and indirect interconnection impacts and their attendant system upgrade needs in a non-discriminatory manner.⁷⁵

32. Otter Tail argues that, consistent with Commission precedent, an affected system operator should be able to elect to initially fund network upgrades and recover capital costs for those upgrades through a network upgrade charge established using the formula in Attachment GG of the Tariff. Otter Tail cites *Hoopeston*, where the Commission determined that it is just and reasonable for a transmission owner under a GIA to elect to initially fund necessary network upgrades and recover from the interconnection customer a return of and on the capital costs of the network upgrades.⁷⁶ Otter Tail states that the Commission noted in *Hoopeston* that the transmission owner's decision to initially fund network upgrades was consistent with Orders Nos. 2003 and 2003-A.⁷⁷ Otter Tail also cites a case in which an executed GIA allowing a transmission owner to elect to initially fund network upgrades was accepted under delegated authority.⁷⁸

⁷² *Id.* at 14 (citing Ex. No. Otter Tail-1 at ¶ 10) (Pawlowski Affidavit).

⁷³ *Id.* at 15 (citing Pawlowski Affidavit at ¶ 6).

⁷⁴ *Id.* at 15-16 (citing Pawlowski Affidavit at ¶ 7).

⁷⁵ *Id.* at 16 (citing Pawlowski Affidavit at ¶ 7).

⁷⁶ *Id.* at 13 (citing *Hoopeston*, 145 FERC ¶ 61,111 at P 41).

⁷⁷ *Id.* (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 720).

⁷⁸ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER13-125-000, at 1 (Dec. 12, 2012) (delegated letter order)).

33. Otter Tail states that Article 11.3 of MISO's *pro forma* GIA expressly permits a transmission owner to elect to provide the initial funding for network upgrades,⁷⁹ and therefore, to ensure that an affected system operator and a transmission owner are treated comparably, Otter Tail requests that section 3.2.1 of MISO's *pro forma* FCA be revised as follows:

Costs. Interconnection Customer shall pay to the Transmission Owner costs (including taxes and financing costs) associated with seeking and obtaining all necessary approvals and of designing, engineering, constructing, and testing the Network Upgrades and System Protection Facilities, as identified in Appendix A, in accordance with the cost recovery method provided herein, *except to the extent that Transmission Owner has elected to self-fund the Network Upgrades and System Protection Facilities as detailed in Appendix A.*⁸⁰

Otter Tail also notes that it may be necessary to make additional revisions to the FSA contained in Appendix A of the *pro forma* FCA to correspond with the aforementioned changes.⁸¹

34. Otter Tail argues that the cost impact of not having the option to initially fund network upgrades under the *pro forma* FCA includes the opportunity cost of Otter Tail being forced to use Option 2 funding, which in turn includes the inability to fund network upgrades up-front and recover a return of and on such payments from the interconnection customer.⁸² Otter Tail also argues that not having the initial funding option could impede future network upgrades from being undertaken or completed in a timely fashion. Otter Tail states that it could envision a scenario in which an interconnection customer must forego or delay interconnection because it does not have the financial resources to fund all the necessary network upgrades up-front and, because some of the network upgrades are on an affected system operator's transmission system, the affected system operator

⁷⁹ *Id.* at 16 (citing MISO Tariff, FERC Electric Tariff, Attachment X (Generator Interconnection Procedures), Appendix 6 (Generator Interconnection Agreement), art. 11.3 (37.0.0)).

⁸⁰ *Id.* at 17 (citing MISO Tariff, FERC Electric Tariff, Attachment X (Generator Interconnection Procedures), Appendix 8 (Facilities Construction Agreement), art. 3.2.1 (35.0.0)) (proposed revision in italics).

⁸¹ *Id.*

⁸² *Id.* at 20-21.

would have no choice but to require the interconnection customer to provide the up-front funding.⁸³

35. Otter Tail asserts that its complaint is not barred by the doctrine of collateral estoppel, which would prevent parties from reviving issues that were previously decided against them or that should have been presented as part of a prior litigated matter.⁸⁴ Otter Tail argues the issue now before the Commission is not the same issue the Commission faced in the Border Winds FCA Order. Otter Tail states that, in its complaint, it asks whether MISO's *pro forma* FCA is unjust and unreasonable to the extent that it does not permit an affected system operator to elect to provide the initial funding for network upgrades on a comparable basis to that of similarly situated transmission owners. Otter Tail states that, in the Border Winds FCA Order, the issue before the Commission was whether MISO had met its burden to justify the proposed non-conforming provisions of the Border Winds FCA, and the Commission did not address whether an affected system operator should be permitted to initially fund network upgrades in MISO.⁸⁵ Additionally, Otter Tail argues that its complaint is not a collateral attack on the Border Winds FCA Order because the Commission has never reached a merits decision on whether it is unjust and unreasonable for MISO's *pro forma* FCA not to contain an initial funding option comparable to the one in MISO's *pro forma* GIA.⁸⁶ Otter Tail also notes that the doctrine of *res judicata*, or claim preclusion, is also inapplicable to this proceeding because this complaint does not seek to re-litigate the non-conforming FCA that was at issue in the Border Winds FCA Order.⁸⁷

B. Notice and Responsive Pleadings

36. Notice of the complaint was published in the *Federal Register*, 80 Fed. Reg. 2691 (2015), with answers, protests, and interventions due on or before February 2, 2015. On February 2, 2015, MISO filed an answer to the complaint.

37. International Transmission Company d/b/a ITC *Transmission*, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC (collectively, ITC Companies) filed a timely motion to intervene and comments. Exelon Corporation, Calpine

⁸³ *Id.* at 21.

⁸⁴ *Id.* at 17-18.

⁸⁵ *Id.* at 18.

⁸⁶ *Id.* at 17, 19.

⁸⁷ *Id.* at 19 n.59.

Corporation, Ameren Services Company, E.ON Climate & Renewables North America LLC, the MISO Transmission Owners,⁸⁸ EDF Renewable Energy, Inc., Xcel Energy Services Inc., AWEA, and Wind on the Wires (WOW) filed timely motions to intervene. AWEA and WOW filed a timely protest of the complaint.

38. Although MISO states that it is in general agreement with and does not specifically dispute any of the factual allegations contained in the complaint, MISO contends that the issues presented in the complaint are pending before the Commission in Docket No. ER14-2464-002, and timely resolution can be achieved in that docket.⁸⁹ MISO states that it has sought clarification in the aforementioned docket because it believes the Border Winds FCA Order could be read in two ways; one that directed removal of the non-conforming language and rejected the initial funding option, and one that directed removal of the language in question but permitted the initial funding option.⁹⁰ MISO asserts that the issues pending on rehearing in Docket No. ER14-2464-

⁸⁸ The MISO Transmission Owners for this proceeding consist of: American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Dairyland Power Cooperative; Duke Energy Business Services, LLC for Duke Energy Indiana, Inc.; East Texas Electric Cooperative; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Gulf States Louisiana, L.L.C.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Prairie Power Inc.; South Mississippi Electric Power Association; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

⁸⁹ MISO Answer to the Complaint, Docket No. EL15-36-000, at 4 (filed Feb. 2, 2015). MISO asserts in that Rule 206(b)(6) of the Commission's Rules of Practice and Procedure provides that a complaint must: "State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum[.]" *Id.* at 4 n.8 (citing 18 C.F.R. § 385.206(b)(6) (2014)).

⁹⁰ *Id.* at 7.

002 could be resolved, and the complaint mooted, by the Commission accepting the non-conforming edits to the Border Winds FCA and ordering MISO to include such provisions in the *pro forma* FCA in the rehearing proceedings.⁹¹

39. Although MISO argues that the initial funding option is currently available under its *pro forma* FCA, based on Commission precedent,⁹² MISO states that it is amenable to making revisions to its Tariff and *pro forma* FCA to explicitly allow an affected system operator to elect to provide the initial funding for network upgrades.⁹³ Further, MISO states that it believes that the initial funding option should be available to transmission owners and affected system operators under MISO's *pro forma* MPFCA, FCA, and GIA, as the upgrades contemplated under these agreements are essentially the same. Thus, to the extent that the Commission determines it is appropriate to address the *pro forma* FCA and MPFCA in this complaint proceeding, MISO states it is willing to amend the MISO Tariff to clarify that the initial funding option is available under the MISO *pro forma* MPFCA.⁹⁴

40. ITC Companies support Otter Tail's position that MISO's *pro forma* FCA should be revised to include a provision that allows an affected system operator to provide the initial funding for network upgrades. ITC Companies reference *Hoopeston* to reinforce the point that a transmission owner directly connected to an interconnection customer may elect to initially fund network upgrades.⁹⁵ ITC Companies reiterate Otter Tail's argument that the transmission owner and the affected system operator are obligated to perform similar functions and are equally necessary to the interconnection process, and therefore, it is just and reasonable to treat an affected system operator comparably to the directly-connected transmission owner.⁹⁶

⁹¹ *Id.* at 7-8.

⁹² *Id.* at 9 (citing *Hoopeston*, 145 FERC ¶ 61,111 at P 42 n.62; Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 720).

⁹³ *Id.* at 2.

⁹⁴ *Id.* at 3, 8-10.

⁹⁵ Motion to Intervene and Comments of the ITC Companies, Docket No. EL15-36-000, at 1, 3 (filed Jan. 30, 2015) (ITC Companies Comments).

⁹⁶ *Id.* at 3.

41. ITC Companies argue that an affected system operator that elects to initially fund network upgrades should not be limited to calculating its revenue requirement for network upgrades pursuant to Attachment GG, but rather should be able to calculate its revenue requirement in any manner that is just and reasonable, given the relevant circumstances of each case. ITC Companies reference a template accepted by the Commission in Docket No. ER15-884-001 as an example of an alternative methodology for calculating the revenue requirement for network upgrades the transmission owner proposes to initially fund.⁹⁷ ITC Companies suggest that any proposed revisions to MISO's *pro forma* FCA should provide an affected system operator the flexibility to calculate the revenue requirement for network upgrades in any manner that is just and reasonable, given the circumstances of each case.⁹⁸

42. AWEA and WOW request that the Commission reject the complaint without prejudice or, in the alternative, set the matter for hearing.⁹⁹ AWEA and WOW argue that Otter Tail has bypassed MISO's committee and stakeholder process, which they argue is the first step for amending MISO's Tariff to include the initial funding option in its *pro forma* FCA.¹⁰⁰ AWEA and WOW argue that Otter Tail provides no evidence that it raised the present issue in the appropriate MISO committee, or that MISO has thwarted Otter Tail's attempt to do so.¹⁰¹ AWEA and WOW assert that, if the Commission grants Otter Tail's request for relief, it would signal to industry participants that the committee and stakeholder process can be bypassed whenever a market participant desires, and

⁹⁷ See ITC Holdings Corp., Docket No. ER15-884-001 (May 14, 2015) (unpublished letter order). This FSA implements the initial funding option and establishes a charge to recover the return of and on the costs of the network upgrades, i.e., the monthly revenue requirement, using a formula that calculates a levelized fixed charge rate based on the initial capital cost, the term of the facilities services agreement, and certain data from the ITC Midwest Attachment O Formula Rate under the MISO Tariff, including: (i) the ITC Midwest combined tax rate; (ii) the ITC Midwest interest rate on long term debt; (iii) the long term debt and common equity balances; and (iv) the Commission-approved return on equity for ITC Midwest. See MISO Facilities Service Agreement Filing, Docket No. ER15-884-000, Transmittal Letter at 1-3 (filed Jan. 21, 2015).

⁹⁸ ITC Companies Comments at 4.

⁹⁹ Protest of the American Wind Energy Association and Wind on the Wires, Docket No. EL15-36-000, at 1 (filed Feb. 2, 2015).

¹⁰⁰ *Id.* at 2-4.

¹⁰¹ *Id.* at 2.

would be contrary to the required Commission-approved independent system operator or regional transmission organization business practices and procedures related to the board of directors' responsiveness to customers and other stakeholders.¹⁰²

43. AWEA and WOW argue that the initial funding issue is an issue of first impression and requires adequate opportunity for debate and discussion among affected regional stakeholders to vet costs, benefits, and implications.¹⁰³ AWEA and WOW argue that the Commission in Order No. 2003 did not discuss the ability of the transmission owner to provide the initial funding for network upgrades on an affected transmission system that neighbors an interconnecting transmission owner under an FCA, and that it has not discussed in a MISO proceeding before the Commission the initial funding option under the *pro forma* FCA. AWEA and WOW note that the relief Otter Tail seeks is not limited to its system and facilities, but could impact all transmission owners and customers in the region.

44. AWEA and WOW argue that, contrary to Otter Tail's claim that the inability to initially fund network upgrades could impede future network upgrades from being undertaken or completed in a timely manner, no interconnection customer has made such a claim, and numerous FCAs have been executed within MISO with no delays.¹⁰⁴ Further, AWEA and WOW state that if the interconnection customer would prefer the transmission owner to elect to provide the initial funding for network upgrades, this ability should be the choice of the interconnection customer, rather than the prerogative of the transmission owner to impose its costs of capital on the interconnection customer.¹⁰⁵ In response to Otter Tail's request for fast-track processing, which Otter Tail argues is critical to support near future indirect interconnections between new generation sources and its transmission system, AWEA and WOW argue that the current *pro forma* FCA has not caused delays or adversely impacted the interconnection customer's ability to provide its own up-front funding.¹⁰⁶

¹⁰² *Id.* at 4-5 (citing 18 C.F.R. § 35.28(g)(6) (2014)).

¹⁰³ *Id.* at 5.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 5-6.

¹⁰⁶ *Id.* at 7-8.

45. AWEA and WOW request that, if the Commission grants the complaint, it should set the matter for hearing, as factual support addressing the costs, benefits and impacts is needed.¹⁰⁷ Furthermore, AWEA and WOW note that, due to the nationwide implication of the revisions to the *pro forma* FCA that Otter Tail is seeking, the Commission should consider allowing industry-wide comment.

C. Discussion

1. Procedural Matters

46. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

2. Substantive Matters

a. The Transmission Owner's Election to Provide Initial Funding for Network Upgrades

47. We grant Otter Tail's complaint in part because we agree with Otter Tail, ITC Companies, and MISO that the customers of an affected system operator under MISO's *pro forma* FCA or MPFCA and the customers of a directly-connected transmission owner under MISO's *pro forma* GIA are similarly situated, and the comparability principle requires similarly situated customers to be treated comparably in the transmission system planning context.¹⁰⁸ In Order No. 2003, the Commission recognized that affected system operators and directly-connected transmission owners perform similar functions and are equally necessary to the interconnection process. For instance, the Commission recognized that in some instances, "Network Upgrades must be constructed on Affected Systems to protect the reliability of those systems," and stated that "an Affected System Operator may require the Interconnection Customer to pay for all . . . Network Upgrades constructed to accommodate the Interconnection Customer's Interconnection Request."¹⁰⁹ We are also persuaded by the affidavit submitted with Otter Tail's

¹⁰⁷ *Id.* at 8.

¹⁰⁸ See, e.g., *South Carolina Elec. & Gas Co.*, 143 FERC ¶ 61,058 at P 48; see also *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,161 at P 63.

¹⁰⁹ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 29 n.32 and P 738. In Order No. 2003-A, the Commission stated that, with respect to the pricing of network upgrades on affected system, the Commission's "pricing policy as it applies to an Affected System Operator that is not independent should be consistent with the policy [adopted] for the non-independent Transmission Provider." Order No. 2003-A, FERC

complaint, which demonstrates that the funding and construction obligations are equal whether the connection of a new generator is direct or indirect, and that both affected system operators and directly-connected transmission owners must conduct the same types of studies, complete similar engineering tasks, and pay for similar types of services in order to complete their respective network upgrades, which are built for the same purpose of interconnecting generation to the transmission system. Therefore, in order to avoid undue discrimination among interconnection customers under MISO's Tariff, we find that the same funding options should be available to all interconnection customers in MISO, regardless of whether their upgrades are governed pursuant to MISO's *pro forma* GIA or MISO's *pro forma* FCA.

48. However, we deny Otter Tail's complaint in part because we disagree with Otter Tail and MISO that the *pro forma* FCA should adopt the language of MISO's *pro forma* GIA, which currently allows the transmission owner to unilaterally elect to provide the initial funding for network upgrades. Upon review of Article 11.3 of MISO's *pro forma* GIA, it appears that this provision may be similarly unjust, unreasonable, unduly discriminatory or preferential because it allows the transmission owner the discretion to elect to initially fund the upgrades and subsequently assess the interconnection customer a network upgrade charge that is not later reimbursed to the interconnection customer through the provision of credits, which may result in discriminatory treatment by the transmission owner of different interconnection customers. We additionally find that, by *unilaterally* electing to initially fund network upgrades where the interconnection customer is held responsible for such costs and does not receive credits to reimburse it for those costs, pursuant to MISO's Interconnection Customer Funding Policy, the affected system operator or transmission owner may deprive the interconnection customer of other options to finance the cost of the network upgrades that provide more favorable terms and rates. Thus, allowing the transmission owner to charge more for upgrade costs than the interconnection customer may have incurred on its own may result in unjust and unreasonable rates, given interconnection customers' limited ability to receive transmission credits for funding upgrades under MISO's Interconnection Customer Funding Policy.

49. The unilateral election to initially fund network upgrades in MISO's *pro forma* GIA also triggers the requirement for the interconnection customer to post security on the full cost of the network upgrades over the term of the construction phase and over the

Stats. & Regs. ¶ 31,160 at P 636. The term "transmission provider" as it is used here also refers to a transmission owner because, in the context of an independent system operator or regional transmission organization, the individual utilities continue to own their own systems and are therefore transmission owners.

term of the FSA,¹¹⁰ which, under Option 2, is only required over the term of the construction phase of the network upgrades. Yet the need for security is a direct result of the transmission owner's election of the initial funding option; such costs would be avoided if the interconnection customer paid the network upgrade costs up-front, as the Tariff would otherwise provide. The security requirement on the network upgrade charge imposes an additional cost on the interconnection customer. An increase to the interconnection customer's total costs of the network upgrades may, in turn, frustrate the development of new, competitive generation, which would contradict a stated purpose of Order No. 2003 to "increas[e] the number and variety of new generation that will compete in the wholesale electricity market."¹¹¹ We note that the *unilateral* election to initially fund network upgrades (where the interconnection customer is held responsible for such costs and does not receive credits to reimburse it for those costs, pursuant to MISO's Interconnection Customer Funding Policy), which may increase costs of interconnection service by assigning increased capital costs and a security requirement to the interconnection customer with no corresponding increase in service, shares similar characteristics to those of Option 1, which the Commission eliminated in *E.ON*.¹¹²

50. In its complaint, Otter Tail argues that the lack of a unilateral option to initially fund network upgrades would harm Otter Tail (as an affected system operator) through the cost impact of being forced to use Option 2 customer funding.¹¹³ This argument implies that the affected system operator is owed the interconnection customer's financing business and need not allow the interconnection customer to choose freely how to fund the costs of network upgrades for which the interconnection customer is responsible. Furthermore, as the costs for network upgrades under 345 kV in MISO are the responsibility of the interconnection customer under MISO's Interconnection Customer Funding Policy,¹¹⁴ it stands to reason that the interconnection customer would have the incentive to find the lowest cost solution to funding network upgrades associated

¹¹⁰ The amount of security provided in the FSA is theoretically reduced ratably by the depreciated portion of the network upgrade charge rate, which is also called the return of capital.

¹¹¹ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 1.

¹¹² *E.ON*, 137 FERC ¶ 61,076 at P 37 (finding that "the election of Option 1 by a transmission owner increases the costs that are directly assigned to the interconnection customer, but there is no difference in the interconnection service provided.").

¹¹³ Otter Tail Complaint at 21.

¹¹⁴ The interconnection customer may receive 10 percent reimbursement for the costs of projects that are 345 kV or above.

with its interconnection requests, and therefore the transmission owner should not have control over the interconnection customer's funding decision. Additionally, Otter Tail would not be forced to use Option 2 if the option to initially fund network upgrades is allowed under mutual agreement between the transmission owner and the interconnection customer, as the option to initially fund would still be available to the transmission owner if the interconnection customer is in agreement. We are also not persuaded by Otter Tail's assertion that the possibility of an interconnection customer lacking the means to fund the network upgrades is grounds to provide the transmission owner with the unilateral right to elect the initial funding option in MISO. Otter Tail has not provided any evidence of this scenario occurring in MISO, let alone demonstrated that individual instances where that could occur warrant conferring a unilateral right to transmission owners for all generator interconnections in MISO, given interconnection customers' limited ability to receive transmission credits for funding upgrades under MISO's Interconnection Customer Funding Policy.

51. We disagree with Otter Tail's assertion that *Hoopeston* provides support for applying the unilateral initial funding option to MISO's *pro forma* FCA. In *Hoopeston*, the Commission did not consider whether the *unilateral* aspect of the initial funding option in Article 11.3 of MISO's *pro forma* GIA was just and reasonable, and no party challenged the Tariff language. Rather, the Commission was presented for the first time with the issue of how MISO's Interconnection Customer Funding Policy should be implemented under the initial funding option, as it was written into MISO's *pro forma* GIA. The Commission implemented the existing Tariff language and found it unduly discriminatory for a transmission owner to recover costs other than the return of and on the capital costs of the network upgrades from an interconnection customer under the initial funding option, because an interconnection customer charged under Option 2 would only be required to pay for the capital costs of the network upgrades.¹¹⁵

52. By contrast, in this complaint proceeding, Otter Tail alleges that the existing Tariff is unjust, unreasonable and unduly discriminatory and seeks to revise that Tariff under FPA section 206 to extend the unilateral initial funding election in MISO's *pro forma* GIA to MISO's *pro forma* FCA. We now consider the justness and reasonableness of the unilateral initial funding language in MISO's *pro forma* GIA, and we find that, because there is the possibility for an increase in costs presented by a transmission owner's unilateral election to provide initial funding as compared with Option 2, and yet there is no increase in interconnection service provided, such unilateral election may be contrary to *E.ON*, and may otherwise be unjust and unreasonable for the reasons discussed above.

¹¹⁵ *Hoopeston*, 145 FERC ¶ 61,111 at P 41.

b. Institution of New Proceeding

53. We have examined Article 11.3 of MISO's *pro forma* GIA and it appears that this provision may be unjust, unreasonable, unduly discriminatory or preferential in light of the opportunities for undue discrimination and for increasing costs where there is no increase in service, given that interconnection customers are held responsible for network upgrade costs and do not receive credits that reimburse them for those costs under MISO's Interconnection Customer Funding Policy, as discussed above. Accordingly, we reject Otter Tail's request to revise the *pro forma* FCA to include the language that is currently available in Article 11.3 of MISO's *pro forma* GIA and institute a proceeding in Docket No. EL15-68-000, pursuant to section 206 of the FPA, to examine MISO's *pro forma* FCA, GIA, and MPFCA. Upon initial review, we find that the potentially unjust and unreasonable Tariff language could be remedied by revising MISO's Tariff to provide that the transmission owner or affected system operator may only elect to provide the initial funding for network upgrades if the interconnection customer agrees to such election; otherwise, the interconnection customer must fund the network upgrades associated with its interconnection request through other means. Specifically, MISO could revise Article 11.3 of its *pro forma* GIA to remove the ability for a transmission owner to unilaterally elect to initially fund network upgrades, as follows:

Transmission Owner shall provide Transmission Provider and Interconnection Customer with written notice pursuant to Article 15 ~~that~~ Transmission Owner elects to fund the capital for the Network Upgrades and Transmission Owner's System Protection Facilities, which election shall only be available upon mutual agreement of Interconnection Customer and Transmission Owner; otherwise, such facilities, if any, shall be solely funded by Interconnection Customer.

As we have determined that the customers of an affected system operator under MISO's *pro forma* FCA or an affected system operator under MISO's *pro forma* MPFCA must be treated similarly to the customers of a directly-connected transmission owner under MISO's *pro forma* GIA, MISO would also include the initial funding language above in its *pro forma* FCA and *pro forma* MPFCA, revising as necessary to reflect the proper terminology for each *pro forma* agreement.

54. The Commission requires MISO, within 60 days of the date of publication of notice of the Commission's initiation of Docket No. EL15-68-000, either to (1) report whether it will propose Tariff changes as suggested by the Commission, providing that the transmission owner or affected system operator may only elect to provide the initial funding for network upgrades if the interconnection customer agrees to such election, or (2) explain why such changes are not necessary to address the potential that MISO transmission owners may exercise their discretion to increase the network upgrade costs that are directly assigned to interconnection customers under MISO's Interconnection Customer Funding Policy.

55. Assuming that the interconnection customer is agreeable to the transmission owner providing the initial funding for network upgrades, we agree with the ITC Companies that MISO's *pro forma* GIA, FCA, and MPFCA should provide an affected system operator or transmission owner with the flexibility to calculate a revenue requirement for network upgrades that is just and reasonable, and we decline to prescribe the method by which a revenue requirement for network upgrades would be calculated under the initial funding option.

56. In cases where, as here, the Commission institutes a proceeding under section 206 of the FPA, the Commission must establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months subsequent to that date. We will establish a refund effective date at the earliest date allowed, i.e., the date the notice of the initiation of the investigation in Docket No. EL15-68-000 is published in the *Federal Register*. The Commission is also required by section 206 to indicate when it expects to issue a final order. The Commission expects to issue a final order in this section 206 proceeding by April 30, 2016.

c. Other Issues

57. We agree with Otter Tail that its complaint in Docket No. EL15-36-000 is not barred by the doctrine of collateral estoppel, as the issue now before the Commission is not the same issue the Commission faced in the Border Winds FCA Order. In the complaint proceeding, the issue before the Commission is whether the *pro forma* FCA is unjust and unreasonable to the extent that it does not permit an affected system operator to elect to initially fund network upgrades. In the Border Winds FCA Order, the issue before the Commission was whether MISO had met its burden to justify the proposed non-conforming provisions of the Border Winds FCA, and the Commission specifically stated that it did not pre-judge whether it would be just and reasonable to amend MISO's *pro forma* FCA to adopt the initial funding option on a generic basis.¹¹⁶ We also agree with Otter Tail that the doctrine of *res judicata* is also inapplicable to this proceeding because Otter Tail's complaint does not seek to re-litigate the non-conforming FCA that was at issue in the Border Winds FCA Order. Thus, we disagree with MISO's assertion that the Commission need not address the complaint because it could address the issues in the complaint on rehearing of the Border Winds FCA Order.

58. We disagree with the contention of AWEA and WOW that the Commission must reject the complaint and require this matter to be discussed at the MISO stakeholder level. While we encourage parties to follow the MISO stakeholder process when requesting changes to MISO's Tariff, parties have a statutory right to file complaints

¹¹⁶ Border Winds FCA Order, 149 FERC ¶ 61,224 at P 25 n.57.

under section 206 of the FPA. Furthermore, Otter Tail has stated that it attempted to work with MISO on revising its *pro forma* FCA for years and has been unable to effectuate any changes to MISO's Tariff – therefore, we disagree that Otter Tail failed to first seek relief through the MISO stakeholder process.¹¹⁷

The Commission orders:

(A) The requests for rehearing of the Border Winds FCA Order filed in Docket No. ER14-2464-002 are denied, as discussed in the body of this order.

(B) Otter Tail's complaint filed in Docket No. EL15-36-000 is granted in part and denied in part, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL15-68-000, as discussed in the body of this order.

(D) MISO is hereby directed to submit a filing, within 60 days of the date of publication of notice of the Commission's initiation of Docket No. EL15-68-000, either to (1) report whether it will propose Tariff changes providing that the transmission owner or affected system operator may only elect to provide the initial funding for network upgrades if the interconnection customer agrees to such election, or (2) explain why such changes are not necessary to address the potential that MISO transmission owners may exercise their discretion to increase the network upgrade costs that are directly assigned to interconnection customers under MISO's Interconnection Customer Funding Policy.

(E) Any interested person desiring to be heard in Docket No. EL15-68-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2014)) within 21 days of the date of this order.

(F) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL15-68-000.

¹¹⁷ Otter Tail Complaint at 22.

(G) The refund effective date in Docket No. EL15-68-000 established pursuant to section 206 of the FPA shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F) above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.