

directed MISO to submit a compliance filing making corresponding changes to its *pro forma* Generator Interconnection Agreement (GIA), *pro forma* Facilities Construction Agreement (FCA), and *pro forma* Multi-Party Facilities Construction Agreement (MPFCA) within 30 days of the date of the order, with such changes to be effective prospectively from that date.⁴ The Commission also requested further briefing limited to the treatment of the GIAs, FCAs, and MPFCAs that were entered into during the time period between June 24, 2015 (the effective date of the Commission's prior determination that was vacated) and August 31, 2018 (the date the Commission prospectively reversed its prior determination).⁵

2. In an order dated December 20, 2019, the Commission found that GIAs, FCAs, and MPFCAs entered into between June 24, 2015 and August 31, 2018 should be revised to allow transmission owners and affected system operators to unilaterally elect to provide initial funding for network upgrades, referred to herein as Transmission Owner Initial Funding, if they so choose.⁶ The Commission accepted MISO's filing made in compliance with the Ameren Remand Order and denied a request for rehearing of the Ameren Remand Order. The Commission directed MISO to file tariff sheets providing that transmission owners and affected system operators that were parties to any GIAs, FCAs, and MPFCAs that became effective between June 24, 2015 and August 31, 2018 (this time period is referred to herein as the "interim period") may elect Transmission Owner Initial Funding for the network upgrades in those agreements, provided that such election is done in a not unduly discriminatory manner.⁷ The Commission also directed MISO to: (1) file a list of all GIAs, FCAs, or MPFCAs that became effective during the interim period under which the transmission owner or affected system operator intends to elect Transmission Owner Initial Funding; and (2) file all such amended GIAs, FCAs, and MPFCAs, along with their associated Facilities Service Agreements (FSAs).⁸

Attach. X, § 1 (109.0.0). We refer below to interconnection-related network upgrades as "network upgrades."

⁴ Ameren Remand Order, 164 FERC ¶ 61,158 at P 33.

⁵ *Id.* P 36.

⁶ *Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233, at P 1 (2019) (December 2019 Order).

⁷ *Id.* P 125 and ordering paras. B-C.

⁸ *Id.* PP 136-141. The Commission twice granted MISO's motion for an extension of time to file the amended agreements and their associated FSAs, such that these agreements were due on or before July 17, 2020.

3. On January 21, 2020, American Wind Energy Association (AWEA) timely requested rehearing of the December 2019 Order. Pursuant to *Allegheny Defense Project v. FERC*,⁹ the rehearing request filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),¹⁰ however, we are modifying the discussion in the December 2019 Order and continue to reach the same result in this proceeding, as discussed below.¹¹

4. On February 18, 2020, as amended on February 21, 2020, MISO submitted a partial compliance filing to the December 2019 Order that includes the tariff sheets allowing transmission owners and affected system operators to elect Transmission Owner Initial Funding for agreements that became effective during the interim period, as well as a list of all such agreements where the transmission owner or affected system operator intends to elect Transmission Owner Initial Funding. In this order, we accept MISO's proposed tariff revisions. We note that the affected agreements and related FSAs submitted in compliance with the December 2019 Order are pending before the Commission and will be acted on in the relevant dockets.

5. The relevant history of this proceeding is addressed in detail in the December 2019 Order, and will not be repeated here.

I. Background

A. Compliance Filing in Docket No. ER18-2513-000

6. On September 28, 2018, MISO submitted revisions to the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) in compliance with the Ameren Remand Order. MISO proposed to restore the right of the transmission owner to unilaterally elect the Transmission Owner Initial Funding option under the *pro forma* GIA for the capital cost of network upgrades, as well as extend the unilateral right of the transmission owner or affected system operator to elect the Transmission

⁹ *Allegheny Def. Project v. FERC*, 964 F.3d 1, 16-17 (D.C. Cir. 2020) (en banc) (*Allegheny Defense Project*).

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

¹¹ *Allegheny Defense Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the December 2019 Order. See *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

Owner Initial Funding option under the *pro forma* FCA and the *pro forma* MPFCA for network upgrades.¹² MISO requested an August 31, 2018 effective date.¹³

7. As relevant here, AWEA (among other entities) requested rehearing of the Ameren Remand Order.

B. December 2019 Order

1. AWEA's Request for Rehearing of Ameren Remand Order

8. The Commission in the December 2019 Order denied AWEA's request for rehearing of the Ameren Remand Order. The Commission found that information provided by AWEA did not adequately support the Commission's earlier conclusions that providing transmission owners the right to unilaterally elect Transmission Owner Initial Funding is unduly discriminatory, or overcome the Court's finding in *Ameren* that the Commission failed to carry its burden of proof in the vacated orders to justify providing interconnection customers the right to elect Generator Up-Front Funding.¹⁴

9. The Commission stated that AWEA had provided no evidence of actual discrimination on rehearing and had not shown why the ability of interconnection customers to challenge costs before the Commission, a point on which the Court relied, is inadequate to address any concerns with potential undue discrimination.¹⁵ The Commission stated that AWEA had not overcome the Court's findings in *Ameren* that allowing transmission owners to unilaterally elect Transmission Owner Initial Funding is necessary to assure transmission owners do not face uncompensated risks and to satisfy the capital attraction standard.¹⁶

10. As discussed more fully below, in the December 2019 Order, the Commission also permitted transmission owners or affected system operators to elect Transmission Owner Initial Funding for GIAs, FCAs, and MPFCAs entered into in the interim period, and therefore, the Commission rejected AWEA's request that the Commission exclude

¹² MISO Compliance Filing, Transmittal Letter at 2-3, Docket No. ER18-2513-000 (filed Sept. 28, 2018).

¹³ *Id.* at 4.

¹⁴ December 2019 Order, 169 FERC ¶ 61,233 at P 37.

¹⁵ *Id.* P 38.

¹⁶ *Id.* PP 39-40.

projects in Phase III of MISO's interconnection queue from the Tariff changes the Commission directed in the Ameren Remand Order.¹⁷

2. Ameren Remand Compliance Directive

11. The Commission found that transmission owners and affected system operators should have the unilateral right to elect the Transmission Owner Initial Funding option for any GIA, FCA, or MPFCA that became effective during the interim period (i.e., between June 24, 2015 and August 31, 2018). Therefore, the Commission directed MISO to file Tariff sheets stating that transmission owners and affected system operators that were parties to any GIAs, FCAs, or MPFCAs that became effective during the interim period may elect Transmission Owner Initial Funding for the network upgrades in those agreements, provided that such election is done in a not unduly discriminatory manner.¹⁸ The Commission found that providing transmission owners and affected system operators the right to elect the Transmission Owner Initial Funding option for any GIA, FCA, and MPFCA that became effective during the interim period is an appropriate remedy in this case to give effect to the Court's vacatur, as it seeks to return the parties to the position they would be in if the Commission had not issued the now-vacated orders.¹⁹

12. The Commission found that the alleged regulatory uncertainty resulting from reopening existing agreements (i.e., increased costs, inability to meet the deadlines for the Production Tax Credit, delayed production schedules, withdrawal from interconnection queues, agreement termination) are not so burdensome as to overcome the presumption that the Commission should place parties in the position they would have been in absent the Commission's legal error. The Commission also was not persuaded that these potential impacts are so great that it should deprive transmission owners or affected system operators of an opportunity to earn a return on the capital costs of the network upgrades built on their system that should have been expressly allowed under the Tariff during the interim period. Regarding agreements that are not filed with the Commission but that may be affected by the December 2019 Order, such as Power Purchase Agreements and Asset Purchase Agreements, the Commission found that the parties were on notice that the Commission's previous orders could be remanded or vacated, and that, therefore, these parties could have included language in such contracts to address the

¹⁷ *Id.* P 41.

¹⁸ *Id.* P 125.

¹⁹ *Id.* P 126.

possibility that the Commission's orders would be vacated and limit the need for renegotiation in that event.²⁰

13. The Commission disagreed with arguments that the Commission would be engaging in retroactive ratemaking by revising prior agreements and that prior agreements may only be modified prospectively under FPA section 206. The Commission also disagreed that any reliance on a refund effective date would expire on December 25, 2017. The Commission stated that it has authority to take corrective action pursuant to FPA section 309 to remedy a legal error and that here the Commission has the authority under section 309 to remedy its error by allowing election of Transmission Owner Initial Funding from June 24, 2015 for GIAs that became effective during the interim period.²¹ Given that the Commission has previously found that transmission owners and affected system operators that enter into FCAs and MPFCAs are similarly situated to transmission owners with regard to GIAs and that the Court in *Ameren* did not distinguish among GIAs, FCAs, and MPFCAs when it vacated the Commission's orders, the Commission also found that transmission owners and affected system operators should have the unilateral right to elect the Transmission Owner Initial Funding option not only for GIAs, but also for FCAs and MPFCAs, that became effective during the interim period.²²

14. The Commission directed MISO to submit a filing within 60 days of the December 2019 Order that included: (1) a list of all GIAs, FCAs, or MPFCAs that became effective in the interim period under which the transmission owner or affected system operator is electing the Transmission Owner Initial Funding option; (2) amended GIAs, FCAs, or MPFCAs that meet certain conditions; and (3) where network upgrades are in service, executed or unexecuted FSAs associated with the refiled GIAs, FCAs, or MPFCAs. In order to provide certainty for all the parties to agreements that became effective in the interim period, the Commission stated that this filing would be the only opportunity for a transmission owner or affected system operator to elect the Transmission Owner Initial Funding option for such agreements. In order to ensure that each transmission owner and affected system operator exercises its discretion to revise existing agreements in a manner that is not unduly discriminatory or preferential, the Commission required that, if a transmission owner or affected system operator desires to treat funding of network upgrade costs differently for different interconnection customers, it must provide adequate support that such treatment is done on a not unduly discriminatory basis. The Commission required that the transmission owner or affected

²⁰ *Id.* PP 127-28.

²¹ *Id.* P 129.

²² *Id.* P 135.

system operator provide any necessary support to MISO, and MISO must include this information in an attachment to the compliance filing.²³

II. Discussion

A. Rehearing

1. AWEA's Request for Rehearing

15. AWEA argues that the Commission erred in allowing Transmission Owner Initial Funding for MPFCAs during the interim period and urges the Commission to find that Transmission Owner Initial Funding does not apply to MPFCAs during the interim period. AWEA states that allowing Transmission Owner Initial Funding for MPFCAs during the interim period violates the filed rate doctrine because MISO's Tariff never provided for Transmission Owner Initial Funding to apply to MPFCAs and was only filed for the first time in Docket No. ER18-2513-000. AWEA states that Otter Tail's complaint in Docket No. EL15-36-000 never requested that Transmission Owner Initial Funding apply to MPFCAs and only requested Transmission Owner Initial Funding for FCAs involving affected system operators. AWEA asserts that the Commission could, at best, allow Transmission Owner Initial Funding for MPFCAs on a prospective basis effective August 31, 2018, as it did in Docket No. ER18-2513-000.²⁴

16. As to GIAs, FCAs, and MPFCAs, AWEA more broadly argues that the Commission erred in finding that it would not be discriminatory to allow Transmission Owner Initial Funding for the interim period, despite the fact that only one transmission owner in one agreement had ever selected Transmission Owner Initial Funding prior to June 24, 2015. AWEA represents that the opportunity for Transmission Owner Initial Funding has existed in MISO's Tariff in some form since 2005 and that no difference in facts arose during the interim period, and between 2005 and the interim period. AWEA therefore reasons that the December 2019 Order is patently discriminatory because it permits transmission owners who never applied Transmission Owner Initial Funding between 2005 and June 23, 2015 to apply Transmission Owner Initial Funding to agreements entered into during the interim period. AWEA states that allowing a Transmission Owner the choice to apply a different and more expensive rate to two different sets of interconnection customers paying for network upgrades is per se discriminatory. AWEA describes the Commission as ignoring AWEA's request that any transmission owner who had not selected Transmission Owner Initial Funding prior to the

²³ *Id.* P 136.

²⁴ AWEA Request for Rehearing at 5-6.

interim period be precluded from doing so going forward and that two transmission owners had argued that the Commission should not look back retroactively.²⁵

17. AWEA argues that the Commission erred in finding that interconnection customers were on notice that the Commission's orders could be remanded and could have included protective language in power purchase agreements and asset purchase agreements. AWEA maintains that, contrary to the Commission's assertions in the December 2019 Order, the notice exception to the filed rate doctrine applicable when a court invalidates an earlier Commission order could have applied in this proceeding at the earliest on the date the petition for review of the earlier orders was filed at the D.C. Circuit (i.e., February 26, 2016). AWEA states that parties that negotiated power purchase agreements and asset purchase agreements during the interim period could never have anticipated that a court would invalidate those agreements or that the Commission would abrogate them four years later.²⁶ AWEA represents that interconnection customers had no notice that asset purchase agreements and power purchase agreements at issue would be abrogated because these agreements were negotiated in advance of GIAs, FCAs, and MPFCAs in order to yield the value of the Federal Production Tax Credit that expires on December 31, 2020. AWEA states that the Commission has not required transmission owners to include similar protective language addressing the possibility that the Commission's orders would be vacated at some future date and that the Commission has applied the notice exception of the filed rate doctrine to interconnection customers, but not transmission owners.²⁷

18. Further, AWEA argues that the Commission departed from its precedent preserving the sanctity of contracts. AWEA states that the Commission has previously only departed from that precedent in extreme circumstances, such as fundamental industry-restructuring and reorganization of a bankrupt utility.²⁸ AWEA states that, "[t]here is no evidence of any risk to the financial ability of a transmission owner to continue service yet generation developers and interconnection customers will be

²⁵ *Id.* at 6-9.

²⁶ *Id.* at 9-11 (citing, e.g., *W. Deptford Energy LLC v. FERC*, 766 F.3d 10, 22-23 (D.C. Cir. 2014) (*West Deptford*); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299-300 (D.C. Cir. 2001); *W. Res., Inc. v. FERC*, 72 F.3d 147, 151 (D.C. Cir. 1995) (*Western Resources*)).

²⁷ *Id.* at 11-12.

²⁸ *Id.* at 12-13 (citing *PacifiCorp v. Reliant Energy Servs.*, 99 FERC ¶ 61,381 at P 25 (2002); *E.ON Climate & Renewables N. America LLC v. N. Ind. Pub. Serv. Co.*, 149 FERC ¶ 61,217, at PP 25, 41 (2014)).

financially harmed and will experience ‘an excessive burden.’”²⁹ AWEA states that the Commission has not acknowledged the burden it must satisfy to abrogate existing contracts, and provided no evidence justifying abrogating those contracts under that burden.³⁰

19. AWEA argues that the Commission erred in failing to find that disruptive consequences to interconnection customers were so great that transmission owners or affected system operators should be denied an opportunity to earn a return on the capital costs of the network upgrades built on their system. AWEA again states that the Commission ignored the fact that transmission owners since 2003 have had the opportunity to elect to earn a return on network upgrades and to roll that into their rate base and the fact that no transmission owner has reserved its right to do so in GIAs, FCAs, and MPFCAs during the interim period does not amount to a deprived opportunity to earn a rate of return. AWEA argues that interconnection customers lack the ability to recover unexpected costs in their regulated rates. AWEA states that, while there was no harm described by transmission owners failing to use Transmission Owner Initial Funding during the interim period, applying Transmission Owner Initial Funding to existing agreements would result in costs increasing by 30-40% for each interconnection customer on a net present value basis. Given the 100 agreements MISO stated could be affected by the December 2019 Order, AWEA states that costs to interconnection customers could rise by multiple hundreds of millions of dollars (with no increase in service), even excluding resulting cost shifts in asset purchase agreements and power purchase agreements with third parties. AWEA states that “all MISO transmission owners reported strong financial health with abundant sources of capital to provide services” before, during, and after the interim period.³¹ AWEA states that allowing transmission owners to apply Transmission Owner Initial Funding retroactively is not a rational conclusion given the harm to interconnection customers and absence of harm to transmission owners. AWEA argues that, “at best” Transmission Owner Initial Funding “should be retroactively reinstated if there is a need per *Hope*,” but that no transmission owner has demonstrated such a need.³²

²⁹ *Id.* at 13 (citing *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956)).

³⁰ *Id.* at 13-14 (citing December 2019 Order, 169 FERC ¶ 61,233 at P 11 (Glick, Comm’r, dissenting)).

³¹ *Id.* at 16.

³² *Id.* (citing *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (*Hope*)).

20. Finally, AWEA argues that the Commission failed to address the depreciation issue for which it specifically sought input in the Ameren Remand Order.³³ AWEA states that generation owners might have already started depreciating in their books their investment in network upgrades. AWEA represents that, contrary to transmission owners that use straight-line depreciation, interconnection customers use accelerated depreciation that is recorded as an expense in early years for state and federal income tax purposes. AWEA states that it urged the Commission to allow the amount reimbursed to be in a lump-sum and at a depreciated amount if it permitted retroactive application of Transmission Owner Initial Funding. AWEA represents that Ameren concurred that repayment should be in a lump sum minus the depreciation if the network upgrade is already in service. AWEA states that the Commission's refusal to require a specific method of depreciation leaves open a point of disagreement that MISO must resolve to implement the December 2019 Order.³⁴

2. Commission Determination

21. For the reasons discussed below, we are unpersuaded by AWEA's arguments on rehearing that the Commission erred in applying Transmission Owner Initial Funding to MPFCAs and other agreements entered into during the interim period.

³³ In the Ameren Remand Order, the Commission solicited briefing on the following question:

For GIAs entered into between June 24, 2015 and the date of this order, that the relevant transmission owner wants to elect the Transmission Owner Initial Funding option for, should the network upgrade principal subject to such election be valued at the construction cost minus depreciation? If so, from what date should the network upgrades be depreciated from (e.g., in service date), what time frame should the network upgrades be depreciated over (e.g., useful life or initial term of the relevant agreement), and what depreciation rates should apply? Should the interconnection customer instead receive the undepreciated value of the network upgrade in repayment by the transmission owner? Should the interconnection customer be repaid in one lump sum payment or with several payments over time?

Ameren Remand Order, 164 FERC ¶ 61,158 at P 36.

³⁴ AWEA Request for Rehearing at 17-18.

22. We agree that MISO's Tariff never contained language applying Transmission Owner Initial Funding to MPFCAs specifically until the filing in Docket No. ER18-2513-000. Nevertheless, we disagree that allowing Transmission Owner Initial Funding for MPFCAs during the interim period violates the filed rate doctrine and/or rule against retroactive ratemaking.

23. In the June 2015 Order in this proceeding, the Commission recognized that MISO's *pro forma* MPFCA, like MISO's *pro forma* FCA but unlike MISO's *pro forma* GIAs, did not include Transmission Owner Initial Funding.³⁵ Given that difference, the Commission in the June 2015 Order first "agree[d] . . . 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."³⁶ The Commission similarly held 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."³⁷ Accordingly, in a finding separate from its now-reversed prohibition on Transmission Owner Initial Funding for all agreements, the Commission held in the June 2015 Order that MPFCAs and FCAs should be treated the same as GIAs with regard to network upgrade funding decisions.³⁸ To remedy the disparity, the Commission directed MISO, in its June 2015 Order, to revise all affected agreements—GIAs, FCAs, and MPFCAs—beginning June 24, 2015 to bar unilateral Transmission Owner Initial Funding. As relevant here, the agreements affected by the *Ameren* decision are those agreements that became effective during the interim period (June 24, 2015 and August 31, 2018), and for which transmission owners or affected system operators are now electing Transmission Owner Initial Funding for the network upgrades in those agreements.

³⁵ See *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,220, at P 9 (2015) (June 2015 Order).

³⁶ *Id.* P 47.

³⁷ *Id.*

³⁸ *Id.* ("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.").

24. Once a party requested rehearing of the June 2015 Order, all parties to this proceeding were on notice that agreements filed in compliance with the Commission's orders were subject to revision in the continuing litigation. The Commission has not disavowed its finding that transmission owners and affected system operators that are a party to an MPFCA should be treated the same as they would be under GIAs and FCAs with regard to network upgrade funding decisions. Moreover, as the Commission stated in the December 2019 Order, "the Court [in *Ameren*] did not make a distinction among GIAs, FCAs, and MPFCAs when it vacated the Commission's orders."³⁹ Therefore, parties were on notice that any agreement entered into after the refund effective date of the first order that made this finding, June 24, 2015, could be subject to later adjustment.

25. Accordingly, we continue to find, as the Commission stated in the December 2019 Order, that parties had sufficient notice pursuant to the presence of continuing litigation concerning the June 2015 Order that the Commission's directive in the June 2015 Order could be overturned, such that the filed rate doctrine and rule against retroactive ratemaking do not apply to the extent that transmission owners or affected system operators now seek Transmission Owner Initial Funding for these affected agreements.⁴⁰ By the same reasoning, parties to agreements that are dependent on the terms of GIAs, FCAs, and MPFCAs entered into during the interim period (i.e., asset purchase agreements and power purchase agreements) were also on notice that GIAs, FCAs, and MPFCAs could be overturned by judicial invalidation in a way that affects these agreements.

26. As to AWEA's undue discrimination claim, we disagree with AWEA that it would be unduly discriminatory to permit revision of agreements entered into during the interim period even when the relevant transmission owner did not elect Transmission Owner Initial Funding for agreements entered into before the interim period. Although Transmission Owner Initial Funding has been part of MISO's Tariff since before the interim period for GIAs, treating transmission owners and affected system operators the

³⁹ December 2019 Order, 169 FERC ¶ 61,233 at P 135.

⁴⁰ See December 2019 Order, 169 FERC ¶ 61,233 at P 128 & n.244 (citing *West Deptford*, 766 F.3d at 22-23 ("the filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service" (citing *Nat. Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992))) and "the notice exception has been applied when judicial invalidation of Commission decisions has resulted in retroactive changes in rates. . . . generators in those cases were aware in advance of the risk of litigation-induced change" (referencing *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299--300 (D.C. Cir. 2001); *Western Resources*, 72 F.3d at 151; *Pub. Utils. Comm'n v. FERC*, 988 F.2d 154, 163-66 (D.C. Cir. 1993); *Natural Gas Clearinghouse*, 965 F.2d at 1075-77))).

same with respect to network upgrade funding options under GIAs, FCAs, and MPFCAs—which is a separate issue from transmission owners having the unilateral right to elect Transmission Owner Initial Funding—had not been part of MISO’s Tariff until the interim period. The Commission found that transmission owners and affected system operators that are parties to FCAs and MPFCAs should be treated the same as GIAs with respect to network upgrade funding options for the first time on June 24, 2015 (the effective date set in the June 2015 Order), and was unable to order revision of agreements that preceded that effective date. Therefore, FCAs and MPFCAs entered into before the interim period are not similarly situated to agreements entered into during the interim period and it was not unduly discriminatory for the Commission in the December 2019 Order to require revision of agreements entered into during the interim period. Furthermore, the fact that transmission owners may not have elected Transmission Owner Initial Funding in GIAs they were a party to prior to the interim period, as contended by AWEA, does not, by itself, support a finding that such transmission owners should be barred from electing Transmission Owner Initial Funding on an ongoing basis.

27. We continue to find, as we did in the December 2019 Order, that “AWEA’s argument that allowing transmission owners to unilaterally elect Transmission Owner Initial Funding is not required to assure transmission owners do not face uncompensated risks, or to satisfy the capital attraction standard,” does not overcome the Court’s findings in *Ameren*.⁴¹ As the Commission stated in the December 2019 Order, “[t]he Court in *Ameren* was skeptical of the idea that a transmission owner need not earn a profit on all parts of its business. AWEA has not demonstrated that the risks that interconnecting customers using Generator Up-Front Funding in the aggregate or in other specific instances impose on each transmission owner or on all transmission owners in MISO would likewise be negligible.”⁴² The Commission therefore appropriately considered the relevant evidence and factors, in light of the *Ameren* decision, and was not required in this proceeding, where the Commission is correcting its own legal error, to apply another standard.⁴³ It was therefore reasonable for the Commission to find, on balance, that harm to interconnection customers caused by transmission owners having the unilateral right to elect Transmission Owner Initial Funding did not outweigh the harm to transmission owners from not having that right that was recognized by the Court in *Ameren*.

28. We disagree with AWEA that the Commission failed to address its depreciation concerns by declining to express a preferred method of calculating depreciation amounts. In the December 2019 Order, the Commission stated that “[t]he filing that MISO submits

⁴¹ *Id.* P 39.

⁴² *Id.* (citations omitted).

⁴³ *See id.* PP 128-129.

to the Commission that includes the FSAs associated with these GIAs, FCAs, or MPFCAs must adequately support any proposed method for determining the return on and of capital for the relevant network upgrades . . . , as well as the stated value of the remaining principal on the network upgrades and the depreciation rate chosen by the parties to the relevant agreement.”⁴⁴ The Commission will determine in each proceeding whether the depreciation rate in a refiled agreement meets the standards as articulated in the December 2019 Order.

B. MISO’s Partial Compliance Filing

1. Filing

29. On February 18, 2020, as amended on February 21, 2020, MISO submitted a partial compliance filing proposing revisions to the *pro forma* GIA, *pro forma* FCA, and *pro forma* MPFCA to reinstitute the transmission owner’s unilateral right to elect Transmission Owner Initial Funding under the *pro forma* GIA and to extend the unilateral right to elect Transmission Owner Initial Funding to transmission owners and affected system operators under the *pro forma* FCA and *pro forma* MPFCA, effective June 24, 2015.⁴⁵ MISO also submitted a list of affected GIAs, FCAs, and MPFCAs from the interim period for which the transmission owner or affected system operator have elected the Transmission Owner Initial Funding option. The list includes 13 GIAs, five FCAs, and three MPFCAs.

⁴⁴ *Id.* P 140; *see also id.* P 139 (“We direct the transmission owner or affected system operator to refund any payments that it received from the interconnection customer for network upgrades in one lump sum payment, unless the parties agree to refund such payments using a different method. We also direct MISO to file with the Commission an FSA, which necessarily will set forth the costs for the network upgrades including a return on and of capital, for the Transmission Owner Initially Funded network upgrade(s) included in the GIA, FCA, or MPFCA that falls under this second scenario after the parties submit the executed or unexecuted FSA to MISO. As noted above, each filing regarding an FSA that MISO submits to the Commission must adequately support any proposed method for determining the return on and of capital for the relevant network upgrades as just and reasonable and not unduly discriminatory or preferential.”).

⁴⁵ MISO also requested the following effective dates for proposed revisions to the *pro forma* GIA, *pro forma* FCA, and *pro forma* MPFCA in order to true-up the Tariff between June 24, 2015 to August 31, 2018: August 1, 2015, April 5, 2016, September 21, 2016, October 5, 2016, January 4, 2017, February 15, 2017, March 23, 2017, June 30, 2017, March 1, 2018, May 15, 2018, July 10, 2018, July 19, 2018, and July 24, 2018. The requested effective dates are necessary for the Tariff to reflect the proposed revisions in eTariff back to June 24, 2015.

2. Commission Determination

30. We accept MISO's proposed Tariff revisions, effective June 24, 2015, as these Tariff revisions comply with the directives in the December 2019 Order.⁴⁶ We note that the affected agreements and their associated FSAs are pending before the Commission in various dockets and will be acted on by the Commission in the relevant dockets at a future date.

The Commission orders:

(A) In response to AWEA's requests for rehearing, the December 2019 Order is hereby modified and the result sustained, as discussed in the body of this order.

⁴⁶ We also accept the proposed Tariff revisions effective August 1, 2015, April 5, 2016, September 21, 2016, October 5, 2016, January 4, 2017, February 15, 2017, March 23, 2017, June 30, 2017, March 1, 2018, May 15, 2018, July 10, 2018, July 19, 2018, and July 24, 2018, as requested.

(B) MISO's proposed partial compliance filing submitted in Docket No. ER18-2513-003 is hereby accepted, effective June 24, 2015, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

pro forma Multi-Party Facilities Construction Agreement (MPFCA) to not have the same initial funding options for network upgrades as directly-connected transmission owners under MISO's *pro forma* Generator Interconnection Agreement (GIA).³ Simultaneously, acting pursuant to its own motion under section 206 of the Federal Power Act, the Commission found that it may be unjust, unreasonable, unduly discriminatory, or preferential to allow transmission owners the unilateral right to elect to fund network upgrades.⁴ The Commission explained that giving a transmission owner the discretion to choose whether to fund a required network upgrade or to permit the interconnecting generator to finance the upgrade itself could result in discriminatory treatment of different interconnection customers by the transmission owner. Further, the Commission found that allowing a transmission owner to unilaterally elect to fund the upgrade could deprive the interconnection customer of the opportunity to finance network upgrades with more favorable rates and terms, such that the interconnection customer could face unjust and unreasonable increased costs, with no corresponding increase in service.⁵ For these reasons, the Commission concluded that MISO's *pro forma* interconnection agreements may not give transmission owners the unilateral discretion to elect to fund network upgrades.⁶

3. In *Ameren Services Co. v. FERC*, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) vacated and remanded the Commission's orders.⁷ While the court acknowledged that vertically-integrated transmission owners that own integrated generation facilities would have an economic incentive to discriminate, it noted that only one of the petitioning transmission owners fell into that category.⁸ The court was likewise unconvinced by the Commission's argument that transmission owner funding

³ *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,220, at P 47 (2015) (June 2015 Order), *order denying reh'g*, 153 FERC ¶ 61,352 (2015) (December 2015 Rehearing Order), *order denying reh'g*, 156 FERC ¶ 61,099 (2016) (August 2016 Rehearing Order).

⁴ *Id.* P 48.

⁵ *Id.* PP 48-49, 52.

⁶ *Id.* PP 53-54; December 2015 Rehearing Order, 153 FERC ¶ 61,352 at P 29.

⁷ 880 F.3d 571, at 572, 585 (D.C. Cir. 2018) (*Ameren*). In *Ameren*, the D.C. Circuit vacated the following orders: June 2015 Order, 151 FERC ¶ 61,220, *order denying reh'g*, December 2015 Rehearing Order, 153 FERC ¶ 61,352, *order denying reh'g*, August 2016 Rehearing Order, 156 FERC ¶ 61,099; *Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,098, *order denying reh'g*, 157 FERC ¶ 61,013 (2016).

⁸ *Ameren*, 880 F.3d at 578.

imposes increased costs on interconnection customers with no corresponding increase in service.⁹ Further, the court found that the Commission failed to respond to the transmission owners' argument that they cannot be forced to construct and operate generator-funded network upgrades without the opportunity to earn a return.¹⁰ Nevertheless, the court declined to reach the merits of the transmission owners' complaint,¹¹ explaining that, "[it] should not do so until the Commission has developed a record by considering that question itself."¹²

4. On remand, instead of further developing the record, the Commission simply reversed its prior determination in the vacated orders that transmission owners and affected system operators should not be allowed to unilaterally elect to provide initial funding for network upgrades.¹³ In addition to directing MISO to restore the transmission owners' right to unilaterally elect initial funding in the *pro forma* GIA, the Commission went a step further and, without any additional analysis or meaningful response to arguments raised by protestors, directed MISO to include that same right in the *pro forma* FCA and *pro forma* MPFCA.¹⁴

5. As I explained in my prior dissent, the Commission erred on remand by not ordering additional briefing to better develop the record, as the court in *Ameren* required.¹⁵ Rather than engaging in essential record development and meaningfully addressing the questions posed by the court, the Commission simply reversed the vacated orders with nothing more than conclusory statements that relied on effectively the same record the court dismissed.

⁹ *Id.* at 579-80.

¹⁰ *Id.* at 580-82.

¹¹ *Id.* at 582 ("At present . . . we have no need to reach the merits of those questions. Because the Commission failed even to respond to these concerns . . . it is sufficient now to require that it do so.").

¹² *Id.* at 584.

¹³ *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158, at PP 1, 28, 33 (2018) (Remand Order), *order on briefing, compliance & reh'g*, 169 FERC ¶ 61,233 (2019) (Remand Rehearing Order).

¹⁴ *Id.* PP 1, 34.

¹⁵ Remand Rehearing Order, 169 FERC ¶ 61,233 (Glick, Comm'r, dissenting at PP 5, 12).

6. I remain concerned with the Commission's failure to wrestle with the record evidence that the Commission's determination on remand will provide an opportunity for transmission owners to favor their own generation and create an environment where similarly-situated interconnection customers pay higher network upgrade costs—exactly the type of behavior the Commission sought to eliminate in Order No. 2003.¹⁶ In extending the unilateral right to elect to fund network upgrades to affected system operators under the *pro forma* FCA and *pro forma* MPFCA, the Commission relied solely on its conclusion that interconnection customers of an affected system operator under MISO's *pro forma* FCA or *pro forma* MPFCA are similarly situated to those of a directly-connected transmission owner under the *pro forma* GIA. The Commission failed to meaningfully respond to arguments that it is unduly discriminatory to give affected system operators the unilateral discretion to choose to fund any network upgrades,¹⁷ thereby sidestepping the most significant issue presented in this proceeding: Transmission owners in MISO have the incentive to favor their own generation over others seeking to interconnect to the transmission system, and giving them discretion to pick and choose when to self-fund network upgrades vests them with the opportunity to do so.¹⁸

7. I also continue to be frustrated with the Commission's decision to allow transmission owners and affected system operators to reopen GIAs, FCAs, and MPFCAs that became effective between June 24, 2015 and August 31, 2018 (the Interim Period), without engaging in meaningful balancing of the specific facts and equities.¹⁹ When given the opportunity, the transmission owners failed to produce evidence that they will

¹⁶ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at PP 11-13 (2003) (concluding that “[t]he delays and lack of standardization inherent in the current system undermine the ability of generators to compete in the market and provide an unfair advantage to utilities that own both transmission and generation facilities”), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at P 2, *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 Regul. Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

¹⁷ Remand Rehearing Order, 169 FERC ¶ 61,233 (Glick, Comm’r, dissenting at P 5).

¹⁸ *Id.* (Glick, Comm’r, dissenting at P 5, n.9, n.18) (noting that the record shows that “the majority of investor-owned transmission owners in MISO—in fact—also own generation”).

¹⁹ *Id.* (Glick, Comm’r, dissenting at PP 9-11) (citing *Black Oak Energy, LLC*, 167 FERC ¶ 61,250, at P 27 (2019)).

experience actual harm if the Commission leaves these interconnection agreements in place, while on the other hand interconnection customers demonstrated with empirical evidence that they will experience substantial harm if the existing agreements are revised.²⁰

8. Today the Commission compounds these errors and doubles down on its unsupported and unreasoned findings. Again, rather than directly address AWEA's arguments concerning potential undue discrimination that would result from allowing transmission owners to unilaterally elect to upfront fund network upgrades for some interconnection customers but not others,²¹ the Commission simply reiterates its prior finding that parties to FCAs and MPFCAs should be treated the same as parties to GIAs with respect to network upgrades.²² Notwithstanding this fact, the Commission must still grapple with the challenge that allowing transmission owners—in their sole discretion—to go back and reopen some interconnection agreements and not others, when those customers may be similarly situated, is unduly discriminatory. I continue to believe that the Commission should grant rehearing and develop a record sufficient to evaluate the threat of undue discrimination presented both as to those contracts entered into during the Interim Period and those interconnection agreements that will be executed going forward under the new rules.

9. In addition to failing to adequately address AWEA's arguments about undue discrimination, the Commission continues to gloss over the extensive evidence AWEA presents regarding the significant adverse impacts of allowing transmission owners to retroactively, in their sole discretion, reopen interconnection agreements entered into during the Interim Period.²³ I agree with AWEA that the Commission failed to

²⁰ *Id.* (Glick, Comm'r, dissenting at P 11) (citing AWEA Initial Brief at 8-17; Xcel Energy Services Inc. Initial Brief, Docket Nos. EL15-68-003 *et al.*, at 9, 19-21 (filed Oct. 1, 2018); MISO Initial Brief, Docket Nos. EL15-68-003 *et al.*, at 8-9 (filed Oct. 1, 2018)).

²¹ *See* AWEA Request for Rehearing at 3, 7-9 (“All interconnection customers for the period 2005 through the end of the Interim Period, August 31, 2018, are similarly situated with respect to Transmission Owner Initial Funding. Treating similarly-situated customers differently in such a manner would be patently discriminatory in violation of the [Federal Power Act].”).

²² *Midcontinent Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,248, at P 26 (2020).

²³ AWEA Request for Rehearing at 12-16 (stating that the evidence shows that costs to interconnection customers will increase between 30-40% on a net present value basis if a transmission owner retroactively elects to fund, and explaining that interconnection customers have no means to recover these unexpected costs in regulated rates); *id.* at 15 (noting that there will also be collateral damage to third parties as a result

adequately support its decision to allow reopening of those contracts. It continues to do so in today's order. Rather than evaluate and weigh the evidence already presented, or open up the record for further investigation of this important issue, the Commission instead refers back to the court's skepticism in *Ameren* that "a transmission owner need not earn a profit on all parts of its business," and the Commission's prior determination in the Remand Rehearing Order that AWEA had not demonstrated that transmission owners would not face uncompensated risks if generators were allowed to upfront fund network upgrades.²⁴ The Commission states that this demonstrates that it "appropriately considered the relevant evidence and factors, in light of the *Ameren* decision" and that it was "reasonable for the Commission to find, on balance, that harm to interconnection customers caused by transmission owners having the unilateral right to elect [to fund network upgrades] did not outweigh the harm to transmission owners from not having that right."²⁵

10. This reasoning doesn't hold up. While the court in *Ameren* expressed skepticism about the merits of allowing generators to fund network upgrades and how that would impact transmission owners, the court explicitly did not reach a determination on the merits of this question.²⁶ Instead, the court remanded with instructions that the Commission should further develop the record and consider this question itself.²⁷ The Commission failed to do that. Further, the evidence the Commission does have regarding potential harms "weighs heavily in favor of preserving the existing GIAs, FCAs, and MPFCAs."²⁸ The Commission has a duty to weigh the facts and equities in coming to a decision.²⁹ It has not done so here. While the Commission may use the term "on balance" in describing its determination to reopen the interconnection agreements as "reasonable," there is no indication in today's order, or the Commission's prior orders in this proceeding, that the Commission actually took the time to engage in reasoned

of cost shifts under PPAs and APAs).

²⁴ *Midcontinent Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,248 at P 27 (citing Remand Rehearing Order, 169 FERC ¶ 61,233 at P 39).

²⁵ *Id.*

²⁶ *Ameren*, 880 F.3d at 582, 584-85.

²⁷ *Id.*

²⁸ Remand Rehearing Order, 169 FERC ¶ 61,233 (Glick, Comm'r, dissenting at P 10).

²⁹ *Black Oak Energy, LLC*, 167 FERC ¶ 61,250 at P 27.

balancing of the specific facts and equities presented, including the benefits and harms to the parties involved, to the MISO market, and to the industry as a whole.

11. I would grant rehearing and order briefing to develop the record. In acting under section 206 of the Federal Power Act, the Commission bears the burden of establishing the just and reasonable replacement rate. Without a thorough record, the Commission can neither meet its burden to show that the revisions it requires to the *pro forma* GIA, FCA, and MPFCA are just and reasonable nor justify its decision to permit the reopening of certain GIAs, FCA, and MPFCAs. Today's order is, therefore, arbitrary and capricious and not the product of reasoned decisionmaking. Unfortunately, I think the likely result of today's order is another remand by the court, which will only further delay resolution of this proceeding, which already spans more than five years.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner