

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Midwest Independent Transmission )  
System Operator, Inc. )**

**Docket No. ER12-309-000**

**PROTEST OF THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),<sup>1</sup> and the Commission’s November 18, 2011 “Notice of Extension of Time,” the Electric Power Supply Association (“EPSA”)<sup>2</sup> hereby submits this protest of the November 1, 2011 filing<sup>3</sup> by the Midwest Independent Transmission System Operator, Inc. (“MISO”) of proposed revisions to the Generator Interconnection Procedures (the “GIP”) in Attachment X of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (the “Tariff”).<sup>4</sup>

The November 1 Filing proposes wholesale changes to MISO’s existing GIP and its *pro forma* Generator Interconnection Agreement (“GIA”). While EPSA shares MISO’s interest in reforming and streamlining its interconnection procedures, EPSA

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<sup>1</sup> 18 C.F.R. § 385.211, 385.214 (2011).

<sup>2</sup> EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA filed a motion to intervene in this proceeding on November 15, 2011. See (doc-less) Motion to Intervene of the Electric Power Supply Association, Docket No. ER12-309-000 (filed Nov. 15, 2011).

<sup>3</sup> Midwest Independent Transmission System Operator, Inc., Section 205 Filing to Revise Attachment X of its Tariff, Docket No. ER09-312-000 (filed Nov. 1, 2011) (the “November 1 Filing”).

<sup>4</sup> Except as otherwise indicated, all capitalized terms used herein shall have the same meaning as provided in the MISO Tariff or the November 1 Filing.

objects to the following elements of its proposal, which would undermine the proven and successful Order No. 2003<sup>5</sup> interconnection framework and upset the balance of burdens and benefits between Interconnection Customers and transmission providers that this framework is designed to achieve:

- MISO's proposals to require withdrawing customers to forfeit the "cash at risk" and "initial payment" milestone payments and interest accrued on their study deposits must be rejected as confiscatory and punitive in nature.
- MISO has failed to justify the excessive restrictions on modifications, which, if adopted, would require a customer to lose its place in the queue (and consequently, forfeit millions or tens of millions of dollars in deposits, accrued interest, milestone payments, and security) if it must delay its project by a single day or makes even minor equipment changes.
- MISO's "Net Zero" Interconnection Service ("NZIS") proposal would permit new generators affiliated with incumbent generators or other favored projects to bypass MISO's interconnection process altogether and avoid funding necessary Network Upgrades, while also granting them privileged access to existing capacity and potentially requiring the redispatch of existing customers to address the resulting overloads.

These proposals would actively discourage new entry within the MISO footprint by placing a new set of unduly burdensome hurdles in the path of generators seeking to proceed through MISO's interconnection process, and would further tilt the playing field in favor of incumbent utilities and their affiliates.

Moreover, MISO's proposal to generically revise existing interconnection agreements to incorporate the changes proposed in the November 1 Filing is contrary to

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<sup>5</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003) ("Order No. 2003"), *on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 ("Order No. 2003-A"), *on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

the requirements of Section 205 of the Federal Power Act (“FPA”),<sup>6</sup> and to the Commission’s prior directives to MISO that it must make a separate Section 205 filing for each existing agreement it seeks to revise in which it must demonstrate that its proposed revisions are just and reasonable with respect to each such agreement.<sup>7</sup> Perhaps the most disruptive consequence of MISO’s proposal is that it would permit MISO unilaterally to revise, or even abrogate, dozens of existing agreements and the final, binding cost allocations contained therein. As MISO itself has observed elsewhere, “[s]uch reopening of established payments and contractual obligations would ripple outward in unpredictable ways and cause massive uncertainty for existing and pending projects.”<sup>8</sup> MISO’s proposal in this regard must, therefore, be rejected as it would upset settled investment expectations and destroy the “stability and predictability [that] is crucial to the functioning of businesses and markets and to attracting investment in the utility business.”<sup>9</sup>

MISO’s proposed deviations from Order No. 2003 cannot be justified under Order No. 2003’s “independent entity variation” standard of review, because they are unduly discriminatory, unduly preferential, and do not further the purposes of Order No. 2003. In light of these defects in MISO’s proposal, it would be unjust and unreasonable, and unduly discriminatory and preferential, to require existing interconnection agreements and all pending Interconnection Requests to become subject to MISO’s proposed

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<sup>6</sup> 16 U.S.C. § 824d (2006).

<sup>7</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128 at PP 25, 27 (2006) (“*MISO I*”), *reh’g denied*, 119 FERC ¶ 61,097 at PP 13-14 (2007) (“*MISO II*”).

<sup>8</sup> See *Midwest Independent Transmission System Operator, Inc.’s Response to the Commission’s October 7, 2011 Data Requests* at 14, Docket No. EL11-53-000 (filed Nov. 7, 2011) (“*MISO NZIS Data Request Response*”).

<sup>9</sup> *MISO I*, 117 FERC ¶ 61,128 at P 26.

revisions. The Commission should therefore reject these elements of the November 1 Filing, or accept them subject to the modifications discussed below. In addition, the Commission should require MISO to grandfather all existing interconnection agreements and all pending Interconnection Requests that have entered the Definitive Planning Phase (“DPP”) or that have executed a Facilities Study Agreement. In support thereof, EPSA states as follows:

## **I. COMMUNICATIONS**

EPSA requests that all pleadings, correspondence and communications concerning this protest be directed to the following persons:<sup>10</sup>

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## **II. BACKGROUND**

### **A. Changes To DPP Requirements**

MISO has proposed a number of revisions to the rules governing the entry into the DPP (*i.e.*, the final stage in MISO’s interconnection study process) and the processing of requests that have entered this phase. First, a customer would be permitted to enter the DPP immediately after satisfying the requirements in Section 8.2 of the Revised GIP, which include the provision of required technical data, payment of a

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<sup>10</sup> EPSA requests waiver of Rule 203(b)(3) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.203(b)(3) (2011), to the extent necessary to permit more than two persons to be included on the official service list on their behalf in this proceeding.

deposit, and satisfaction of a new "cash at risk" milestone (described below).<sup>11</sup> Second, MISO has proposed to establish a separate queue position and priority for customers in the DPP.<sup>12</sup> Third, under MISO's proposed changes to Section 4.4.1 of the GIP, the only modifications that will be permitted after a customer has entered the DPP are:

(1) changes to the technical parameters for the generator (e.g., change to the turbines used); and (2) certain changes to the Point of Interconnection.<sup>13</sup> In addition, MISO proposes to revise Section 4.4.4 of the GIP such that, after entry into the DPP, any extension of the In-Service Date or Commercial Operation Date would be deemed a Material Modification,<sup>14</sup> and consequently, the customer's request would be deemed to have been withdrawn from the queue.

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<sup>11</sup> See November 1 Filing, Attachment 1, Redlined Tariff Sheets, § 8.2 ("Revised GIP"). Thus, customers satisfying these requirements would not be required complete the Feasibility Study or the System Planning and Analysis phases to enter the DPP.

<sup>12</sup> Specifically, MISO proposes to delete the defined term "Queue Position" and replace it with two new defined terms: "Initial Queue Position" and "Definitive Planning Phase Queue Position." The former is largely identical to the current term "Queue Position," which indicates that queue priority is determined based on the date that the Interconnection Request is submitted. Under the latter definition, queue position and priority are established based on the date on which the customer satisfies all of the requirements in Section 8.2 of the Revised GIP for entry into the DPP. See November 1 Filing, Transmittal Letter at 5.

<sup>13</sup> See Revised GIP, § 4.4.1. A reduction in the output of the facility or a change to the type of interconnection service requested would be deemed a Material Modification (with the exception of a change from Network Resource Interconnection Service ("NRIS") to Energy Resource Interconnection Service ("ERIS")). For any permitted modification proposed by the customer, the customer must submit a detailed analysis demonstrating that the proposed change is not a Material Modification when it requests the change. See *id.*

<sup>14</sup> See *id.*, § 4.4.4.

## **B. Changes To Milestone And Deposit Requirements**

### **1. The “Cash at Risk” Milestone**

MISO proposes to add to Section 8.2 of the GIP a new requirement for entering the DPP, which would require a generator to post a deposit<sup>15</sup> – either in the form of cash or an irrevocable letter of credit – equal to approximately 10 percent of estimated interconnection costs,<sup>16</sup> subject to a floor of \$2,000 per MW and a ceiling of \$10,000 per MW.<sup>17</sup> This milestone payment would be forfeited upon withdrawal of the request,<sup>18</sup> and refunded upon satisfaction of the initial payment milestone (described below) pursuant to Article 11.5 of a non-provisional GIA or upon commencement of Commercial Operation under a provisional GIA.

### **2. The Initial Payment Milestone**

MISO proposes to add a new “initial payment” milestone in Section 11.5 of MISO’s *pro forma* GIA. This provision would require a customer to provide a payment

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<sup>15</sup> While MISO styles this requirement as a “milestone payment” or “capital contribution,” this payment appears to be an additional deposit (or earnest money) for entry into the DPP, because it is normally fully refundable as described above. In addition, it is not a prepayment or security that may be drawn down to cover study or construction costs.

<sup>16</sup> See November 1 Filing, Transmittal Letter at 14-15. The amount of this deposit is calculated based on the following formula:

$$\text{(Schedule 7 \$/MW yearly rate for a given transmission zone * gross MW capacity increase) + (fixed rate for transmission constraints at each voltage level * number of constraints at that level)}$$

The transmission constraints are identified in the Feasibility Study, and are \$130K for each constraint on a 115, 138, or 161 kV line, \$200K for each constraint on a 230 kV line, and \$350K for a constraint on a 345 kV line. See Revised GIP, § 8.2. See also November 1 Filing, Exhibit 1, Prepared Direct Testimony of Eric Lavery at 22:5-23 (“Lavery Testimony”) (providing calculation of milestone payment for two hypothetical projects).

<sup>17</sup> See Revised GIP, Section 8.2. See also Lavery Testimony at 22:22-23 (noting that the floor and cap for a new 1,600 MW facility would be \$3.2 million and \$16 million, respectively).

<sup>18</sup> A customer may withdraw its request and receive a full refund in the event the estimate of the total Network Upgrade costs in the Facilities Study is 25 percent or more greater than the estimate in the DPP System Impact Study. See Revised GIP, § 8.2.

equal to one of the following amounts – which would be selected by the Transmission Owner – within 30 days of executing the GIA (or if filed unexecuted, within 30 days of the Commission's acceptance of the unexecuted GIA):

- an initial payment of 20 percent of the total costs of Network Upgrades, Transmission Interconnection Facilities, and other required facilities, if the In-Service Date is less than or equal to five years from the date on which the initial payment is due;
- an initial payment of 10 percent of the total costs of such upgrades if the In-Service Date is more than five years from the initial payment date; or
- the total cost of all upgrades in the form of security pursuant to Section 11.6 of the GIA (*i.e.*, a guarantee, surety bond, letter of credit or other form of security that is reasonably acceptable to the Transmission Owner).<sup>19</sup>

### **3. Elimination Of Requirement To Refund Accrued Interest On Withdrawing Customers' Study Deposits**

MISO proposes to revise Section 3.6 of the GIP to eliminate the requirement that MISO pay interest on the study deposits refunded to a customer that withdraws its Interconnection Request. According to MISO, refunding interest earned on deposits “is no longer needed due to the shift away from the ‘first-in, first-out’ paradigm contemplated by Order No. 2003,” and because, under the proposed revisions, “[t]he Interconnection Customer now has more control over how long it remains in the queue because it can elect to move forward into the [DPP] faster.”<sup>20</sup>

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<sup>19</sup> See Revised GIA, § 11.5.

<sup>20</sup> November 1 Filing, Transmittal Letter at 8.

### **C. NZIS**

MISO proposes to add new provisions throughout the GIP governing NZIS.<sup>21</sup> MISO describes this service as a form of conditional ERIS, which permits a customer with an existing facility and a customer with a new facility at the same Point of Interconnection to agree to reallocate existing interconnection service between them.<sup>22</sup> To do so, the new customer and the existing customer would have to negotiate and execute an "Energy Displacement Agreement" that sets forth the terms of their arrangement, and the new customer must execute a "Monitoring and Consent Agreement" with the interconnecting Transmission Owner.<sup>23</sup> MISO explains that it will not place requests for this service in the interconnection queue with other requests because, according to MISO, this service would not create any new capacity.<sup>24</sup>

### **D. Effective Date And Transition Provisions**

MISO requests that the Commission permit it to apply these changes to all pending Interconnection Requests and to certain customers with existing interconnection agreements, effective January 1, 2012. Under the proposed revisions

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<sup>21</sup> MISO acknowledges that this service is not mentioned in any existing Tariff provisions, but claims that this service is authorized by its existing Tariff. See November 1 Filing, Transmittal Letter at 6-7 & n. 17. EPSA notes that MISO's current NZIS policy is the subject of a complaint that is currently pending before the Commission. See *generally* Complaint of Shetek Wind Inc., Jeffers South LLC, and Allco Renewable Energy Limited against Midwest Independent Transmission System Operator, Inc., Docket No. EL11-53-000 (filed July 15, 2011) (the "NZIS Complaint"). The NZIS Complaint alleges, among other things, that MISO's existing Tariff provisions do not authorize the provision of NZIS. The instant protest addresses only the Tariff revisions proposed in the November 1 Filing, and EPSA takes no position herein on MISO's current NZIS policy or whether MISO is authorized to provide this service under its existing Tariff.

<sup>22</sup> November 1 Filing, Transmittal Letter at 6-7

<sup>23</sup> *Id.* at 8.

<sup>24</sup> *Id.* at 6.

to Section 5.1.1.1, the only customers that would be exempted from the new rules are those that both “are in Commercial Operation **and** (b) have an executed GIA.”<sup>25</sup> Thus, projects that have an executed interconnection agreement (or an executed provisional GIA) would not be exempt. Additionally, if a restudy of a project with an existing agreement “is needed for any reason, the project will become subject to the revised GIP at that time,” and it “will need to execute a new GIA.”<sup>26</sup>

### III. PROTEST

#### A. The Commission Must Reject MISO’s Proposal To The Extent It Would Impose The Proposed Revisions On Customers With Existing Interconnection Agreements And Late-Stage Interconnection Requests.

##### 1. MISO Cannot Generically Modify Existing Interconnection Agreements.

In *MISO I*, the Commission rejected a nearly identical MISO proposal to revise existing interconnection agreements on a generic basis.<sup>27</sup> The Commission found that MISO had failed to demonstrate that generic application of the new provisions was just and reasonable, emphasizing that:

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<sup>25</sup> *Id.* at 10 (emphasis in original).

<sup>26</sup> *Id.*

<sup>27</sup> In that proceeding, MISO had proposed to apply its new cost allocation rules for customer-funded upgrades to interconnection agreements executed prior to the effective date of the new cost allocation provisions if the customer’s Network Upgrades had not yet been placed in service and its generating facility had not commenced Commercial Operations. *MISO I*, 117 FERC ¶ 61,128 at P 4.

Even a contract that can be revised under the just and reasonable standard (as opposed to the more stringent public interest standard) is not to be lightly revised. This is because a degree of stability and predictability is crucial to the functioning of businesses and markets and to attracting investment in the utility business.<sup>28</sup>

Instead, the Commission held that, if MISO wanted to revise existing interconnection agreements, it would have to file to revise each individual agreement,<sup>29</sup> and demonstrate that its proposed changes satisfy the requirements of Section 205 of the FPA with respect to each such agreement.<sup>30</sup> The Commission instructed MISO that, to make this Section 205 showing, it would have to demonstrate that the proposed changes to the existing agreement are consistent with the purposes of Order No. 2003, *i.e.*, that the proposed changes would encourage efficient siting of generators or prevent improper subsidization.<sup>31</sup>

The Commission further found that applying the proposed changes to a generator with an existing agreement (but that had not yet entered Commercial Operation) could not encourage efficient siting because the siting decision had already been made. In addition, the Commission rejected arguments that applying the new rule to a project for which construction had not yet commenced would encourage efficient siting because such arguments:

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<sup>28</sup> *Id.* at P 26. See also, e.g., *PacifiCorp v. Reliant Energy Servs., Inc.*, 99 FERC ¶ 61,381 at P 27 (2002) (explaining that “even under a ‘just and reasonable’ burden of proof standard, parties who seek to overturn market-based contracts into which they voluntarily entered will bear a heavy burden”); *Pub. Utils. Comm’n of California v. Sellers of Long Term Contracts*, 99 FERC ¶ 61,087 at 61,383 (2002) (same); *Nevada Power Co. v. Duke Energy Trading & Mktg., L.L.C.*, 99 FERC ¶ 61,047, at 61,191 (2002) (same); *Soyland Power Coop., Inc. v. Central Illinois Pub. Serv. Co.*, 51 FERC ¶ 61,004, at 61,014 (refusing to modify contract rates even under a “just and reasonable” standard based on changed circumstances).

<sup>29</sup> *MISO I*, 117 FERC ¶ 61,128 at P 27.

<sup>30</sup> *MISO II*, 119 FERC ¶ 61,097 at PP 13-14.

<sup>31</sup> See *id.* at PP 16, 18.

ignore[] the fact that once a site has been selected, significant costs are incurred for studies and site preparation, well before construction commences. Such costs would need to be incurred again with a new site. Additionally, if the customer does change its site, it faces loss of its queue position, further delaying its development plans.<sup>32</sup>

The Commission should reject MISO's proposal to apply MISO's proposed revisions to existing interconnection agreements because MISO has not satisfied the procedural requirements to make a separate Section 205 filing for each individual agreement that it proposes to revise and to demonstrate therein that the proposed changes are just and reasonable with respect to each such agreement. In any case, MISO could not make such a showing, either on a generic or an individualized basis, because its proposed changes are demonstrably not consistent with the purposes of Order No. 2003, such as promoting efficient siting, because generators with executed interconnection agreements have already made their siting decision, selected their Point of Interconnection, and committed to fund the upgrades necessary to accommodate their Interconnection Requests. In addition, MISO's proposal could result in restudy and reallocation of costs for potentially dozens of projects,<sup>33</sup> and thereby undermine the "stability and predictability" necessary to "attract[] investment in the utility business."<sup>34</sup>

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<sup>32</sup> *MISO II*, 119 FERC ¶ 61,097 at P 21.

<sup>33</sup> See generally MISO, "Queue Projects Complete List" (listing projects for which a GIA has been executed but that are either under construction or otherwise have not yet entered service), available at: [https://www.midwestiso.org/\\_layouts/MISO/ECM/Redirect.aspx?ID=18896](https://www.midwestiso.org/_layouts/MISO/ECM/Redirect.aspx?ID=18896) (last visited November 30, 2011).

<sup>34</sup> *MISO I*, 117 FERC ¶ 61,128 at P 26.

## 2. MISO's Proposal Would Permit It To Revise At Will the Final, Binding Cost Allocations In Executed Interconnection Agreements.

The Commission has consistently held that the interconnection agreement establishes the customer's final, binding cost allocation.<sup>35</sup> It is for this reason that the Commission requires customers to challenge the transmission provider's proposed cost allocation or other relevant provisions of the draft agreement on or before the date that the agreement is executed, or to request that the transmission provider file the agreement unexecuted so that the customer may challenge the agreement before the Commission in that proceeding.<sup>36</sup>

The Commission's holdings in *Marcus Hook III* and *IV* are consistent with, and reinforce, the requirement in *MISO I* and *II* that post-execution changes to interconnection agreements must be proposed through a separate Section 205 filing relating to each individual agreement. MISO's proposal would instead permit it to

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<sup>35</sup> See generally *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,069, *on reh'g*, 108 FERC ¶ 61,171 (2004), *vacated and remanded*, *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441 (D.C. Cir. 2005), *on remand*, 118 FERC ¶ 61,169 (2007) ("*Marcus Hook III*"), *reh'g denied*, 123 FERC ¶ 61,289 (2008) at P 13 (2008) ("*Marcus Hook IV*") ("[t]he ISA is designed to establish the generation interconnection customer's final cost responsibility.").

<sup>36</sup> In *Marcus Hook IV*, the Commission held that any challenge to a transmission provider's proposed cost allocation "must precede execution" of the interconnection agreement. *Marcus Hook IV*, 123 FERC ¶ 61,289 at P 29. See also *CED Rock Springs, LLC & Old Dominion Elec. Coop.*, 114 FERC ¶ 61,285, *reh'g denied*, 116 FERC ¶ 61,163 at P 31 (2006) (holding that disputes regarding cost allocation must be "raised at the time the interconnection agreements were signed"). In *Marcus Hook III*, the Commission denied the complaint filed by FPL Energy Marcus Hook, L.P. ("*Marcus Hook*") because it found that the tariff of PJM Interconnection, L.L.C. ("*PJM*") provides two options for a customer to challenge PJM's determination of its cost responsibility – to request dispute resolution procedures or to request that PJM file the interconnection service agreement ("*ISA*") unexecuted – but that it did not permit the customer to sign an agreement and then challenge PJM's determinations therein. *Marcus Hook III*, 118 FERC ¶ 61,169 at PP 15-16. Taken together, these orders demonstrate that the Commission intends to address cost allocation challenges when the interconnection agreement is filed with the Commission, which is the only Commission proceeding in which the customer will have an opportunity to raise its objections to the transmission provider's proposed cost allocation.

unilaterally change the rate on file for potentially dozens of customers, without giving the affected Interconnection Customers an adequate opportunity to challenge MISO's proposed changes to its agreement or any resulting changes to the cost allocation contained therein. The instant proceeding – which addresses generic changes to the GIP and GIA – is simply not an appropriate forum for the Commission to consider the individual facts and circumstances necessary to determine whether MISO's proposed revisions are just and reasonable with respect to each affected customer and agreement (not to mention the potential ripple effects on other customers resulting from the changes).

In addition, under MISO's proposal, if a restudy of a customer with an existing agreement "is needed **for any reason**," it will be subject to the revised GIP, and "will need to execute a new GIA."<sup>37</sup> MISO's proposal would thus give MISO broad (if not unfettered) discretion to determine whether a restudy of an individual project or group of projects is necessary<sup>38</sup> in which case it could unilaterally abrogate the existing agreements of the affected customers and the final, binding cost allocations therein. If accepted, this provision would permit MISO to reopen the final, binding cost determinations of any number of customers that have executed interconnection

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<sup>37</sup> November 1 Filing, Transmittal Letter at 10 (emphasis added).

<sup>38</sup> MISO's November 1 Filing does not explain why, or under what circumstances, MISO would be permitted or required to restudy a project with an executed agreement, but MISO's proposal would indisputably expand the scope of requests subject to such restudies. MISO's proposed revisions to Section 8.7 would expand the scope of circumstances in which a restudy is permitted, and revised Section 5.1.1.2 clearly contemplates making customers with existing agreements subject to the restudy results. See Revised GIP, §§ 5.1.1.2, 8.7. In addition, MISO's proposed Tariff language appears to permit MISO to apply the results of a restudy of one project (whether or not it has an existing agreement) to other customers (including ones that have an existing agreement), and to permit MISO to perform group restudies without regard to whether the customers in the group have an existing agreement. Thus, MISO's proposal would give it broad discretion to initiate restudies that could change existing cost allocations.

agreements, a result that the Commission has found to be fundamentally at odds with Order No. 2003's goals of providing stability and predictability in the interconnection process.<sup>39</sup> MISO's proposal is all the more surprising in light of its strong, and well founded, opposition to the relief requested in the NZIS Complaint, which would require similar post-execution changes to existing cost allocations. As MISO explained in its response to the NZIS Complaint:

Such reopening of established payments and contractual obligations would ripple outward in unpredictable ways and cause massive uncertainty for existing and pending projects. This process would amount to an infinite loop of restudy, reallocation, and litigation as other projects face changes in their costs. ... In short, restudy at this level would create a queue-wide "do-over." ... Such action would halt generation development in ... MISO for several years.<sup>40</sup>

EPSA is in full agreement with MISO regarding the dangers of such wide-ranging "do-overs," and urges the Commission to reject MISO's proposal in the November 1 Filing to conduct the same sort of "do-overs" in this case.

### **3. MISO Has Failed to Distinguish Between Early- And Late-Stage Pending Requests, As Required By Commission Precedent.**

Commission precedent requires a transmission provider to distinguish between early- and late-stage requests when it revises its interconnection procedures and

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<sup>39</sup> In *Marcus Hook III*, the Commission rejected Marcus Hook's post-execution challenge to its cost allocation because such challenges create the "potential for never-ending reallocations of costs related to numerous other projects." *Marcus Hook III*, 118 FERC ¶ 61,169 at P 17. In *Marcus Hook IV*, the Commission reaffirmed this holding, emphasizing that, in its view, Marcus Hook was seeking:

to revisit not [only] the costs for which it must pay, but for the entirety of PJM's cost responsibility for each interconnection customer ... in the queue, **after** [Marcus Hook] executed the ISA, accepted full cost responsibility, and signaled its intent to proceed with construction of the Marcus Hook project.

*Marcus Hook IV*, 123 FERC ¶ 61,289 at P 37 (emphasis added).

<sup>40</sup> MISO NZIS Complaint Response at 14.

agreements due to the significant, investment-backed reliance interest that late-stage requests have on the existing rules.<sup>41</sup> The Commission has permitted transmission providers to draw the line between early- and late-stage requests at the execution date of the interconnection agreement, or in certain cases, the execution date of a Facilities Study Agreement. In Order No. 2003, for example, the Commission grandfathered agreements filed before the effective date of Order No. 2003.<sup>42</sup> In an order addressing MISO's interconnection queue reforms in the Docket No. ER08-1169 proceeding, the Commission accepted MISO's proposal to grandfather customers that had entered the Facilities Study stage, because it found that "having started a Facilities Study is a reasonable distinction between early and late stage interconnection requests."<sup>43</sup>

MISO has not cited any instance in which the Commission accepted a transmission provider's proposal to make all pending Interconnection Requests subject to new rules without making any distinction between early- and late-stage requests; nor is EPSA aware of any such Commission precedent. MISO's proposed transition provisions must therefore be rejected for failing to make any distinction whatsoever

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<sup>41</sup> See, e.g., *Interconnection Queuing Practices*, 122 FERC ¶ 61,252 at P 19 (2008) (emphasizing that reforms affecting later-stage requests "create special circumstances that require careful consideration" because "such reforms could significantly disrupt the activities of customers who may have taken action in reliance upon the existing process.").

<sup>42</sup> See Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 911. The Commission also directed transmission providers to give any customer that had signed an interconnection study agreement by the effective date of Order No. 2003 the option to continue with any remaining studies under the existing procedures or to complete the process under the new, Order No. 2003 procedures. *Id.* at P 912.

<sup>43</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183 at P 90 (2008) (the "*MISO Queue Reform Order*"), *on reh'g*, 127 FERC ¶ 61,294 (2009) ("*MISO Queue Reform Rehearing Order*"). In an order accepting similar transition provision proposed by the Southwest Power Pool, Inc., the Commission held that grandfathering customers with an executed Facilities Study Agreement under the previous rules was appropriate because "customers who have late-stage requests may have taken action in reliance upon existing procedures." *Southwest Power Pool, Inc.*, 128 FERC ¶ 61,114 at P 98 (2009) ("*SPP*").

between the treatment of early- and late-stage Interconnection Requests. The Commission should instead require MISO to grandfather all existing interconnection agreements and all pending Interconnection Requests that have entered the DPP or that have executed a Facilities Study Agreement under the applicable, existing rules, consistent with its precedent in the *MISO Queue Reform Order* and *SPP*.

**4. If The Commission Accepts MISO’s Proposed Transition Provisions, It Should Require MISO To Clarify That The Revised GIP Does Not Apply To Any Customer With An Existing Interconnection Agreement If Any Part Of Its Facility Has Commenced Commercial Operations.**

In the event the Commission accepts MISO’s proposed transition provisions, it should clarify that the new rules will not apply to a customer with an existing interconnection agreement if any part of its proposed generation facility has commenced Commercial Operations. This issue is of particular significance to Interconnection Customers such as Mankato Energy Center, LLC (“Mankato”), an indirect subsidiary of EPSA member Calpine Corporation, which owns and operates an approximately 375 MW natural-gas fired electric generation facility (the “Mankato Facility”) in Mankato, Minnesota. Mankato executed an interconnection agreement, dated November 17, 2004, with MISO and Northern States Power (d/b/a XCel Energy) (“XCel”) (the “Mankato Agreement”).<sup>44</sup> Mankato’s project was to be developed in two phases – the Mankato Facility, which commenced Commercial Operations in 2006, and a second phase expansion of 345 MW that was to enter service in 2007 – with a total capacity of approximately 720 MW. MISO studied the Mankato project at the full

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<sup>44</sup> See Midwest Independent Transmission System Operator, Inc., Filing of Interconnection and Operating Agreement, Docket No. ER05-344-000 (filed Dec. 15, 2004) (filing of Mankato Agreement); *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER05-344-000 (Jan. 21, 2005) (unreported) (letter order accepting Mankato Agreement).

capacity of both phases, and the Mankato Agreement requires Mankato to fund Network Upgrades necessary to accommodate this full capacity.<sup>45</sup> To date, Mankato has not secured a power purchase agreement for the output of the second phase of the project, however, and therefore has not constructed the second phase.

MISO's proposal is not clear as to whether Mankato would be exempted from the new rules. Mankato has an executed interconnection agreement, and the first phase of the project has commenced Commercial Operations. Accordingly, Mankato should be exempt. Nevertheless, given the fact that the second phase of the project has not entered service, MISO might claim that Mankato is subject to the revised GIP. EPSA respectfully requests Commission clarification that Mankato, and any other similarly situated customers, will be exempt from the revised GIP. It would be patently unreasonable if Mankato were deprived of the capacity on the Network Upgrades that it has already funded, and then required to fund the upgrades for the second phase of the project a second time. It would be similarly unreasonable if MISO were to unilaterally determine that the second phase of the project must be restudied, abrogate the Mankato Agreement as it pertains to the second phase, and require Mankato to execute a new GIA for the second phase.

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<sup>45</sup> Mankato has funded all but approximately \$100,000 of the \$9.8 million of total costs for the Interconnection Facilities and Network Upgrades necessary to interconnect both phases of the project. See Mankato Agreement, Appendix A at 2.

**B. The Commission Must Reject MISO’s Proposal To Limit The Scope Of Permissible Modifications In The DPP.**

The Commission must reject MISO’s proposal to restrict the scope of permissible modifications in the DPP.<sup>46</sup> MISO has failed adequately to justify the need for such excessive restrictions, and its proposal would unreasonably upset the balance struck in Order No. 2003 between providing customers with the appropriate flexibility and transmission providers’ ability to efficiently and accurately process Interconnection Requests.

Both the Order No. 2003 *pro forma* LGIP and Attachment X of the MISO Tariff define “Material Modifications” as “those modifications that have a material impact on the cost or timing of any Interconnection Request with a later queue priority date.”<sup>47</sup> In Order No. 2003, the Commission determined that extensions to the Commercial Operation Date of three years or less are not Material Modifications. The Commission noted that such extensions may place a burden on transmission providers, but emphasized that “these extensions in most cases are well within the scope of other

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<sup>46</sup> As noted above, the only modifications that MISO would permit after a customer has entered the DPP are: (1) changes to the technical parameters for the generator (*e.g.*, change to the turbines used); and (2) certain changes to the Point of Interconnection. In addition, the following changes would be deemed Material Modifications: (1) a reduction in the output of the facility or a change to the type of interconnection service requested (with the exception of a change from NRIS to ERIS); or (2) any extension of the In-Service Date or Commercial Operation Date would be deemed a Material Modification. See November 1 Filing, Transmittal Letter at 9-10. A party seeking a modification deemed to be material will have to start the DPP over, *i.e.*, by resubmitting a new Interconnection Request, which will then be assigned a new Definitive Planning Phase Queue Position, and will be subject to forfeiture of deposits, accrued interest, interconnection financial security, and the cash or letter of credit posted to satisfy the “cash at risk” milestone.

<sup>47</sup> See MISO Tariff, Attachment X, § 1; Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, Appendix B (*Pro Forma* LGIP), § 1.

unforeseen changes that affect the planning process.”<sup>48</sup> Moreover, the Commission has consistently held that extensions of more than three years are not Material Modifications, unless it can be demonstrated that the proposed extension will harm lower-queued generators or otherwise harm reliability.<sup>49</sup> This is because there are any number of factors beyond a customer’s control that may force it to delay the Commercial Operation Date for the project, such as the court order enjoining construction of the facility in question in *Illinois Power*. In proposing its draconian rule that **any** extension – even for a single day – requested in the DPP automatically constitutes a Material Modification, MISO has not even attempted to demonstrate that extensions of three years or more harm lower-queued generators, much less that an extension of a single day would do so. The punitive effects of MISO’s proposal are further exacerbated by the fact that the customer would be required to forfeit potentially millions or tens of millions of dollars in deposits, accrued interest, the “cash at risk” milestone payment, and interconnection financial security.

MISO has similarly failed to justify its determination that the only plant equipment that may be changed in the DPP is the generator turbine or its decision to eliminate other changes that the Commission determined to be permissible and non-material in Order No. 2003, such as reductions in the size of the proposed facility. MISO’s decision not to permit changes to step-up transformers or other plant equipment fails to recognize the realities of generation development, where developers often make limited

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<sup>48</sup> Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 177. See also Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 134 (same).

<sup>49</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,172 at P 13 (2010); *Judith Gap Energy LLC, NorthWestern Corp.*, 125 FERC ¶ 61,169 at PP 17-20 (2008); *Illinois Power Co.*, 120 FERC ¶ 61,237 at PP 20-22 (2007) (“*Illinois Power*”).

equipment changes (e.g., due to availability or cost factors) that do not significantly affect the plant's performance or other operating characteristics. MISO similarly provides no basis for its blanket presumption that, apart from changes to the generation turbines, any such changes will necessarily materially affect lower-queued generators.<sup>50</sup> While there may be a certain cost in terms of MISO staff time and resources for evaluating such changes, these costs are minimal in comparison with the costs that MISO would impose on customers – namely, the forfeiture of deposits, accrued interest, security, and milestone payments, and years of further delay – by forcing them to start the interconnection process over from the beginning for proposing even minor equipment modifications. Thus, rather than reflecting a proper weighing of the impact on lower-queued customers, MISO's proposal would give it the discretion to use any minor modification (other than a turbine change) as an excuse to toss otherwise viable requests from the queue. The Commission should require MISO to continue to examine, on a case-by-case basis, whether a proposed change has a material impact on lower-queued generators.

**C. The Commission Must Direct MISO To Modify The “Cash At Risk” And Initial Payment Milestones.**

As proposed, MISO's “cash at risk” and initial payment milestones are unduly discriminatory against independent power producers and unduly preferential to generators affiliated with vertically-integrated Transmission Owners. These milestones create unreasonable barriers to entry that threaten to exclude independent generators from the MISO market.

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<sup>50</sup> MISO simply states that “[b]y limiting the number of potential modifications to only a specified few, MISO's proposal will reduce the cost of evaluating such alternatives and reduce uncertainty to lower-queued projects in the queue.” November 1 Filing, Transmittal Letter at 10.

Proposals of this nature present a “chicken and egg” problem for independent developers. Without an interconnection agreement, lenders will typically not provide financing for projects, and purchasers will often decline to enter into power purchase agreements with developers. At the same, without financing or a power purchase agreement, a developer may not be in a position to satisfy the “cash at risk” and initial payment milestones. While these milestones may appear neutral on their face, they are in fact unduly preferential to generators that are affiliated with Transmission Owners. Unlike independent developers who normally use off-balance sheet financing (which is premised on the project having entered into an interconnection agreement and an offtake agreement), utility-affiliated generators can finance projects based on the balance sheets of their regulated parents. Such utility-affiliated generators are thus less risky (and therefore have lower costs of external financing) by virtue of their ability to guarantee repayment by inclusion in rate base. The Commission should reject these elements of MISO’s proposal because they are unduly discriminatory and will serve as a deterrent to the entry of independent generation, rather than as a means to ensure that MISO’s queue is cured of backlogs and that MISO recovers its actual costs.

**1. MISO’s Proposal to Require Withdrawing Customers To Forfeit The “Cash At Risk” Milestone” Should Be Rejected, Or Modified To Permit Full Reimbursement Under A Wider Range Of Circumstances And Impose A Maximum Cap On Forfeiture.**

Under MISO’s proposal, to enter the DPP, a customer must provide a deposit – either in the form of cash or an irrevocable letter of credit – of up to \$10,000 per MW. This deposit would be forfeited upon withdrawal of the project in all cases, with one limited exception, namely, where the estimate of the total Network Upgrade costs in the Facilities Study is 25 percent or more greater than the estimate in the DPP SIS.

MISO's forfeiture requirements should be rejected because it has failed to justify the need for such a punitive measure.<sup>51</sup> Penalties are justified only where a market participant has violated some identifiable rule, regulation, or tariff provision. Withdrawal or termination of an interconnection agreement does not violate any such rule; a developer may be forced to withdraw an Interconnection Request for any number of legitimate reasons, which is why Order No. 2003 and MISO's GIP both explicitly permit withdrawal. MISO has not provided any evidence showing that the precondition for imposing such punitive measures has been satisfied. In particular, MISO has failed to demonstrate that the measures are narrowly-tailored to deter the alleged abuses,<sup>52</sup> and will not instead deter legitimate projects from progressing through the queue.<sup>53</sup> In addition, the November 1 Filing does not mention what MISO intends to do with the

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<sup>51</sup> While insisting that the "cash at risk" milestone is superior to non-monetary milestones, such as evidence of a turbine order, because MISO would not have to expend time and resources to determine if this milestone has been met, see Lavery Testimony at 19:8-19, MISO provides no evidence in support of its assertions. MISO similarly asserts that the "capital contribution in the form of cash or an irrevocable letter of credit will provide the best indicator that a project is ready to proceed to the DPP," November 1 Filing, Transmittal Letter at 15, but fails to provide any support for this claim.

<sup>52</sup> In fact, it is not clear what types of allegedly abusive behavior MISO is trying to deter. Instead, MISO simply asserts, without providing any support, that it has determined that a "capital contribution in the form of either cash or an irrevocable letter of credit will provide the best indicator that a project is ready to proceed to the DPP." November 1 Filing, Transmittal Letter at 15. In any case, the fact that a project is canceled does not mean that it was a speculative project. There are a number of reasons that a project that was economically viable at its inception may be canceled, e.g., changes in market conditions or failure to obtain financing or required regulatory approvals, as well as excessive costs for Network Upgrades identified through the interconnection process.

<sup>53</sup> See, e.g., *Sierra Pac. Power Co. & Nevada Power Co.*, 92 FERC ¶ 61,179 at 61,627 (2000) (rejecting proposed penalty provision because transmission providers had not demonstrated that proposed penalties "discourage[d] inappropriate practices without being exorbitant or exploitative" and because they were "overly broad in application and [went] beyond addressing the cited problem"); *Entergy Servs., Inc.*, 88 FERC ¶ 61,098, at 61,233-34 (1999); *Mirant Kendall, LLC & Mirant Americas Energy Mktg., L.P.*, 110 FERC ¶ 61,272 at 17 (2005) ("Penalties should be narrowly designed to balance the need to deter conduct that is harmful to the system with the need to limit excessive and unnecessary costs").

forfeited amounts, or how they will be distributed. Given MISO's silence, the only reasonable conclusion that can be drawn is that MISO will retain the forfeited amounts, or that it will distribute them among the MISO Transmission Owners. Either way, this will result in MISO and/or the MISO Transmission Owners reaping a windfall profit, which is unjust and unreasonable on its face.

While MISO styles this measure as a "milestone payment," it is, in fact, a deposit.<sup>54</sup> Commission precedent requires transmission providers to refund deposits in excess of actual costs. In the *MISO Queue Reform Rehearing Order*, for example, the Commission reaffirmed its rejection of a MISO proposal to retain unused study deposits, holding that "it is not just and reasonable for [MISO] to retain deposit money beyond that which is necessary to conduct studies for the project and any necessary studies caused by project withdrawal."<sup>55</sup> The Commission further emphasized that "refund to the customer of the balance is consistent with our traditional cost causation policy – that costs are borne by those who cause them."<sup>56</sup> and that the deposit provision "is a cost-covering provision, not a punitive provision."<sup>57</sup> The Commission's holding applies with equal force to MISO's proposal here, and compels rejection of the proposal.

While EPSA does not agree that this milestone is necessary or just and reasonable, if the Commission does accept this aspect of MISO's proposal, it should require MISO to modify the proposal to mitigate its punitive effects. At the very least,

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<sup>54</sup> As noted above, this milestone payment is normally fully refundable. In addition, this milestone is not a prepayment or financial security because neither MISO nor the interconnection Transmission Owner may use these funds to fund construction or study costs.

<sup>55</sup> *MISO Queue Reform Rehearing Order*, 127 FERC ¶ 61,294 at P 13.

<sup>56</sup> *Id.* See also *SPP*, 128 FERC ¶ 61,114 at P 67.

<sup>57</sup> *MISO Queue Reform Rehearing Order*, 127 FERC ¶ 61,294 at P 13.

the Commission should eliminate the forfeiture requirement. Alternatively, the Commission should permit full reimbursement of the amounts posted under a wider range of circumstances than MISO proposes. EPSA notes that the Commission has approved a similar provision proposed by the California Independent System Operator Corporation (the “CAISO”), which permits withdrawing customers to receive partial reimbursement of security posted where the customer’s withdrawal is due to one of the following causes that are beyond its control: (1) the customer had failed to secure an acceptable power purchase agreement; (2) the customer had been denied a permit or other authorization necessary to construct and operate its generation facility; or (3) the CAISO had required the customer to make a material change to its interconnection point.<sup>58</sup> EPSA respectfully submits that permitting full reimbursement under the above circumstances would go a long way toward mitigating the proposal’s punitive effects. Second, the Commission should adopt a maximum cap on the amount that must be forfeited, for example, the lesser of half the amount posted or \$2 million.<sup>59</sup> The risk of forfeiting up to \$2 million should be more than adequate to deter speculative projects that are not ready to move forward from entering the DPP, while not excessively penalizing economically viable projects that are forced to withdraw (or to delay the Commercial Operation Date, which would necessitate withdrawal of the request) due to forces beyond their control.

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<sup>58</sup> See CAISO Tariff, Appendix Y, § 9.4.1. See also *California Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,292 at P 135 (2008) (order accepting CAISO’s refund provisions).

<sup>59</sup> EPSA notes that, while the example in Mr. Lavery’s testimony may be reasonable when applied to the upgrades associated with a 1,600 MW nuclear plant, it is also true that much smaller plants could be tagged with upgrade costs that represent a much larger portion of total project costs. See Lavery Testimony at 22:5-23.

**2. The Commission Should Either Reject The Proposed Initial Payment Milestone, Or Require MISO To Give Customers At Least Six Months To Satisfy This Milestone.**

The initial payment milestone proposed in the November 1 Filing is similarly excessive and unduly discriminatory, in particular, because it gives the Transmission Owner the right to require the Interconnection Customer to either provide a payment of 10 percent or 20 percent of the total cost of Network Upgrades (depending on the In-Service Date of the upgrades) or to post security equal to 100 percent of Network Upgrade costs.<sup>60</sup> In Order No. 2003, the Commission explicitly rejected commenters' requests to require Interconnection Customers to provide security equal to "the total amount of Network Upgrades."<sup>61</sup> The Commission instead limited the security that customers must post to the cost of discrete portions of the Transmission Provider Interconnection Facilities or Network Upgrades.<sup>62</sup> The Commission acknowledged that this could expose the transmission provider to some risk, but emphasized that "the chilling effect of requiring the Interconnection Customer to maintain the full security during the length of the interconnection process would seriously discourage new generation."<sup>63</sup>

In any case, the initial payment milestone unduly discriminates against independent developers who (unlike utility-affiliated generators) would have to first

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<sup>60</sup> In the *MISO Queue Reform Order*, the Commission accepted MISO's proposed set of four Facilities Study milestones in Section 8.2 from which the Interconnection Customer could choose to satisfy the milestone requirement, one of which was to post security for the full cost of all required Network Upgrades. See *MISO Queue Reform Order*, 124 FERC ¶ 61,183 at P 83. The November 1 Filing, however, gives the **Transmission Owner**, rather than the Interconnection Customer, the option of requiring the customer to post the security for all Network Upgrade costs.

<sup>61</sup> Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 596.

<sup>62</sup> *Id.*

<sup>63</sup> Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 431.

obtain financing for the project in order to post the required amount of security, whether the Transmission Owner elects to require posting of 10 percent, 20 percent or 100 percent of the full cost of the Network Upgrades, which may run into the tens or hundreds of millions of dollars. As explained above, an interconnection agreement is a precondition to entering into a power purchase agreement, which in turn is a precondition to obtaining the financing necessary to post this security. Thirty days is not a sufficient time period for an independent developer to raise this amount of capital.<sup>64</sup>

In the event the Commission does not reject outright the proposed initial payment milestone, it should direct MISO to modify its proposal to give customers additional time to post the required security. EPSA respectfully submits that nine months would be a more appropriate period to obtain the necessary financing, or at a minimum six months, which is the period that the Commission has approved for CAISO.<sup>65</sup>

#### **D. The Commission Must Reject MISO's NZIS Proposal.**

The Commission must reject MISO's NZIS proposal because it is both unnecessary and would create more problems than it solves. In particular, in its responses to the Commission's data request in the NZIS Complaint proceeding,<sup>66</sup> MISO implicitly conceded that it does not have the ability to automatically curtail or otherwise prevent the combined output of the new and existing Interconnection Customers from

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<sup>64</sup> Utility-affiliated generators, on the other hand, can more easily satisfy this requirement due to their superior access to both internal and external financing, not to mention the ability to enter into a power purchase agreement with an affiliated utility.

<sup>65</sup> See CAISO Tariff, Attachment Y, § 9.3.1.2 (giving customers 180 days after completion of the final study to post a smaller amount of security, namely, the lesser of 30 percent of network upgrade costs or \$15 million). Moreover, CAISO does not require customers to post the full amount of security until the construction of the network upgrades has commenced. See *id.*, § 9.3.2.

<sup>66</sup> See generally Data Requests, *Shetek Wind Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. EL11-53-000 (filed Oct. 7, 2011).

exceeding the maximum injection limits specified in the existing generator's GIA.<sup>67</sup>

MISO also gives no indication that it will actively monitor generators with NZIS, in real time, to identify and sanction such violations, and the November 1 Filing does not propose to adopt any such protective measures or to penalize breaches of these limits. Consequently, MISO may need to curtail or redispatch other existing generators to address any overloads caused by generators with NZIS service.<sup>68</sup>

In addition, MISO's proposal would permit a generation owner to favor itself or an affiliate in obtaining interconnection service because it, in effect, permits the incumbent generation owner, rather than MISO, to reassign existing interconnection capacity.<sup>69</sup>

MISO's proposal would not require the incumbent generation owner to reassign this capacity in a non-discriminatory manner or prevent it from doing so in a non-transparent manner that is unduly preferential to itself or an affiliate. For example, an incumbent generator with an existing coal-fired or natural gas-fired plant could enter into an agreement with an affiliate developing a wind or fossil fuel project that would permit the new project to take over the interconnection rights of the existing facility (and potentially, its Network Resource designation), without submitting a new Interconnection Request,

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<sup>67</sup> In its data request responses, MISO acknowledges that it must rely on the new and existing generators' agreement not to exceed the maximum injection limit specified in the existing generator's interconnection agreement. MISO NZIS Complaint Response at 2. MISO also claims that the generators' output is governed by the operating limits, the GIA, and when applicable, the security constrained economic dispatch algorithm, *id.* at 5, but MISO fails to explain how these instruments will prevent such breaches.

<sup>68</sup> As noted above, the instant protest addresses only the Tariff revisions proposed in the November 1 Filing, and EPSA takes no position herein on whether MISO's current Tariff authorizes it to provide NZIS.

<sup>69</sup> To reassign such capacity to an entity that is not the owner, or a subsidiary of the owner, of the existing generation facility, the new and existing generation owners must execute an Energy Displacement Agreement. See Revised GIP, § 3.3.1.

going through MISO's study process, or funding Network Upgrades.<sup>70</sup> An unaffiliated developer's competing project would not have this option, and would therefore face significantly higher costs for interconnection service and need significantly more time to move through the interconnection process.

MISO already has Tariff measures in place to facilitate the development and interconnection of generation, measures that will be substantially enhanced by some of the proposals in the November 1 Filing. The NZIS proposal is therefore not only unnecessary, but, if accepted, it would allow injections in excess of an existing generator's injection rights, which would then require curtailment or redispatch of other existing generation. In addition, MISO's proposal would be unduly discriminatory insofar as it would allow incumbent generators, rather than MISO, to reassign capacity in a non-transparent and potentially discriminatory manner. For these reasons the Commission should reject MISO's NZIS proposal.

**E. The Commission Must Reject MISO's Proposal To Confiscate Accrued Interest On Customer Deposits.**

The Commission must reject MISO's outrageous proposal to confiscate the interest accrued on interconnection study deposits for a customer that withdraws its Interconnection Request. MISO's proposal, if accepted, violates the express requirements of Order No. 2003 and the Commission's more general policies requiring transmission providers to pay interest on customer deposits and similar prepayments that they hold.

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<sup>70</sup> Moreover, the NZIS proposal would permit such arrangements despite the markedly different operating characteristics of the new and existing generators. As such, this proposal flatly contradicts MISO's stated rationale for nearly eliminating customer's rights to modify projects in the DPP. See November 1 Filing, Transmittal Letter at 9-10.

The only explanation that MISO offers for its proposal – namely, that the “main driver” for Order No. 2003’s requirement to pay interest on customers’ deposits was to incentivize transmission providers to promptly process requests – is simply false.<sup>71</sup> Nowhere in Order No. 2003 does the Commission suggest that this is the reason why it adopted this requirement, nor has MISO pointed to any such statement. Instead, the Commission explained, in response to objections to its transmission credit policy, that the payment of interest is necessary to ensure that the customer “is fully and fairly compensated for the time value” of its money.<sup>72</sup> The fact that MISO hopes the time periods will be shorter does not mean that the money no longer has any time value. While no party objected to the requirement to pay interest on study deposits (and, as far as EPSA is aware, MISO is the first utility that has proposed to keep interest accrued on customer funds), this rationale applies with equal force to the payment of interest on such deposits.

Moreover, the Commission’s holding in Order No. 2003 is consistent with its long-standing policy of requiring transmission providers (as well as natural gas pipelines) that hold **customers’ money** to pay the customer any interest accrued on those funds.<sup>73</sup> This policy is reflected throughout the Commission’s *pro forma* Open Access Transmission Tariff (“OATT”), which requires the refund of deposits plus interest

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<sup>71</sup> See November 1 Filing, Transmittal Letter at 8.

<sup>72</sup> Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 618. See also Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 723 (explaining that the Commission “continues to believe that the Interconnection Customer is entitled to a refund for all the costs of Network Upgrades for which it has paid, including a reasonable estimate of the carrying costs [*i.e.*, interest] that it incurs in making the advance payments.”).

<sup>73</sup> See, e.g., *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats. & Regs. ¶ 31,191 at P 22 (2005) (requiring pipeline customers to withdraw accrued interest at any time).

for withdrawn service requests and for rejected or deficient applications for service.<sup>74</sup> The MISO Tariff includes the same requirement to refund study deposits, and more generally,<sup>75</sup> requires MISO and customers to pay interest on any unpaid balances.<sup>76</sup> MISO has provided no justification for singling out this class of deposits and customers for such unduly discriminatory, and confiscatory, treatment.

Finally, as discussed above, the Commission has rejected analogous proposals by MISO and others to retain unused study deposits.<sup>77</sup> In the *MISO Queue Reform Rehearing Order*, the Commission emphasized that the deposit provision “is a cost-covering provision, not a punitive provision.”<sup>78</sup> Like the proposal at issue in that proceeding, MISO’s proposal to confiscate accrued interest is clearly a punitive provision and therefore should be rejected because MISO has not justified the need to impose such penalties on withdrawing customers. As noted above, penalties are justified only where a market participant has violated some identifiable rule, regulation, or tariff provision. The withdrawal or termination of an Interconnection Request does not violate any such rule, nor does MISO claim that it does or identify any alleged abuses that this requirement is intended to seeking to deter. In addition, MISO’s filing is once again completely silent as to what it intends to do with the forfeited interest, or how

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<sup>74</sup> See Order No. 890 *pro forma* OATT, §§ 17.3, 17.4, 17.6 (firm point-to-point transmission service); §§ 32.1, 32.4 (network integration transmission service). See also *id.*, § 20.3 (requirement to refund deposit with interest for unfinished facility additions).

<sup>75</sup> See, e.g., MISO Tariff, §§ 17.4, 17.5, 17.7 (firm point-to-point transmission service); §§ 27A.5.4, 27A.5.5, 27A.5.7 (firm point-to-point transmission service over HVDC facilities); §§ 32.1, 32.4 (network integration transmission service). See also *id.*, §§ 20.3, 27A.8.3 (requirement to refund deposit with interest for unfinished facility additions).

<sup>76</sup> See *id.*, §§ 7.3, 7.7, 7.12, 7.15.

<sup>77</sup> See, e.g., *MISO Queue Reform Rehearing Order*, 127 FERC ¶ 61,294 at P 13.

<sup>78</sup> *Id.*

it will be distributed. MISO has provided no justification for why it is entitled to receive a windfall profit, or to distribute this windfall profit to others.



