

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

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

**Docket No. ER10-1791-  
000**

**REQUEST FOR REHEARING AND RECONSIDERATION OF  
THE AMERICAN WIND ENERGY  
ASSOCIATION AND WIND ON THE WIRES**

Pursuant to Section 313 of the Federal Power Act (“FPA”), 16 U.S.C. § 8251 (2009), and Rule 713 of the Rules and Regulations of the Federal Energy Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. § 385.713 (2008), the American Wind Energy Association (“AWEA”) and Wind on the Wires (“WOW”) hereby file a request for rehearing and reconsideration of the Commission’s December 16, 2010 order (“December 16 Order”) in the above-captioned docket.<sup>1</sup> Specifically, AWEA and WOW respectfully request that the Commission grant rehearing of the December 16 Order approving the Midwest Independent Transmission System Operator, Inc. (“Midwest ISO”) amendments to the Midwest ISO’s Open Access Transmission, Energy and Operating Reserve Markets Tariff (“Tariff”). For the reasons discussed below, there was not sufficient evidence in the record before the Commission to support, among other things, its approval of the Filing Parties’ cost allocation proposal for network upgrades, which places virtually all the costs for network upgrades for generation interconnection projects on interconnection customers.

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<sup>1</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 (2010).

## I. BACKGROUND

### A. October 23 Order

In 2006, the Commission accepted the incorporation of language in the Tariff,<sup>2</sup> providing that if (at the time an interconnection customer achieves commercial operation) the interconnection customer demonstrates that the generator has been designated as a network resource or committed by a contract of at least one year to supply capacity or energy to a network customer, then 50 percent of the costs of the network upgrades for the generation interconnection project will be repaid to the interconnection customer (a 50-50 cost sharing methodology).<sup>3</sup> Under this methodology, the repayment to the interconnection customer was allocated based on voltage level and modeled flow impacts. For facilities rated 345 kV and above, 20 percent of the cost of the repayment to the interconnection customer was allocated to all Midwest ISO pricing zones on a system-wide basis and 80 percent was allocated among pricing zones using a Line Outage Distribution Factor (“LODF”) method.<sup>4</sup> For facilities rated less than 345 kV, the entire repayment to the interconnection customer was allocated among the

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<sup>2</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106 (“RECB I Order”), *order on reh’g*, 117 FERC ¶ 61,241 (2006), *aff’d sub nom. PSC of Wis. v. FERC*, 543 F.3d 1058 (D.C. Cir. 2008); Midwest ISO, Tariff, Fourth Revised Volume No. 1.

<sup>3</sup> Midwest ISO, Tariff, Fourth Revised Volume No. 1 at Attachment FF, section III.A.2.d, Sheet Nos. 3461-3462. The 50-50 cost sharing methodology did not apply to: “(i) a Generation Interconnection Project that is also a Baseline Reliability Project, or to the extent it includes Network Upgrades that advance a Baseline Reliability Project; or (ii) a Generation Interconnection Project located on the Transmission Facilities owned by American Transmission Company, LLC, or International Transmission Company.” Midwest ISO, Tariff, Fourth Revised Volume No. 1, Attachment FF, section III.A.2.d, Sheet No. 3461.

<sup>4</sup> Midwest ISO, Tariff, Fourth Revised Volume No. 1, Sheet No. 3467.

pricing zones based on LODF.<sup>5</sup> In its August 2008 report on its experience with its regional expansion criteria and benefits (“RECB”) cost allocation methodology, the Midwest ISO reported to the Commission that a small number of stakeholders were dissatisfied with the current rules and had wide-ranging views on suggested further changes to those rules.<sup>6</sup> The Midwest ISO also noted that some transmission owners were so concerned about the impact of the allocation rules that they might withdraw from the Midwest ISO. As a result, the Midwest ISO recommended a continued review of unanticipated consequences of the RECB, and consideration of a possible solution, through the RECB Task Force.

On July 9, 2009, as supplemented on September 17, 2009, and on September 18, 2009,<sup>7</sup> the Midwest ISO and the Midwest ISO Transmission Owners (“TOs”) filed proposed amendments (“Cost Allocation Proposal”) to the Tariff to revise the method for allocating the cost of network upgrades for generation interconnection projects meeting the Midwest ISO’s RECB standards.

~~On October 23, 2009, the Commission conditionally accepted the proposed amendments to the Tariff and provided guidance to help inform the ongoing discussions related to the RECB Phase II cost allocation evaluation. In addition, the Commission directed the Filing Parties to make a compliance filing: (1) to fulfill their commitment to file superseding Tariff revisions regarding the Phase II~~

<sup>5</sup> *Id.* at Attachment FF, section III.A.2.c.i. The LODF method considers the flow effects of a given facility’s outage on transmission facilities in each pricing zone, taking into account the length of each affected transmission facility.

<sup>6</sup> Informational Compliance Filing of the Midwest Independent Transmission System Operator, Inc., Docket No. ER06-18-000 (filed Aug. 29, 2008).

<sup>7</sup> The September 17 filing was a response to a deficiency letter. The September 18 filing was an errata to the September 17 response.

~~cost allocation methodology on or before July 15, 2010; and (2) to reflect certain conforming changes to the Tariff. The Commission also required the Filing Parties to provide the Commission with informational reports on the status of the Phase II stakeholder process, on November 20, 2009, February 26, 2010, and May 28, 2010.~~

In ~~the~~its October 23, 2009 Order, the Commission accepted the Interim Cost Allocation Proposal conditioned upon the July 9 Applicants meeting their commitment to file superseding Tariff revisions on or before July 15, 2010, and required informational status reports to be submitted on November 20, 2009, February 26, 2010, and May 28, 2010. The Commission also recognized that Midwest ISO was engaged in a stakeholder process that was looking at a longer-term solution to the existing cost allocation issues. The Commission strongly encouraged Midwest ISO and its stakeholders to dedicate themselves to use the stakeholder process for the evaluation of Phase II reforms to transmission planning and cost allocation to more efficiently plan transmission expansions to interconnect and integrate new generation resources. The Commission suggested that “stakeholders may take a comprehensive approach to evaluating transmission needs by considering what upgrades are needed in light of load growth forecasts, aggregate generation interconnection requests, reliability and economic needs and benefits, and state resource policies.”<sup>8</sup>

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<sup>8</sup> October 23, 2009 Order, 129 FERC ¶ 61,060 at P 60.

## B. December 16 Order

On July 15, 2010, pursuant to section 205 of the Federal Power Act (FPA),<sup>9</sup> and in accordance with the Commission's October 23, 2009 order,<sup>10</sup> the Midwest filed proposed revisions to the Tariff<sup>11</sup> (July 15 Filing). Filing Parties proposed to establish a new category of transmission projects designated as Multi Value Projects ("MVP") for projects that are determined to enable the reliable and economic delivery of energy in support of documented energy policy mandates or laws that address, through the development of a robust transmission system, multiple reliability and/or economic issues affecting multiple transmission zones.<sup>12</sup> In recognizing the regional orientation of such projects, Filing Parties proposed that the costs of the MVPs be allocated to all load in, and exports from, Midwest ISO on a postage-stamp basis.

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<sup>9</sup> 16 U.S.C. § 824d (2006).

<sup>10</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 68-70 (2009) (October 23, 2009 Order) ("We deny the requests to establish a sunset date for Filing Parties' section 205 Phase I cost allocation methodology because Filing Parties have already committed 'to file the long-term Phase II cost allocation methodology by July 15, 2010. We will, however, condition the acceptance of the instant proposal on Filing Parties fulfilling their commitment to file tariff sheets reflecting the Phase II solution on or before July 15, 2010.'" (footnote omitted)), *reh'g pending*.

<sup>11</sup> Midwest ISO, FERC Electric Tariff, Fourth Revised Vol. No.1. When referring to the applicants, this order uses "Filing Parties" and "Midwest ISO" interchangeably unless otherwise noted.

<sup>12</sup> The Commission has shown interest in expanding transmission planning processes and exploring cost allocation issues in its currently pending Notice of Proposed Rulemaking in Docket No. RM10-23-000. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, 75 Fed. Reg. 37884 (June 30, 2010), FERC Stats. & Regs. ¶ 32,660 (2010) (Transmission NOPR). Because the Commission's action today on Filing Parties' MVP proposal precedes any final rule on the Transmission NOPR, we have reviewed the MVP proposal to ensure consistency with existing Commission policies. Midwest ISO, like all jurisdictional entities, will be subject to any future rulemakings.

Filing Parties also proposed to make permanent the Interim Cost Allocation Proposal for generator interconnection upgrades<sup>13</sup> conditionally approved in the Commission's October 23, 2009 Order. Thus, under Filing Parties' proposal, the interconnection customer will continue to pay 100 percent of the costs of network upgrades to the transmission owner in advance, subject to reimbursement under Attachment FF of the Tariff. (The level of reimbursement is generally 10 percent for the cost of required network upgrades rated at 345 kV or above; there is neither cost reimbursement nor cost sharing for Network Upgrades rated below 345 kV.)<sup>14</sup> The transmission owner may select one of two repayment options through which to reimburse the customer.

The Filing Parties also proposed revisions to narrow the cost burden faced by an initial generator interconnection customer that funds a network upgrade by requiring subsequent interconnection customers that benefit from the same upgrade to contribute to the costs of such upgrade through the creation of a new class of interconnection projects call Shared Network Upgrades ("SNU"). If a project is designated as an SNU, the interconnection customer that originally funded such project that is found to benefit other interconnection customers that come later would be eligible for contributions [or reimbursement](#) from the late-coming interconnection customers.

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<sup>13</sup> This methodology assigns to interconnection customers 100 percent of the costs of network upgrades rated below 345 kilovolts (kV) and 90 percent of the network upgrades rated at 345 kV and above, with the remaining 10 percent of the costs being recovered on a system-wide basis.

<sup>14</sup> Exceptions to this policy have been granted to ITC, and METC, and ATC.

Filing Parties claimed that, with the introduction of the MVP and SNU classifications, the current burden on interconnection customers of paying for network upgrades will be significantly reduced. Filing Parties acknowledge that those network upgrade projects that are required solely for generator interconnection will continue to be subject to the existing cost allocation methodology.

In the December 16 Order, the Commission conditionally accepted Filing Parties' proposed Tariff revisions for filing effective July 16, 2010.<sup>15</sup> The Commission found that the MVP methodology will identify projects that provide regional benefits and allocate the costs of those projects accordingly. The Commission stated, and we agree, that proposed MVP methodology is an important step in facilitating investment in new transmission facilities to integrate large amounts of location-constrained resources, including renewable generation resources, to further support documented energy policy mandates or laws, reduce congestion, and accommodate new or growing loads.<sup>16</sup> The Commission also found the proposal to maintain the existing cost reimbursement policy for network upgrades ("Network Upgrades Cost Allocation Methodology"), along with the addition of the new classification of projects as SNUs, to be appropriate, "as it

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<sup>15</sup> December 16 Order at P 2.

<sup>16</sup> *Id.*

provides a better balance for allocating cost responsibilities for large network upgrades associated with interconnecting with the electric transmission grid.”<sup>17</sup>

## II. STATEMENT OF ISSUES AND IDENTIFICATION OF ERRORS

Pursuant to Rules 203(a)(7) and 713(c)(1), 18 C.F.R. §§203(a)(7) and 713(c)(1), AWEA and WOW present the following statement of issues and identification of errors:

### *1. Statement of Issues*

**A.** Whether the Commission’s decision to approve the Network Upgrades Cost Allocation Methodology was arbitrary and capricious and not the result of reasoned decision-making supported by substantial record evidence.<sup>18</sup>

**B.** Whether the Commission’s decision to approve the Network Upgrades Cost Allocation Methodology departs from the Commission’s precedent regarding cost causation/beneficiaries pay principles without providing a reasoned explanation.<sup>19</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> See Administrative Procedure Act, 5 U.S.C. §706(2)(A); *Petal Gas Storage, L.L.C.*, 496 F.3d 695, 698 (D.C. Cir. 2007); *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (citing *Town of Norwood v. FERC*, 962 F.2d 20, 222 (D.C. Cir. 1992) (finding that Commission must be able to demonstrate that it has “made a reasoned decision based upon substantial evidence in the record”); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004).

<sup>19</sup> See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and quotation omitted) (a court must ensure that FERC has articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made); 5 U.S.C. § 706(2)(A) (2006) (An agency decision must not be upheld if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”); *Entergy Svcs., Inc. v. FERC*, 391 F.3d 1240 (D.C. Cir. 2004) (“The Commission may change its practices, but it must do so with reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”) (internal citations omitted).



C. Whether the Commission's decision to approve the Filing Parties' Network Upgrades Cost Allocation Methodology assigns costs in an unduly discriminatory and unreasonable manner to location-constrained resources.<sup>20</sup>

D. Whether the Commission erroneously determined that the Commission's OASIS posting requirements do not apply to Schedule 26-A.<sup>21</sup>

E. Whether the Commission's approval of the one-year contingency window proposal was arbitrary and capricious and not the result of reasoned decision-making.<sup>22</sup>

## 2. *Identification of Errors*

A. The Commission's decision approving the Filing Parties' Network Upgrades Cost Allocation Methodology is not the result of reasoned decision-making based on substantial record evidence.

B. The Commission's decision approving the Filing Parties' Network Upgrades Cost Allocation Methodology deviated from the Commission's cost causation principles and departs from established Commission precedent without a reasoned explanation.

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<sup>20</sup> See, e.g., *California Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061, *reh'g denied*, 120 FERC ¶ 61,244 (2007) (CAISO). See also Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 P 543, 548-549, *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (January 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

<sup>21</sup> [cites]

<sup>22</sup> [cites]

C. The Commission's decision to approve the Filing Parties' Network Upgrades Cost Allocation Methodology assigns costs in an unduly discriminatory and unreasonable manner to location-constrained resources.

D. The Commission's decision to apply the Commission's OASIS posting requirements to Schedule 26-A departs from established Commission precedent without a reasoned explanation.

E. The Commission's approval of the one-year contingency window proposal was arbitrary and capricious and not the result of reasoned decision-making.

### III. REQUEST FOR REHEARING

#### A. **The Commission's Approval of the Network Upgrades Cost Allocation Proposal was Arbitrary and Capricious and Not the Result of Reasoned Decision-making**

In the October 23 Order,<sup>23</sup> the Commission approved the Interim Cost Allocation Proposal "conditioned upon the Filing Parties fulfilling their commitment to file superseding Tariff revisions regarding the Phase II cost allocation methodology on or before July 15, 2010 as just and reasonable and not unduly discriminatory or preferential."<sup>24</sup> Thus, the Commission's approval appears to have been based not so much on the merits of the Interim Cost

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<sup>23</sup> We note that AWEA and WOW submitted a Request for Rehearing of the October 23 Order and that a final dispositive order has not been issued in that proceeding; therefore, we are not barred by collateral estoppel from raising issues related to that proceeding. *See, e.g., Old Dominion Electric Cooperative, North Carolina Electric Membership Corp. v. Virginia Elec. and Power Comp.*, 133 FERC ¶ 61,009 (2010) (implicitly agreeing with that a collateral attack argument does not apply to an order that remains pending before the Commission on rehearing)..

<sup>24</sup> October 23 Order at P 49.

Allocation Proposal itself, whether or not it was just and reasonable, but instead on the Commission's reliance that it was labeled an interim proposal and would soon be superseded.<sup>25</sup> In other words, the Commission appears to have taken comfort in the notion that the proposal would be in place only on an interim basis because the Filing Parties made representations that there ~~are~~were various ongoing discussions taking place among parties in the Midwest region that ~~will~~would ultimately result in a ~~future~~ filing to the Commission, proposing more equitable long-term cost allocations rules.

In the December 16 Order, the Commission stated:

The comments do not persuade us that the [Network Upgrades] cost allocation methodology accepted in the October 23, 2009 Order has become unjust and unreasonable, or that our approval of the MVP proposal necessitates change to the [Network Upgrades] cost allocation methodology. We will therefore approve Filing Parties' proposal to retain the [Network Upgrades] cost allocation methodology. The previously accepted [interim] cost allocation remains just and reasonable.<sup>26</sup>

The Commission appears to have forgotten in the December 16 Order the fact that it found the Interim Cost Allocation Proposal in the October 23 Order in light

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<sup>25</sup> *Id.* (“[The Cost Allocation Proposal would] reasonably address for the interim period the balance between costs and benefits.”).

<sup>26</sup> December 16 Order at P 331.

of the ephemeral nature of the filing. As such, the Commission appears to have held it to a lower standard and did not require substantial evidence to support the justness and reasonableness of the proposal. Nonetheless, the Commission in the December 16 Order ignores that fact and more or less presumes that the Network Upgrades Cost Allocation Methodology to be just and reasonable as a permanent proposal since it was already approved, albeit that approval was dependent on its “interim” nature. As a result, substantial evidence has never been placed in the record to either support the Commission’s approval of the Interim Cost Allocation Proposal or to make that policy permanent through the Network Upgrades Cost Allocation Methodology.

Under the FPA, the only basis for the Commission to approve a particular proposal for allocating costs is whether it is just and reasonable based upon the substantial evidence in the record.<sup>27</sup> Thus, if rules, such as those in the Network Upgrades Cost Allocation Methodology, are not just and reasonable based on their own merits, the Commission acts in contravention of its statutory duty when it allows them to stay in effect. In other words, the issue before the Commission in the December 16 Order was whether the retention of that methodology met that standard based on the evidence in record.<sup>28</sup>

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<sup>27</sup> FERC has the statutory requirement under sections 205 and 206 of the FPA to ensure that a utility's rates are “just and reasonable.” 16 U.S.C. §§ 824d, 824e.

<sup>28</sup> [cites]

In sum, the Commission’s decision to approve as permanent the Network Upgrades Cost Allocation Proposal based on its prior approval of the Interim Cost Allocation Proposal, which it previously determined to be just and reasonable only on an interim basis, exceeds the Commission’s discretion to approve rates for which there is not substantial evidence in the record that they are just and reasonable. Therefore, the Commission’s decision was arbitrary and capricious and not based on reasoned decision-making.<sup>29</sup>

**B. The Commission’s Approval of the Network Upgrades Cost Allocation Methodology Departed from Its Precedent Regarding Cost Causation/Beneficiaries Pay Principles**

The Commission’s policy for allocating the costs of new transmission facilities must adhere to the principle of cost causation. As the Commission has explained: “the well-established principle of cost causation requires that costs should be allocated . . . to customers based on customer benefits and cost incurrence.”<sup>30</sup> Thus, costs must be fairly allocated among participants, “including those who cause them to be incurred and those who otherwise benefit from them.”<sup>31</sup>

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<sup>29</sup> See *supra* note 9.

<sup>30</sup> *Cal. Power Exch. Corp.*, 106 FERC ¶ 61,196, at P 17 (2004).

<sup>31</sup> See Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 559 (2007); *order on reh’g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh’g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) (explaining that in allocating costs for regional facilities, transmission providers must weigh several factors including: (1) fair assignment among those who cause costs for and benefit from the facilities; (2) whether cost allocations provide proper incentives to construct new transmission; and (3) whether the allocation proposal is generally supported by state authorities and participants in a region); see also *ICC, et al. v. FERC*, 576 F.3d 470, 476 (7th Cir 2009) (“To the extent that a utility benefits from the costs of new facilities, it may be said to have ‘caused’ a part of those costs to be incurred, as without the expectation of its contributions the facilities might not have been built, or might have been delayed.”).

By not even attempting to identify the extent to which and the manner in which network upgrades to the integrated transmission system benefit all transmission users, the Commission failed, in the December 16 Order, to engage in reasoned decision-making. While Order No. 2003 grants regional transmission organizations (“RTOs”), such as the Midwest ISO, deference to construct their own interconnection pricing policies so that those policies can reflect regional needs and local considerations,<sup>32</sup> the Commission still has the duty to ensure that proposals are consistent with its general pricing policy, including cost causation principles. However, the Commission’s approval of the Network Upgrade Cost Allocation Methodology did not attempt to ensure that costs and benefits were roughly commensurate and simply approved a methodology that over-allocated to generators costs that should be paid by a large class of customer-beneficiaries.<sup>33</sup>

In the December 16 Order, the Commission, as it did in the October 23 Order, merely deferred to Midwest ISO’s basic assumption that an interconnection customer should have virtually exclusive financial responsibility for a transmission upgrade over the 40-year plus life of the asset without any real examination of whether or not that is an accurate representation of the actual benefit distribution.

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<sup>32</sup> Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, FERC Stats. & Regs. P 31,146 at P 698 (2003) (Order No. 2003), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. P 31,160 (2004) (Order No. 2003-A), *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. P 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. P 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 374 U.S. App. D.C. 406 (D.C. Cir. 2007).

<sup>33</sup> *Midwest ISO Transmission Owners v. FERC*, 373 F.3d at 1368 (FERC must “compare[e] the costs assessed against a party to the burdens imposed or benefits drawn by that party”); *Western Massachusetts Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) (approving Commission’s determination of benefits as it was based on “substantial evidence” in record).

The notion that a generator who is the immediate cause of an upgrade is also its chief “beneficiary” and should pay most of its costs is not consistent with the reality of an integrated transmission system. An upgrade will benefit the system as a whole, if not immediately, at least within the upgrade’s foreseeable life. Indeed, the beneficial effects and, in turn, the beneficiaries from network upgrades will change continuously over the life of the typical transmission project. Thus, within the context of the past and future development of the transmission system, the Network Upgrade Cost Allocation Methodology erroneously relies not on cost causation/beneficiaries pays principles but purely on the “accident” of when in time a generation project is developed and on a snapshot of system conditions at that time.

In this respect, the December 16 Order mistakenly relies on cost causation concepts that might work well within the context of an abbreviated time frame, such as a test year, but are of extremely limited usefulness, and perhaps of no usefulness at all, when considered within the much longer 40 year or so time horizon defined by the projected life span of transmission assets. Within this context, the original causation of a particular network expansion is of far less, if not trivial, significance in comparison to the benefits which that expansion provides over its useful life. The Commission’s approval of the Network Upgrades Cost Allocation Methodology thus fails to satisfy the just and reasonable standard when measured against the benchmark of how, over the long term,

upgrades to the transmission system provide many users throughout the network the benefit of least cost, reliable service.<sup>34</sup>

The fact that there are residual benefits to consumers of expanding the bulk transmission system is not a fact contested by the Commission in the December 16 Order. In the October 23 Order, the Commission recognized that it “has long held that the transmission system is a cohesive, integrated network that operates as a single piece of equipment, and that network facilities are not ‘sole use’ facilities but facilities that benefit all transmission customers.”<sup>35</sup> Therefore, the Commission explained that it “believes that cost allocation proposals for interconnection-related upgrades should pay attention to cost-causation principles and to identifying the full array of benefits to generators, load, and other entities in the region from enhanced transmission infrastructure.”<sup>36</sup>

In the December 16 Order, the Commission nevertheless fails to require what it preached in the October 23 Order to be put into practice on a permanent basis. The Commission’s decision instead allows the Midwest ISO to continue to directly assign the vast majority of the costs of network upgrades without

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<sup>34</sup> As the Commission has recognized in another proceeding, network upgrades provide significant reliability and competitive benefits to the Midwest ISO transmission grid and energy markets. *International. Trans. Co.*, 123 FERC ¶ 61,065 at P 18-19 (2008); *see also Entergy Ser’s, Inc. v. FERC*, 319 F.3d 536, 542-44 (D.C. Cir. 2003) (holding that a competitive transmission system benefits all users of the grid).

<sup>35</sup> October 23 Order at P 53 (citing *Public Service Co. of Colorado*, 59 FERC ¶ 61,311 (1992), *reh’g denied*, 62 FERC ¶ 61,013 61,061 (1993)).

<sup>36</sup> October 23 Order at P 56. *See also id.* at P 53 (stating that it “even if a customer can be said to have caused the addition of a grid facility, the addition represents a system expansion used by and benefiting all users due to the integrated nature of the grid”); *id.* at P 56 (noting that the Commission “has consistently found that cost allocation for generator interconnection-related network upgrades must strike an appropriate balance between the entity that ‘caused’ the need for an upgrade (i.e., by deciding to interconnect a new generator) and the larger set of entities that will actually benefit from that upgrade”).



exploring whether the proposal ignored an analysis of the benefits from the upgrades.<sup>37</sup>

A reasoned analysis that is consistent with the cost causation principles would have required a demonstration that the allocation of costs of network upgrades has some relationship to benefits. However, the Commission did not even require the Filing Parties to show that the costs allocated bear any relationship, let alone roughly correlate, to the benefits received. It was incumbent upon the Commission prior to approving the Network Upgrade Cost Allocation Methodology to base its decision on evidence that supports its apparent conclusion that transmission customers receive little or no benefit from network upgrades. The Commission provided no specifics concerning difficulties in assessing: benefits from network upgrades to entities other than generators, the contribution that network upgrades are likely to make to the greater reliability of the network as a whole, and even the roughest estimate of likely benefits to transmission owners and load from upgrades.

In short, in the December 16 Order, the Commission did not follow its own precedent to strike a reasonable balance between cost causers and beneficiaries. As much of the benefit from the construction of the upgrades at issue in the December 16 Order will adhere to more than just interconnection customers, it was not just and reasonable within the meaning of section 205 of the FPA to allocate such a disproportionate share of the costs to interconnection customers.

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<sup>37</sup> *Id.*

Accordingly, the Commission failed to apply its cost causation and beneficiary pays approach to the Network Upgrades Cost Allocation Methodology and deviated from its long-held precedent regarding cost sharing.<sup>38</sup>

The Commission appears to have again reached its conclusion based on a desired policy outcome<sup>39</sup> (to encourage transmission owners not to withdraw from the Midwest ISO) rather than basing it on cost causation principles that establish a link between network upgrades and cost causation/beneficiaries pay principles.

The United States Court of Appeals for the 7th Circuit recently granted a petition to overturn a Commission decision regarding cost allocation within the PJM

Interconnection. The court stated that “the fact that one group of utilities desires to be subsidized by another is no reason in itself for giving them their way.”<sup>40</sup> In

remanding the case to FERC for further proceedings, the court further stated that

“we require only that the agency have made a reasoned decision based upon

substantial evidence in the record[,] . . . [b]ut the Commission failed to do that. . .

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<sup>38</sup> See, e.g., *Penn. Elec. Co. v. FERC*, 11 F.3d 207, 211 (D.C. Cir. 1993) (“customers should normally be charged rates that fairly track the costs for which they are responsible”); *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (“Simply put, it has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.”); Order No. 890-A at P 241 (in reviewing new transmission cost allocation proposals, the Commission first reviews “whether a cost allocation proposal fairly assigns costs among participants, including those who cause them to be incurred and those who otherwise benefit from them”); *Inquiry Concerning the Commission’s Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*; Policy Statement, 59 Fed. Reg. 55,031 (November 3, 2004), FERC Stats. and Regs. ¶ 31,005 at 34,141 (1994) (conforming pricing proposals should allocate transmission costs “in a manner which appropriately reflects the costs of providing transmission service to such customers or classes of customers”).

<sup>39</sup> In the October 23 Order, the Commission appeared to concede that the sole advantage of adopting, the otherwise unjust and unreasonable interim cost allocation proposal, was that it would preserve membership in the Midwest ISO. See October 23 Order at P 49.

<sup>40</sup> *ICC, et al. v. FERC*, 576 F.3d 470, 477.

<sup>41</sup> *Id.* at 474 (quoting *Town of Norwood v. FERC*, 962 F.2d 20, 22).

Similarly here, the Commission has not shown that there was evidence in the record that supported a finding that the Network Upgrade Cost Allocation Methodology was just and reasonable, especially given the fact that the proposal abandoned cost sharing and placed virtually all costs on interconnection customers. To the contrary, as discussed, the Commission failed to provide sufficient support for its implicit assumptions about the distribution of benefits from generator interconnection network upgrades and its approval of the Network Upgrade Cost Allocation Methodology. Instead, the Commission approved a proposal that, in effect, requires generators to provide subsidies to other transmission users without exploring the wide range of beneficiaries from transmission expansion.

**C. The Commission's Decision to Approve The Network Upgrade Cost Allocation Methodology Assigns Costs In An Unduly Discriminatory and Unreasonable Manner to Location-Constrained Resources**

The Commission's December 16 Order is unduly discriminatory because it fails to recognize the special challenges faced by location-constrained resources and imposes virtually all of the costs of network upgrades on the developers of such resources. Location-constrained resources, such as wind generation facilities, often require lengthy and expensive high-voltage transmission lines to interconnect them from remote, sparsely populated areas where they are often located far from the load centers where the energy will be consumed. As the Commission has recognized, location-constrained resources present unique

challenges that impede their development, and therefore, it must adopt policies that do not unduly discriminate against them.<sup>42</sup> However, the Network Upgrade Cost Allocation Methodology approved by the Commission fails to even acknowledge, much less address, the difficulties faced by location-constrained resources.

The Commission has consistently found that treating similarly situated generators differently constitutes undue discrimination.<sup>43</sup> Further, when it comes to location-constrained resources, the Commission has recognized that treating dissimilarly situated generators differently does not necessarily constitute undue discrimination.<sup>44</sup> In fact, treating dissimilarly situated generators the same, as the Commission did in the December 16 Order by failing to recognize the realities that distinguish location-constrained resources from other resources that can be sited near load centers, is equivalent to treating similarly situated generators differently. Accordingly, the Commission should have rejected the Network Upgrade Cost

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<sup>42</sup> See, e.g., *California Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061 at P 64 (“CAISO”) (“Location-constrained resources present unique challenges that are not faced by other resources and that are not adequately addressed in the Commission’s current interconnection policies.”), *reh’g denied*, 120 FERC ¶ 61,244 (2007); *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,283 at P 6 (2009) (SPP). See also, Remarks of FERC Chairman Jon Wellinghoff, CAISO Stakeholder Symposium (Oct. 7, 2009) at 8 (“Compelling a resource developer or host utility to bear all of the cost of these transmission facilities, regardless of benefits to others, will make it less likely that these resources will be developed. That result may not be consistent with either meeting a region’s needs in the most cost-effective way or ensuring that the region’s and states’ renewable energy goals are met.”), available at <http://www.ferc.gov/EventCalendar/Files/20091008154017-CAISOSpeech10-07-09.pdf>.

<sup>43</sup> See, e.g., *Transwestern Pipeline Co.*, 36 FERC ¶ 61,175, 61,433 (1986) (“undue discrimination is in essence an unjustified difference in treatment of similarly situated customers”); see also *Alabama Power Co. v. FERC*, 220 F.3d 595, 599-600 (D.C. Cir. 2000) (holding that it is arbitrary and capricious for the Commission to treat similarly situated entities differently).

<sup>44</sup> *CAISO*, 119 FERC ¶ 61,061 at P 9; *SPP*, 127 FERC ¶ 61,283 at P 29.

Allocation Methodology as unduly discriminatory in violation of section 205 of the FPA.

**D. The Commission Erroneously Determined that the Commission’s OASIS Posting Requirements Do Not Apply to Schedule 26-A**

AWEA and WOW also request rehearing regarding the Commission’s decision in the December 16 Order to not require the OASIS posting of transmission charges for the cost recovery of MVP transmission lines.<sup>45</sup> The Commission based that conclusion on its determination that the MVP proposal did not create a new transmission product and that the proposed MVP charge merely recovers transmission revenue requirements.<sup>46</sup> Even if the proposal does not create a new transmission product, the proposed Schedule 26-A clearly states that it creates an MVP Usage Rate that will be charged “in addition” to any charges under Schedules 7, 8, and 9.<sup>47</sup> Therefore, it clearly represents an extension of the rate for the base transmission services.

The proposed Schedule 26-A clearly states that Monthly Net Actual Energy Withdrawals, Export Schedules and Through Schedules will be charged the MVP Usage Rate in addition to any charges under Schedules 7, 8, and 9, which are the

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<sup>45</sup> December 16 Order at P 517 (“[T]he MVP proposal does not violate the Commission’s OASIS posting requirements. The Commission requires transmission providers to ‘post prices and a summary of the terms and conditions associated with all transmission products offered to transmission customers.’ This OASIS posting requirement applies to transmission products, such as charges for transmission service under Schedules 7, 8, and 9 of the Midwest ISO Tariff.”).

<sup>46</sup> *Id.* at P 518 (“ We find that the MVP proposal does not create a new transmission product, and we agree with Filing Parties that the proposed MVP charge merely recovers transmission revenue requirements.”).

<sup>47</sup> See proposed Attachment MM, Part 4 (a) i.

service schedules for base transmission service under the Midwest ISO's tariff. Therefore, we submit that the new Schedule 26-A creates an extension of the rate design, based on energy in MWh instead of a demand charge, for the base transmission service provided under those schedules, and the mere fact that the Midwest ISO proposed a new rate Schedule 26-A, rather than amend the existing schedules to incorporate the MVP Usage Rate into these existing rate schedules, should not absolve the Midwest ISO from posting the charges in advance on OASIS. Commission precedent has consistently held that transmission providers must post rates and terms and conditions of transmission service in advance in an open and transparent manner in order for transmission customers to make informed business decisions.<sup>48</sup>

AWEA and WOW believe that this lack of this transparency will ~~also~~ impact the competitiveness of independent wind generators,<sup>49</sup> is contrary to Commission precedent, and ~~is~~ unjust and unreasonable. The Commission itself acknowledges in the December 16 Order the problematic nature of the lack of

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<sup>48</sup> This type of retroactive ratemaking is contrary to OASIS posting requirements promulgated in 889 that transmission providers post prices and the terms/conditions associated with those prices. *See* Order No. 889: Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, 75 FERC Para 61,078, RM95-9-000 (April 24, 1996), p. 1. Further, it violates the guiding OATT principals promulgated in Order No. 888 that transmission system information be available on a timely basis. *See* Order No. 888: Transmission Open Access. Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 75 FERC Para 61,080, Docket Nos. RM95-8-000 and RM94-7-001 (April 24, 1996). Finally, it violates the basic transparency principle of Order No. 890. *See* Order No. 890: Preventing Undue Discrimination and Preference in Transmission Service, 18 CFR Parts 35 and 37, Docket Nos. RM05-17-000 and RM05-25-000 (February 16, 2007), at P. 435-443. Order Nos. 888, 889 and 890 were developed to allow market participants to make sound business decisions which ultimately benefit end use consumers.

<sup>49</sup> The lack of advance posting of MVP charges has a greater affect on independent generators than utility owned generators as the latter have automatic cost recovery through their ratepayers.

posting of these transmission charges in advance: “[W]e recognize protestors’ concerns that advance notice of MVP charges would allow parties to make more sound business decisions, and we encourage Midwest ISO to continue working with its stakeholders to develop mechanisms to provide such advance notice.”<sup>50</sup>

For the reasons discussed above, rather than just encourage the Midwest ISO to continue to work with stakeholders to solve this issue, we think that the Commission, consistent with its precedent, should require these transmission charges to be posted in a more transparent fashion. Specifically, the Commission should require the Midwest ISO to demonstrate, in a compliance filing, how the exact rate will be calculated and posted in advance on OASIS.

With this in mind, we note that at ~~a a-recent Supply Adequacy Work Group Meeting~~Midwest ISO stakeholder meeting, at which the December 16 Order was reviewed, a representative from the Midwest ISO stated the Midwest ISO would work with stakeholders to develop an estimate of the MVP Usage Rate, based on historical energy usage, and would post this estimated rate on OASIS.<sup>51</sup> Several stakeholders indicated potential solutions to this lack of transparency and known rate in advance. While we appreciate Midwest ISO’s commitment to post an estimate of the MVP Usage Rate on OASIS in advance, this alone is not sufficient. Market participants must know the exact price for the transmission service well in advance in order to make prudent business decisions.

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<sup>50</sup> December 16 Order at P 444.

<sup>51</sup> See the RECB TF meeting materials from January 7, 2011 slide 5 <https://www.midwestiso.org/Library/Repository/Meeting%20Material/Stakeholder/RECBTF/2011%20RECBTF/20110107%20RECBTF/20110107%20RECBTF%2012-16%20FERC%20Order%20Overview.pdf>

The Midwest ISO also stated in its July 15 filing that it will know the numerator for developing the rate in advance for the MVP Usage Rate, by taking the MVP annual revenue requirement and multiplying by a monthly withdrawal weighting factor. The weighted monthly revenue requirement is then divided by the sum of the Monthly Actual Energy Withdrawals plus monthly Real-Time Export Schedules and the monthly Real-Time Through Schedules. As proposed, the billing determinants in the denominator will not be known until after a month's business is closed. The Midwest ISO could cure this deficiency and comply with the OASIS posting requirements by applying the rate for the current month's Schedule 26-A based on the previous month's actual billing determinants. Thus, determination of the MVP Usage Rate would be calculated and posted in advance of the time when service is actually taken. Such a rate design should result in a smoothing of the rate from month-to-month. If the Midwest ISO determines a true-up is required, this could be conducted on an annual basis and netted out in determining the MVP annual revenue requirement, thus avoiding any rate volatility and unpredictability to market participants.

**E. The Commission's Approval of the One-year Contingency Window Proposal was Arbitrary and Capricious and Not the Result of Reasoned Decision-making**

AWEA and WOW request rehearing of the Commission's approval in the December 16 Order of the proposed one-year "contingency window." In our comments to the Filing Parties' proposal, we indicated that, especially in the early



implementation of the MVP planning and approval process, there are likely to be delays for various reasons including stakeholder disagreements.<sup>52</sup> As such, there is a need for a longer contingency process since the interconnection study process is not aligned with the MTEP planning process.

If a “contingency window” longer than one-year is not instituted, the result will be a large number of interconnection customers being forced to drop out of the interconnection queue because the costs of large transmission upgrades are being directly assigned to them. In addition, with a longer contingency window a number of upgrades would be appropriately identified as MVPs and cost shared across the region. Furthermore, without such a change, AWEA and WOW believe the Midwest ISO’s already problematic interconnection process will only become worse, delaying and increasing the overall cost for wind power development in the Midwest.

#### IV. CONCLUSION

WHEREFORE, AWEA and WOW request that the Commission grant rehearing of its December 16 Order. Specifically, we respectfully recommend that the Commission grant our request to rescind the December 16 Order, consistent with request herein, and order the Midwest ISO to submit revised Tariff language in a compliance filing that: provides that costs be allocated to all those receiving the benefits from network upgrades, consistent with cost causation/beneficiaries

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<sup>52</sup> Edison Mission Energy [also](#) provided, in the proceeding, a detailed description of the interconnection planning process at the Midwest ISO and the lengthy time frames involved with each of the steps, [which provides further support for the need for a longer contingency window](#). See EME comments pgs. 9-11.

pay principles; and ensures that the cost allocation proposal for network upgrades is not unduly discriminatory to location-constrained resources.

Respectfully submitted,

By: \_\_\_\_\_/s/ \_Gene Grace\_

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Dated: January 17, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this January 17, 2011.

\_\_\_\_\_/s/ Gene Grace\_\_\_\_\_  
Gene Grace