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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.	**)**	**Docket Nos. EL15-68-003 EL15-68-004**
Otter Tail Power Co. v. Midcontinent Independent System Operator, Inc.,	**)**	**Docket Nos. EL15-36-003 EL15-36-004**
Midcontinent Independent System Operator, Inc.	**)**	**Docket Nos. ER16-696-004 ER16-696-005 ER18-2513-000**

REQUEST FOR REHEARING OF THE AMERICAN WIND ENERGY ASSOCIATION

Pursuant to Section 313 of the Federal Power Act ("FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),[2] the American Wind Energy Association ("AWEA")[3] respectfully submits this request for rehearing of the order issued by the Commission in the above-captioned dockets on December 20, 2019.[4]

I. EXECUTIVE SUMMARY

These proceedings involve Commission orders concerning generator interconnection financing procedures in the Midcontinent Independent System Operator, Inc. ("MISO") region. Following vacatur and remand by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"),[5] the Commission reversed its prior determination in the vacated orders (effective June 24, 2015) that transmission owners and affected system operators should not be

1 16 U.S.C. § 825*l* (2018).
2 18 C.F.R. § 385.713 (2019).
3 This filing does not necessarily reflect the official position of each of AWEA's individual members.
4 *Midcontinent Indep. Sys. Operator, Inc.*, Order on Briefing, Compliance, and Rehearing, 169 FERC ¶ 61,233 (2019) ("Briefing Order").
5 *Ameren Servs. Co. v. FERC*, 880 F.3d 571 (D.C. Cir. 2018) ("Ameren").

allowed the unilateral right to elect to provide initial funding for network upgrades.[6] As a result, the Commission ordered MISO to submit a compliance filing by August 31, 2018 making corresponding changes to its pro forma Generator Interconnection Agreement ("GIA"), pro forma Facilities Construction Agreement ("FCA"), and pro forma Multi-Party Facilities Construction Agreement ("MPFCA").[7]

The Commission ordered briefing regarding the treatment of the GIAs, FCAs, and MPFCAs that were entered into during the time period between June 24, 2015 and August 31, 2018 (the "Interim Period"). AWEA submitted briefs explaining that it is vital that the Commission exercise its lawful discretion and disallow unilateral Transmission Owner Initial Funding on a retroactive basis.[8] AWEA explained that allowing unilateral Transmission Owner Initial Funding for the Interim Period would cause monumental disruption and that the impact would be experienced by generation developers and owners, buyers and sellers under an executed power purchase agreement ("PPA"), buyers and sellers under an executed asset purchase agreement ("APA"), financial investors, capital markets, and third-party vendors.[9]

Despite AWEA's showing that severe delay and financial harm would result, on December 20, 2019, the Commission issued the Briefing Order finding that the GIAs, FCAs, and MPFCAs that were entered into during the Interim Period should be revised to allow transmission owners and affected system operators to unilaterally elect to provide initial funding for network upgrades, if they so choose.[10]

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6 *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158 (2018) ("Ameren Remand Order").

7 Ameren Remand Order at P 33.

8 *Midcontinent Indep. Sys. Operator, Inc.*, Initial Brief and Request for Expedited Action of the American Wind Energy Association, Docket Nos. EL15-68-003, *et al*. (Oct. 1, 2018) ("AWEA Initial Brief").

9 *Id*. at 2.

10 Briefing Order at P 1. The Commission also accepted MISO's compliance filing and denied AWEA's request for rehearing of the Ameren Remand Order. AWEA's Request for Rehearing of the Briefing Order is limited to issues decided for the first time in the Briefing Order.

The Commission's finding is arbitrary, capricious and an abuse of discretion in violation of the Administrative Procedure Act and should be reversed on rehearing. The Commission openly ignored substantial evidence in the record of the undue discrimination that would result if the Commission were to allow unilateral Transmission Owner Initial Funding for the Interim Period. The Commission's Briefing Order will cause substantial disruption and chaos in the industry unless action is taken quickly on rehearing. AWEA submits that the Commission's response to the D.C. Circuit's vacatur is the worst possible outcome for the industry at large. Rather than accepting additional evidence to support its original findings, the Commission opted to throw gasoline on the problem and light a match by allowing the abrogation of existing contracts and disrupting Interim Period agreements.

The Commission acknowledges that its decision will create problems but decides to exercise its remedial authority to retroactively abrogate agreements with no further discussion or analysis of the costs and without a shred of evidence from a single transmission owner that it has been harmed and is being harmed from not exercising Transmission Owner Initial Funding for the Interim Period. The Commission's decision is arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act.[11] As Commissioner Glick stated in dissent, "in fashioning a remedy the Commission must take the time to balance the 'specific facts and equities'—including the benefits and harms to the parties involved."[12] Here, "there is no evidence that the Commission engages in any such balancing"[13] and "the evidence in the record before us *weighs heavily in favor* of preserving the existing GIAs, FCAs, and MPFCAs."[14]

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11 *See* Administrative Procedure Act, Section 10(e), 5 U.S.C. section 706.
12 Briefing Order at Glick Dissent P 10.
13 *Id.*
14 *Id.* (emphasis added).

II. SPECIFICATION OF ERRORS/STATEMENT OF ISSUES

Pursuant to Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[15] AWEA identifies the following errors in the Briefing Order:

1. The Commission erred when it found that Transmission Owner Initial Funding should be allowed for MPFCAs entered into during the Interim Period;[16]
2. The Commission erred by finding that it would not be discriminatory to allow Transmission Owner Initial Funding for the Interim Period despite the fact that no transmission owner ever selected Transmission Owner Initial Funding prior to June 24, 2015;[17]
3. The Commission erred by finding that interconnection customers were on notice that the Commission's orders could be remanded and could have included language in PPAs and APAs to protect again harmful retroactive impacts;[18]
4. The Commission erred by ignoring its own precedent and court precedent regarding the abrogation of contracts;[19]
5. The Commission erred by finding that the impacts to interconnection customers from retroactive disruption of GIAs, MPFCAs, and FCAs is not so great that transmission owners or affected system operators should be deprived of an opportunity to earn a return on the capital costs of the network upgrades built on their system;[20] and

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15 18 C.F.R. § 385.713(c)(2) (2019).

16 *See* Administrative Procedure Act, Section 10(e), 5 U.S.C. section 706; *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("*Motor Vehicles*").

17 *See* Administrative Procedure Act, Section 10(e), 5 U.S.C. section 706; *Motor Vehicles*, 463 U.S. at 43.

18 *Id*.

19 *Id*.

20 *Id*.

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6. The Commission erred by failing to address the depreciation issues that it specifically asked to be addressed in briefs.[21]

III. REQUEST FOR REHEARING

A. The Commission Erred By Allowing Transmission Owner Initial Funding For MPFCAs For The Interim Period

In the Briefing Order, the Commission held that "transmission owners and affected system operators should have the unilateral right to elect the Transmission Owner Initial Funding option for *any GIA, FCA, or MPFCA* that became effective between June 24, 2015 and August 31, 2018 (i.e., during the interim period)."[22] As explained herein, the Commission should grant rehearing and find that the Transmission Owner Initial Funding option does not apply to MPFCAs for the Interim Period.

First, allowing Transmission Owner Initial Funding for MPFCAs would violate the Commission's filed rate doctrine. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."[23] It is undisputed that the MISO Tariff has never contained a provision that provides for Transmission Owner Initial Funding under an MPFCA. If MISO were to submit a filing to include that as part of its Tariff, that will be the first time it might be available and would have prospective effect only. MISO did that in Docket No. ER18-2513. No filed rate has ever existed that provides for Transmission Owner Initial Funding under an MPFCA.

It was reversible error for the Commission to completely ignore AWEA's filed rate doctrine arguments and apply Transmission Owner Initial Funding to MPFCAs for the Interim

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21 *Id*.

22 Briefing Order at P 125 (emphasis added).

23 *See AEP Appalachian Transmission Company, Inc.*, 164 FERC ¶61,180 at P 18 (2018) (*citing Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)).

Period. To satisfy the mandate of the Administrative Procedure Act, the Commission must respond meaningfully to objections raised and cannot simply ignore evidence in the record.[24]

Second, the complaint brought by Otter Tail in Docket No. EL15-36 did not request Transmission Owner Initial Funding for MPFCAs.[25] Instead, the complaint sought only to have the Commission order MISO to revise its "Tariff to include a provision in the pro forma FCA that permits an Affected System Operator to self-fund Network Upgrades."[26] There is no justification for the Commission to retroactively apply Transmission Owner Initial Funding for MPFCAs for the Interim Period. At best, the Commission could find that Transmission Owner Initial Funding should apply to MPFCAs on a prospective basis, which is what it did in Docket No. ER18-2513, accepting MISO's Tariff revision to add Transmission Owner Initial Funding for MPFCAs effective August 31, 2018.

B. The Commission Erred By Finding That It Would Not Be Discriminatory To Allow Transmission Owner Initial Funding For The Interim Period Despite The Fact That No Transmission Owner Ever Selected Transmission Owner Initial Funding Prior To June 24, 2015

In ordering Transmission Owner Initial Funding for the Interim Period as a remedy, the Commission claimed that it was seeking "to return the parties to the position they would be in if the Commission had not issued the now-vacated orders."[27] This rationale is not supported by the facts and should be reversed on rehearing. Allowing Transmission Owner Initial Funding for the

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[24] *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 543-44 (D.C. Cir. 2010) ("The Commission must respond to objections and address contrary evidence in more than a cursory fashion."); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011) ("Among other things, '[a]n agency's "failure to respond meaningfully" to objections raised by a party renders its decision arbitrary and capricious.'") (*quoting PPL Wallingford Energy, LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (*quoting Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001))).

[25] *See Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, Complaint and Request for Fast Track Processing of Otter Tail Power Company Against the Midcontinent Independent System Operator, Inc., Docket No. EL15-36-000 (filed Jan. 12, 2015).

[26] *Id*. at 22.

[27] *Id*. at P 126.

Interim Period when, apart from one transmission owner in one agreement in 2013, no transmission owner ever selected it prior to the start of the Interim Period is per se discriminatory.

As AWEA explained in its briefs, Transmission Owner Initial Funding is not new and MISO's pro forma GIA has included the opportunity for Transmission Owner Initial Funding since 2005.[28] Under the Commission's Briefing Order, a transmission owner who did not apply Transmission Owner Initial Funding to all interconnection customers from 2005 through June 23, 2015, could now choose to apply it to all interconnection customers for the Interim Period. All interconnection customers for the period 2005 through the end of the Interim Period, August 31, 2018, are similarly situated with respect to Transmission Owner Initial Funding. Treating similarly-situated customers differently in such a manner would be patently discriminatory in violation of the FPA.[29]

Any disparate treatment with respect to rates must be supported by a difference in facts or else it is unduly discriminatory.[30] There is no support for allowing a MISO transmission owner to subject an interconnection customer with a GIA executed between June 24, 2015 and August 31, 2018 to Transmission Owner Initial Funding when that same transmission owner did not elect Transmission Owner Initial Funding in any GIA it executed prior to June 24, 2015.[31] There is no difference in facts to justify different rate treatment and hence is per se discriminatory per court

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[28] AWEA Initial Brief at 5.

[29] *See, e.g.*, *Midcontinent Independent System Operator, Inc.*, 149 FERC ¶ 61,099 at P 5 (2014) (explaining "The Commission [previously] found that the fact that the Tariff gives the transmission owner the sole discretion to choose between Option 1 and Option 2 creates opportunities for undue discrimination 'by affording a transmission owner the discretion to increase the costs of interconnection service by assigning both increased capital costs, as well as non-capital costs ... to particular interconnecting generators, but not others.'") (footnote and citation omitted).

[30] *St. Michaels Municipal Utils. Comm'n v. FPC*, 377 F.2d 912 (4th Cir. 1967) ("[D]ifferences in rates are justified when they are predicated upon differences in facts – cost of service or otherwise – and where there exists a difference in rates which is attacked as illegally discriminatory, judicial inquiry devolves on the question of whether the record exhibits factual differences to justify classifications among customers and differences among the rates charged them.").

[31] Transmission Owner Initial Funding under a GIA has been available since 2005 while Transmission Owner Initial Funding for FCAs would be available no earlier than June 24, 2015. Transmission Owner Initial Funding has never been available under an MPFCA until August 31, 2018.

precedent applying the FPA.[32] Under this scenario, both sets of interconnection customers must pay for network upgrades to connect to that transmission owner's grid and both sets of interconnection customers compete to sell power within MISO. This requires that both sets of interconnection customers be subjected to the same network upgrade cost methodology (i.e., rate).[33] Transmission Owner Initial Funding is more costly to the interconnection customer under this scenario.

To AWEA's knowledge, Transmission Owner Initial Funding was rarely elected in a MISO GIA prior to June 24, 2015. In recognition of this fact, AWEA urged the Commission, at the very least, to specifically find and rule that, if a MISO transmission owner did not elect Transmission Owner Initial Funding in a GIA it executed prior to June 24, 2015, then the transmission owner would be precluded from doing so going forward under the no undue discrimination clause of the Federal Power Act. The Commission completely neglected to address this AWEA argument in the Briefing Order in clear violation of the Administrative Procedure Act. The Commission acknowledged "that re-opening existing GIAs, FCAs, MPFCAs may increase costs to certain interconnection customers or result in disruption to schedules" but summarily decided that these costs and disruptions were justified.[34] This type of cursory treatment of AWEA's arguments does not withstand scrutiny under the Administrative Procedure Act and should be reversed on rehearing.

Moreover, the Commission also failed to weigh the fact that certain transmission owners argued in their briefs that the Commission *should not look back retroactively*.[35] These

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[32] *See also Cities of Newark, DE, et al. v. FERC*, 763 F.2d 533 (3rd Cir. 1985).

[33] *See Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122 (D.C. Cir. 2011) (vacating FERC orders that subjected competing generators in MISO to differing competitive market rate schedule as a violation of the undue discrimination clause of the Federal Power Act).

[34] Briefing Order at P 128.

[35] *Midcontinent Indep. Sys. Operator, Inc*., Post Remand Initial Brief of Xcel Energy Services, Inc. on Behalf of the Northern States Power Operating Companies, Docket No. EL15-68-003, et al. at 13 (Oct. 1, 2018) ("As a matter

transmission owners were aware of the potential for undue discrimination and harm that would result if the Commission were to retroactively allow Transmission Owner Initial Funding for the Interim Period. The Commission rejected Xcel's request that the Commission confirm that, if retroactive unilateral Transmission Owner Funding were allowed, transmission owners would be allowed to apply the retroactive unilateral election of Transmission Owner Initial Funding to network upgrade costs assigned to non-affiliate interconnection customers and not to network upgrade costs assigned to affiliate interconnection customers.[36] Not only did the Commission ignore AWEA's warnings about potential discriminatory outcomes, it also ignored similar arguments made by transmission owners. The Commission's cursory conclusions are not supported by the evidence in the record provided by both interconnection customers *and* transmission owners. This is not a just and reasonable outcome and use of the Commission's discretionary remedial authority.

C. The Commission Erred By Finding That Interconnection Customers Were On Notice That The Commission's Orders Could Be Remanded And Could Have Included Language In PPAs And APAs To Protect Against Harmful Retroactive Impacts

The Commission acknowledged the "potentially disruptive consequences" of its decision on PPA and APAs "that are not filed with the Commission but that may be affected by our decision here[.]"[37] The Commission dismissed these concerns outright and stated simply that "parties were on notice that the Commission's previous orders could be remanded or vacated, and, therefore,

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of policy, XES and the NSP Companies generally oppose allowing the unilateral self-fund option language to now be inserted into the FCA and MPFCA forms executed during the period June 24, 2015 and August 31, 2018."); *Midcontinent Indep. Sys. Operator, Inc*., Initial Brief of Alliant Energy Corporate Services, Inc. on Issues Raised in Order on Remand, Docket No. EL15-68-003, et al. at 7 (Oct. 1, 2018) ("It would be unreasonable and inconsistent with those orders for the FERC to order revision of any of the GIAs listed above, each of which is currently in effect, to allow ITC Midwest to elect unilaterally to adopt the Transmission Owner Funding option retroactively.").

[36] Briefing Order at P 131.

[37] *Id.*

these parties could have included language in such contracts to address the possibility that the Commission's orders would be vacated and limit the need for renegotiation in that event."[38]

The cases cited by the Commission in support of this notice argument are unavailing. In *West Deptford Energy, LLC v. FERC,*[39] the D.C. Circuit reviewed the Commission's use of the "notice exception" to the filed rate doctrine. The D.C. Circuit held that the notice exception applies in the following two scenarios: 1) it permits the filing of tariffs that provide a formula for calculating rates, rather than a specific rate number and 2) it applies when judicial invalidation of Commission decisions has resulted in retroactive changes in rates.[40]

At first glance it appears that the second scenario may apply here in light of the D.C. Circuit's invalidation of the Commission's original orders. However, this notice exception to the filed rate doctrine has been applied by courts in cases where "ongoing litigation and absence of a final, non-appealable order--provided the necessary notice to the [customers] that they might have to pay rates up to the level originally filed."[41] The necessary notice in this case could not have been provided until, at the *earliest*, February 26, 2016 when the petition for review was filed at the D.C. Circuit. Parties negotiating PPAs and APAs at the beginning of the Interim Period did not have the necessary notice that a court may invalidate their agreements or that the Commission might abrogate them in an order to be issued more than four years in the future.

In *West Deptford,* the D.C. Circuit chastised the Commission for attempting to stretch the notice exception to the filed rate doctrine too far.[42] The Court held "charging customers with notice of every statement in every pleading submitted in proceedings to which they are not even

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38 *Id*.

39 766 F.3d 10, 22-23 (D.C. Cir. 2014) ("West Deptford").

40 *Id*.

41 *See Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299-300 (D.C. Cir. 2001); *Western Resources, Inc. v. FERC*, 72 F.3d 147, 151 (D.C. Cir. 1995).

42 *West Deptford*, 766 F.3d at 23.

parties is a far logical leap from the discrete categories to which the notice exception has generally been limited."[43] The Commission has done the same thing in this case. It strains credulity to suggest that an interconnection customer could have any notice, let alone adequate notice as required by the Federal Power Act, that the Commission's orders on the original Otter Tail complaint would be vacated.

The PPAs and APAs at issue were executed prior to GIAs, FCAs, and MPFCAs in order to be in a position to realize the value of the Federal Production Tax Credit ("PTC").[44] Generation developers are now facing the December 31, 2020 PTC deadline and PPA and APA pricing was predicated on meeting that date. This is further evidence that, at the time the PPAs and APAs were executed, interconnection customers did not have actual notice that the agreements would be abrogated by the Commission in the future or that the Commission would completely upend the industry. It is arbitrary and capricious, an abuse of discretion and a disregard of substantial evidence in the record for the Commission to find that the parties were aware of the need to include language in PPAs and APAs to address the possibility that the Commission's orders would be vacated at some future date.

Furthermore, the Commission faulted interconnection customers for failing to include protective language in their agreements yet failed to acknowledge that transmission owners could have just as easily inserted language into all GIAs, FCAs, and MPFCAs for the Interim Period reserving their rights. Here, the transmission owners were well aware of the FERC proceedings in these dockets, the Commission orders, and the D.C. Circuit proceeding, but did nothing to preserve the right to apply Transmission Owner Initial Funding if the Commission orders were overturned. As AWEA explained in its briefs, the Commission has accepted GIAs that preserve

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43 *Id.*

44 AWEA Initial Brief at 3.

rights when policy impacting network upgrade costs are at issue.[45] Transmission owners did not do the same here and generation developers relied on the terms of executed GIAs. The Commission ignored this fact and ending up placing the blame on the interconnection customers when faced with competing policies: whether to not abrogate contracts and cause disruption versus retroactively restoring the right of the transmission owners to elect unilateral Transmission Owner Initial Funding. There is no justification for the Commission's application of the filed rate doctrine notice exception to interconnection customers but not to transmission owners.

D. The Commission Erred By Ignoring Its Own Precedent And Court Precedent Regarding The Abrogation Of Contracts

As stated above, the Commission dismissed concerns regarding the disruptive consequences of abrogating contracts because it believed that parties were on notice and could have taken steps to address the possibility that the Commission's orders would be vacated.[46] The Commission's finding is in direct conflict with its own precedent and court precedent regarding the abrogation of contracts.

The Commission's "long-standing policy, consistent with a substantial body of Supreme Court and other judicial precedent, has been to recognize the sanctity of contracts."[47] Until the Briefing Order, the Commission had deviated from that policy in "extreme circumstances, such as the fundamental industry-wide restructuring under Order No. 888 and the reorganization of a

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[45] *See, e.g.*, GIA filed with the Commission in Docket No. ER11-3326 on April 4, 2016, Appendix A, section 11.2 ("Pursuant to Midwest Independent Transmission System Operator, Inc., 129 FERC ¶ 61,060 (2009) ('RECB III Order'), this agreement is subject to the currently effective transmission crediting provisions of Attachment FF (effective July 10, 2009) on file at the Commission. Any subsequent Commission order on rehearing or federal court appeal of the RECB III Order that revises the transmission crediting provisions may be applicable to this GIA.").

[46] Briefing Order at PP 128, 130.

[47] *PacifiCorp v. Reliant Energy Services et al.*, 99 FERC ¶ 61,381 at P 25 (2002) (citations omitted) ("PacifiCorp"). *See also E.ON Climate & Renewables North, America LLC v. Northern Indiana Public Service Co.*, 149 FERC ¶ 61,217 at P 41 (2014) ("The Commission has long respected the sanctity of contracts and continues to do so.").

bankrupt utility."[48] The Commission acknowledged that "Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty, including certainty that the Commission will not modify market-based contracts unless there are extraordinary circumstances."[49]

The Supreme Court has explained that to abrogate an existing contract, the Commission must determine that circumstances are so burdensome that it would "adversely affect the public interest – as where it might impair the financial ability of the public utility to continue service, cast upon consumers an excessive burden, or be unduly discriminatory."[50] No such extraordinary circumstances exist here. There is no evidence of any risk to the financial ability of a transmission owner to continue service yet generation developers and interconnection customers will be financially harmed and will experience "an excessive burden," as described by the Supreme Court.

The Commission's thin analysis in the Briefing Order is absolutely devoid of any acknowledgment of the high burden it must meet before abrogating contracts. There has been no demonstrated need to retroactively reform existing agreements to allow for unilateral Transmission Owner Initial Funding and the Commission did not support its finding with any evidence whatsoever. In dissent, Commissioner Glick succinctly explains the error of the Commission's purported analysis:

> Transmission owners failed to produce any evidence of actual harm they have or will experience if the Commission leaves the existing agreements in place. The interconnection customers, on the other hand, demonstrated with empirical evidence the substantial harm that they will incur if the Commission revises the existing agreements. The Commission must weigh *these* facts and *these* equities in coming to a decision. The Commission cannot discount that allowing revision of the agreements at issue would "pull the economic rug out from under" interconnection customers that

48 PacifiCorp at P 25.

49 *Id.*

50 *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956).

> "made operational decisions in reliance" on MISO's Tariff at the time that they executed their agreement(s) and "would be unable to 'undo' those transactions retroactively in light of the new, corrected rates."[51]

It is well settled that an agency departing from prior precedent "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[52] Here, the Commission swerved so sharply from prior precedent regarding contract abrogation with hardly any explanation at all. This is arbitrary and capricious and an abuse of discretion in violation of the Administrative Procedure Act and should be reversed on rehearing.

E. The Commission Erred By Finding That The Impacts To Interconnection Customers From Retroactive Disruption Of GIAs, MPFCAs, And FCAs Is Not So Great That Transmission Owners Or Affected System Operators Should Be Deprived Of An Opportunity To Earn A Return On The Capital Costs Of The Network Upgrades Built On Their System

The Commission's justification for abrogating Initial Period contracts was that it did not believe that the disruptive consequences to interconnection customers were so great that transmission owners of affected system operators should be deprived of any opportunity to earn a return on the capital costs of the network upgrades built on their system that should have been expressly allowed under the MISO Tariff during the Interim Period.[53] Yet again, this Commission finding is conclusory and lacks support.

Commission findings must be supported by substantial evidence in the record.[54] In *Ameren*, the D.C. Circuit stated that "in the absence of evidence [of actual discrimination], the

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51 Briefing Order at Glick Dissent P 11 (emphasis in original) (citations omitted).

52 *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970) (citations omitted).

53 Briefing Order at P 128.

54 *Williston Basin Interstate Pipeline Co. v. FERC*, 358 F.3d 45, 48 (D.C. Cir. 2004) (The Commission must make a "reasoned decision based upon substantial evidence in the record.").

Commission *must at least rest on economic theory and logic*."[55] The Court agreed that the Commission's underlying decisions lacked both.[56] Here again, the Commission comes to an unsupported conclusion that fails to rely on evidence, economic theory, or logic.

The Commission failed to explain how the impact on interconnection customers is not so great or what evidence, if any, it weighed in the record to make that decision. This Commission statement ignores that transmission owners always have had the opportunity to earn a return and roll into rate base as the Briefing Order specifically notes. There is no deprivation. Rather, the transmission owner simply needed to elect what the Commission has allowed since 2003 and is still part of MISO's Tariff. The fact that no transmission owner chose to do so in GIAs and FCAs executed during the Interim Period does not amount a deprived opportunity to earn a rate of return, and the Commission failed to explain why that is not the case.

By contrast, generation project development companies and interconnection customers are not utilities that have means to recover unexpected costs in regulated rates; they have no rate base on which to fall back. These are the parties that will suffer the greatest harm if the Interim Period contracts are abrogated. In contrast to no evidence submitted by any transmission owner quantifying any harm from a lack of applying Transmission Owner Interconnection Funding to agreements during the Interim Period, AWEA submitted evidence showing that the impacts will increase costs to each interconnection customer by 30-40% on a net present value basis. With MISO identifying 100 agreements at issue, the increased costs by interconnection customer and to the generation development and ownership industry will be astronomical, *i.e.*, multiple hundreds of millions; and this does not even take into account the collateral damage with cost shifts under PPAs and APAs with third parties.

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55 Ameren at 579 (emphasis added).

56 *Id.*

AWEA respectfully submits that the remedy Commission adopted in the Briefing Order is not just and reasonable and is an abuse of its discretionary remedial authority. On one side, there are severely increased costs (with no increased service) and disruption to existing arrangements. On the other side, there is (i) the Commission's decision that transmission owners should be able to retroactively have the opportunity to exercise their right to charge Transmission Owner Interconnection Funding so they can earn a rate of return (although these transmission owner could have just as easily earned that same rate of return from the start by choosing to following the Order No. 2003 path and roll the cost into transmission rate base, but none did), and (ii) a right that, at best, should be retroactively reinstated if there is a need per *Hope*,[57] but not one transmission owner provided any evidence of a need to exercise that right. Indeed, all MISO transmission owners reported strong financial health with abundant sources of capital to provide services before, during and after the Interim Period which continues to today in 2020. Retroactively imposing the opportunity to exercise a right simply because it is a right is not a rational conclusion in the face of severe harm to interconnection customers and no harm to transmission owners or their ability to serve per *Hope*.

F. The Commission Erred By Failing To Address The Depreciation Issues It Specifically Asked To Be Addressed In Briefs

In the Ameren Remand Order, the Commission ordered briefing on several depreciation issues. Specifically, the Commission asked parties to address the following.

> For GIAs entered into between June 24, 2015 and the date of this order, that the relevant transmission owner wants to elect the Transmission Owner Initial Funding option for, should the network upgrade principal subject to such election be valued at the construction cost minus depreciation? If so, from what date should the network upgrades be depreciated from (e.g., in service date), what time frame should the network upgrades be depreciated over (e.g., useful life or initial term of the relevant agreement), and what

[57] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

> depreciation rates should apply? Should the interconnection customer instead receive the undepreciated value of the network upgrade in repayment by the transmission owner? Should the interconnection customer be repaid in one lump sum payment or with several payments over time?[58]

In response, the parties filed extensive briefs explaining how depreciation should be treated.

AWEA argued that, in addition to what the Commission asked, there are other depreciation issues that the Commission must consider.[59] AWEA explained that generation owners may have already begun depreciating the investment in network upgrades on their books.[60] Whereas the transmission owner typically uses straight-line depreciation, the generation developer typically applies accelerated depreciation in the early years and that accelerated depreciation is recorded as an expense for federal and state income tax purposes.[61] AWEA concluded that if the Commission is nonetheless inclined to allow retroactive application of Transmission Owner Initial Funding, then the amount to be reimbursed should be provided in a lump-sum and at the depreciated amount.[62] Even Ameren argued that any repayment should be a lump sum minus depreciation if the network upgrade is in service.[63]

The Commission dismissed the evidence in the record regarding the appropriate treatment of depreciation and instead declined "to require a specific method for the calculation of depreciation."[64] It was arbitrary and capricious and an abuse of discretion for the Commission to leave this issue open-ended despite significant briefing explaining the appropriate treatment of depreciation. This leaves an opportunity for further discord and disagreement as MISO files to

58 Ameren Remand Order at P 36(4).
59 AWEA Initial Brief at 18.
60 *Id*.
61 *Id.*
62 *Id*.
63 *Midcontinent Indep. Sys. Operator, Inc.*, Initial Brief of the Ameren Companies and the ITC Companies, Docket No. EL15-68-003, *et al*. at 14-15 (Oct. 1, 2018).
64 Briefing Order at P 140.

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implement the Commission's mandates in the Briefing Order. AWEA respectfully requests that the Commission take action on rehearing expeditiously to reverse its findings and stem some of the bleeding that its Briefing Order has caused.

IV. CONCLUSION

For the foregoing reasons, AWEA respectfully requests that the Commission expeditiously grant rehearing of the Briefing Order as discussed above. Rehearing is necessary to ensure just and reasonable outcomes and to prevent undue discrimination with respect to the Interim Period.

Respectfully submitted,

/s/ Gene Grace

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January 21, 2020

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served this day upon each person designated on the official service list compiled by the Secretary in these dockets.

Dated at Washington, DC this 21st day of January 2020.

/s/ Gene Grace

_____

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