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VIA ELECTRONIC FILING

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Midwest Independent Transmission System Operator, Inc.
FERC Docket No. ER13-__000
Notice of Termination of Generator Interconnection Agreement

Dear Secretary Bose:

Pursuant to Section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d, and Part 35 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) regulations, 18 C.F.R. § 35.15, the Midwest Independent Transmission System Operator, Inc. (“MISO” or “Transmission Provider”) hereby tenders for filing a Notice of Termination of the Large Generator Interconnection Agreement (“Interconnection Agreement”)¹ among MEP-I LLC, a limited liability company organized and existing under the laws of the State of Minnesota (“Interconnection Customer”), Minnesota Power, a division of ALLETE, Inc., a corporation organized and existing under the laws of the State of Minnesota (“Transmission Owner”), and MISO. The project has been designated as Project No. G519 (“Project G519”).

I. BACKGROUND

On July 9, 2007, MISO, Interconnection Customer, and Transmission Owner entered into the Interconnection Agreement for Project G519. The Interconnection Agreement conformed to the MISO *pro forma* LGIA in effect at the time. Accordingly, the Interconnection Agreement was not filed at the Commission.² MISO designated the Interconnection Agreement as Original Service Agreement No. 1876, under the MISO Tariff.

¹ MISO’s *pro forma* Generator Interconnection Agreement (“GIA”) is contained in Appendix 6 of Generator Interconnection Procedures (“GIP”) in Attachment X of the MISO Tariff.

² See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, 104 FERC ¶ 61,103 (2003) (“Order No. 2003”), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004) (“Order No. 2003-A”), *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004) (“Order No. 2003-B”), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005) (“Order No. 2003-C”), *aff’d sub nom. National Association of Regulatory Utility Commissioners v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007). Because the Interconnection Agreement

As explained in the attached Exhibit 1, Interconnection Customer has breached its obligations under the Interconnection Agreement by failing to provide a deposit for restudy after suspending its obligations under the Interconnection Agreement for three years. The restudy was necessary after the suspension to update Transmission Owner's cost and schedule for Project G519. Details related to the Breach and Default under the Interconnection Agreement reference non-public confidential information. Accordingly, the details of the Breach and Default are addressed in the non-public Exhibit 1 and the Interconnection Agreement is attached as Exhibit 2. Interconnection Customer has not cured its Breach and is now in Default as defined in the Interconnection Agreement and described in Exhibit 1 and **Part II.A** below. Accordingly, MISO asks that the Commission accept the instant Notice of Termination because termination of this Interconnection Agreement is just and reasonable, not unduly discriminatory, and consistent with the public interest for the reasons discussed below in **Part II.B.**³ Specifically, Interconnection Customer's continued presence in the MISO interconnection queue while in Default of its obligations under the Interconnection Agreement causes harm to Transmission Owner, MISO, and to other projects in the queue for the reasons discussed below in **Part II.B.1**. In addition, termination of the Interconnection Agreement will benefit other projects by increasing certainty regarding needed upgrades which will help to expedite the queue process as discussed below in **Part II.B.2**.

II. NOTICE OF TERMINATION

MISO respectfully requests that the Commission terminate the Interconnection Agreement for the following reasons: **(A)** Interconnection Customer is in Default under the Interconnection Agreement, was provided written Notices of Breach and of Default, and has not acted to cure under the Interconnection Agreement, and **(B)** termination of the Interconnection Agreement is just and reasonable, not unduly discriminatory, and is consistent with the public interest as more fully described below.

A. Default under the Interconnection Agreement

conformed to the *pro forma* LGIA in effect at the time of execution, it was not filed with the Commission. See Order No. 2003 at P 915 ("if an interconnection agreement conforms with a Commission-approved standard form of interconnection agreement, the utility does not have to file it but must report it in the Electric Quarterly Reports").

³ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008 (2011) ("*Lakeswind*") (excerpted below), *order on reh'g and clarification*, 141 FERC ¶ 61,097 (2012) ("*Lakeswind Rehearing Order*").

As explained in Exhibit 1, Interconnection Customer is in Breach and Default under the Interconnection Agreement for failing to provide a restudy payment so that the milestones in its Interconnection Agreement could be revised after it suspended its obligations under the Interconnection Agreement for three years.⁴ Failure to fund the restudy is a material term of the Interconnection Agreement.⁵ The Interconnection Agreement and other relevant documents are attached as additional exhibits. Article 11.3.2 of the Interconnection Agreement and MISO's GIP require Interconnection Customer to fund the restudy. MISO will take appropriate steps to terminate projects that do not meet the terms of related agreements as well. For example, if an interconnection customer, refused to make payments under a related FCA or MPFCA, MISO would act to terminate the FCA (or to terminated that project from the MPFCA), its interconnection request will be withdrawn from MISO interconnection queue, and MISO may declare a breach under the interconnection customer's GIA.⁶

⁴ MISO also notes that Article 5.16.1 of the Interconnection Customer's GIA provides that if the Interconnection Customer requests suspension "and has not requested Transmission Owner to recommence the work required under this LGIA on or before the expiration of three (3) years following commencement of such suspension, this LGIA shall be deemed terminated."

⁵ Under the definitions in Article 1 of the Interconnection Agreement, a "**Breach** shall mean the failure of a Party to perform or observe any material term or condition of this LGIA." Interconnection Agreement, Art. 1 ("Definitions") (emphasis in original). These terms and conditions may include milestone payments or other activities required for the transmission owner to start the construction that are listed in the appendices of the GIA. See Interconnection Agreement, Art. 30.4 (noting that "[t]his GIA, including all Appendices and attachments hereto, constitutes the entire agreement between the Parties[.]"). The terms and conditions in the appendices of a GIA may include requirements to fund upgrades on affected transmission systems under separate agreements. Accordingly, a failure to meet obligations under a related Facilities Construction Agreement ("FCA") or a Multi-Party Facilities Construction Agreement ("MPFCA") is a breach of the interconnection customer's GIA as well. Although the Article 30.4 provides that no other agreements constitute any condition to a Party's compliance with its obligations, a requirement to enter into a related FCA and MPFCA as part of a GIA is still a material term of the GIA itself because it is a requirement for Interconnection Service under the GIA.

⁶ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,301 at P 29 (2009) ("*Queue Reform II Order*") (conditionally accepting tariff revisions creating the MPFCA and Common Use Upgrades ("CUU") to provide a cost-sharing mechanism that places the cost responsibility with identifiable, queued generation that would require the CUU). A letter order accepting revisions directed by the *Queue Reform II Order* issued on August 20, 2010 in Docket No. ER09-1619. The MPFCA requires irrevocable security to fund CUU and provides for termination and a breach of the GIA if this condition is not met. MPFCA at Art. 6.1 (explaining that "[i]f an Interconnection Customer fails to provide acceptable irrevocable security pursuant to Article 6.1, Interconnection Customer will be terminated from this Agreement, its Interconnection Request will be withdrawn from the Transmission Provider's interconnection queue, and Transmission Provider may declare a breach under Interconnection Customer's related GIA, if any, and seek termination thereof."); *Queue Reform II Order*, 129 FERC ¶ 61,301 at P 51 (discussing Art. 6.1); see also *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233 at P 190 (2012) ("*Queue Reform III Order*") (allowing Transmission Provider to subject a project to restudy, under the GIP in effect at the time of the restudy, when it comes out of suspension if the Transmission Provider determines that such a restudy is necessary).

Pursuant to Articles 2.3.2 and 2.3.3 of the Interconnection Agreement, any non-Breaching Party may terminate the Interconnection Agreement upon the Default of a Breaching Party with the termination being effective after compliance with all “Applicable Laws and Regulations” as defined in Article 1 the Interconnection Agreement, which includes the filing of this Notice of Termination at the FERC. Article 1 also defines “Default” as “the failure of a Breaching Party to cure its Breach in accordance with Article 17 of this LGIA.” Article 17.1.1 provides that the failure of a Breaching Party to cure a Breach within thirty (30) Calendar Days of receiving such notice shall result in a Default under the Interconnection Agreement, provided that Interconnection Customer shall have up to ninety (90) Calendar Days to cure the Breach where such Breach is not capable of cure within thirty (30) Calendar Days and the Breaching Party commences such a cure within thirty (30) Calendar Days after notice and “continuously and diligently complete[s] such cure within ninety (90) Calendar Days from receipt of the Breach notice[.]” Such continuous and diligent effort to complete a cure should amount to more than a bare minimum attempt to cure and the Commission should consider the level of effort in evaluating whether efforts to cure are appropriately “continuous and diligent.” For example, a payment of at least fifty percent (50%) of a monetary milestone would support a finding of a diligent effort to cure. Regardless, an incomplete effort to cure is not sufficient to prevent a Default. The cure must be completed within the timeframe of ninety (90) Calendar Days from receipt of the Breach in order for the Breach to cease under Article 17.1.1. As detailed in Exhibit 1, Interconnection Customer is now in Default under the Interconnection Agreement.⁷

A Notice of Breach, Notice of Default, and Notice of Termination have been provided to Interconnection Customer under the terms of the Interconnection Agreement. The Notice of Termination to Interconnection Customer indicated the intent to seek termination of the Interconnection Agreement based on Interconnection Customer’s Default.⁸ To MISO’s knowledge, Interconnection Customer has not taken appropriate steps to fulfill its obligations and cure the Breach or Default or to place any disputed amount in escrow as required by the Interconnection Agreement.⁹ Therefore, Interconnection Customer is in Default, and MISO, on behalf of itself and Transmission Owner, is filing the instant Notice of Termination seeking to have the Interconnection Agreement terminated pursuant to the terms of Article 2.3 of the Interconnection Agreement. MISO respectfully requests that the Commission accept the Notice of Termination for the reasons outlined below and in the attached exhibits.

⁷ See GIA at Art. 17.1. Exhibit 1 discusses the specifics of the Default at issue here.

⁸ See *id.* at Art. 17.1.2 (stating that if a Breaching Party has not cured within 30 days (or 90 days under some circumstances) “the non-Breaching Party . . . shall have the right to terminate this GIA by written notice to the Breaching Party at any time until cure occurs”); see also *id.* Article 2.3.3 (providing that Termination shall not be effective until filed with and accepted by the Commission).

⁹ *Id.* at Art. 12.4 (requiring payment of disputed amounts to Transmission Provider or Transmission Owner or to an escrow account in the event of a “billing dispute” and permitting a Notice of Default pursuant to Article 17 if no such payment is made).

B. Termination of the Interconnection Agreement is just and reasonable, not unduly discriminatory, and consistent with the public interest because termination will end the harm created by Interconnection Customer's Default, appropriately enforce the terms of the Interconnection Agreement, and increase certainty for other projects in the queue.

As discussed above and in Exhibit 1, Interconnection Customer's Default provides grounds for termination under Articles 2 and 17 of the Interconnection Agreement. In its order regarding the Lakeswind generation project ("*Lakeswind*"), the Commission articulated its standard as follows:

Commission precedent supports acceptance of a notice of termination if the applicant demonstrates that the proposed termination is not unjust, unreasonable, unduly discriminatory or preferential, or if it is consistent with the public interest. When considering whether to extend milestones or to grant or extend a suspension, the Commission takes into account many factors, including whether the extension would harm generators lower in the interconnection queue and any uncertainty that speculative projects may present to other projects in the queue.¹⁰

The Commission should accept this Notice of Termination under this standard because doing so (1) will eliminate the harm to lower queued projects, projects in the same Group Study, the Transmission Owner, and the MISO interconnection queue process caused by this project if it remains in the queue, and (2) will benefit other projects by removing uncertainty regarding whether the upgrades in the Interconnection Agreement will be built. These considerations are discussed below in Parts **II.B.1** and **II.B.2**.

In addition, termination of the Interconnection Agreement is appropriate because neither the suspension under the Interconnection Agreement nor the extension of milestones referenced in Paragraph 25 of the *Lakeswind* order (quoted above) is a permissible option. As explained in Exhibit 1, no additional suspension time can be permitted for this project and the milestones cannot be extended, because the suspension period has expired.¹¹ To permit a project to evade the limits in the suspension provision without first curing a Default would permit a "*de facto* suspension."¹² In the *Lakeswind Rehearing Order*, the Commission clarified that key factors in

¹⁰ *Lakeswind*, 137 FERC ¶ 61,008 at P 25 (citations omitted).

¹¹ *See* Exh. 1.

¹² In the *Lakeswind* proceeding, MISO referred to an interconnection customer's decision to Default under a Generator Interconnection Agreement ("GIA") as an impermissible "*de facto* suspension" because a project

its determination not to accept a notice of termination for Lakeswind's GIA were (1) whether any other projects were relying on network upgrades to be built by the interconnection customer and (2) Lakeswind's good faith efforts to cure its Default, including payment of security sufficient for the transmission owner.¹³ In this case, the Default has not been cured and MISO cannot permit the project to avoid its obligations or alter its milestones until its current Default is cured.¹⁴ Accordingly, MISO respectfully requests that the Commission accept the instant Notice of Termination for the reasons outlined below.

1. Termination of the Interconnection Agreement is just and reasonable, not unduly discriminatory, and consistent with the public interest because the Interconnection Customer's Default demonstrates that the project is not ready to proceed and the Commission has recognized the harm from retaining speculative projects in the queue.

Interconnection Customer's uncured Default under its executed Interconnection Agreement demonstrates that the project is speculative and the Commission has found that such a project is at a greater risk of not proceeding to commercial operation even though it has progressed to the GIA stage of the interconnection process.¹⁵ The Commission has found

that is in Default and remains in the queue without making progress towards commercial operation is, in fact, suspended as a practical matter. *See Lakeswind Rehearing Order*, 141 FERC ¶ 61,097 at P 32 (declining to find a "*de facto* suspension" because that term is not defined in the Tariff). The Commission should consider such delays as impermissible under the terms of the Tariff regardless of the shorthand term used and not permit an interconnection customer to disregard a signed contract with impunity.

¹³ *Id.* at P 34.

¹⁴ In the case of the Lakeswind project, the Commission noted that circumstances changed for the project in part because "preliminary results of the Group 5 Restudy indicat[ed] that network upgrades were no longer required for Lakeswind's project." *Id.* at P 33.

¹⁵ Under the Commission's Order No. 2003 paradigm, projects are studied in queue order and then execute an interconnection agreement governing the conditions of interconnection and cost of any upgrades needed for interconnection. *See Order No. 2003* at P 34-38 (providing an overview of the standardized interconnection process). MISO has revised its interconnection process to incorporate a "first-ready, first-served" paradigm in which the projects that are ready to proceed may move through the system more quickly in order to expedite the queue process. MISO's most recent revisions were proposed in part to eliminate the problem that occurs when a project reaches the late stage where a GIA is executed, but then does not proceed to commercial operation and withdraws from the queue. These "late-stage" withdrawals increase uncertainty for other projects and slow the queue process. The instant Notice of Termination is part of the ongoing effort to respond to conditions in the MISO footprint, particularly the "increase in the number of projects withdrawing in the later stages of the interconnection process." *Queue Reform III Order*, 138 FERC ¶ 61,233 at P 29-30, *order on reh'g and compliance filing*, 139 FERC ¶ 61,253 (2012) ("*June 27 Rehearing Order*"). On August 27, 2012, MISO filed with the Commission a Request for Clarification or, in the alternative, Rehearing of the *June 27 Rehearing Order*. On August 30, 2012, the

evidence that “simply having an executed GIA was not sufficient to demonstrate a commitment to achieve commercial operation[.]”¹⁶ MISO’s most recent queue reforms accepted in the *Queue Reform III Order* responded to the ongoing challenges created by the “late-stage terminations” that result from the decisions by interconnection customers who have executed a GIA to terminate their projects at that late stage of the interconnection process.¹⁷ Among the goals of queue reform, the Commission emphasized the goals of “getting projects that are not making progress toward commercial operation out of the queue, and helping viable projects achieve commercial operation as soon as possible.”¹⁸ Termination of this Interconnection Agreement would further these goals by removing a project that is not making progress towards commercial operation from the queue, thereby helping viable projects to achieve commercial operation more quickly by removing the increased risk that they would be subject to additional upgrades or restudies if this project does not proceed. By failing to meet its contractual obligations, Interconnection Customer has demonstrated that its project is not prepared to proceed at this time and is at increased risk for late-stage termination, an increased risk, which in turn, harms other projects in the queue.¹⁹

Two main harms to other projects occur if this project remains in the queue. First, the harm of uncertainty caused by speculative projects remaining in the queue has been quantified and discussed in the *Queue Reform III Order* and provides grounds for termination of this Interconnection Agreement. Specifically, the *Queue Reform III Order* accepted revisions to MISO’s GIP that require greater cash commitments for projects to remain in the queue based on the “*documented harm*” of shifts in network upgrade costs to a lower queued customer when a

Commission issued an Order Granting Rehearing for Further Consideration in response to MISO’s August 27, 2012 request. This request is pending at the Commission.

¹⁶ *June 27 Rehearing Order* 139 FERC ¶ 61,253 at P 34 (explaining that MISO submitted evidence supporting this conclusion); *id.* at P 39 (declining to exempt projects that are unable to meet GIA milestones from meeting the M2 milestone “readiness” payment under the GIP and declining to consider the impact of restudy to be a Force Majeure event that would justify suspending an interconnection customer’s obligations under a GIA).

¹⁷ *Queue Reform III Order*, 138 FERC ¶ 61,233 at P 68; *see id.* at PP 62, 64 & 146 (discussing the challenges that led to the *Queue Reform III Order* and the phenomenon of “queue churn” when projects enter and leave the queue).

¹⁸ *Id.* at P 30.

¹⁹ *Id.* at P 68 (explaining that “the number of projects that have withdrawn from the interconnection queue at the later stages of the interconnection process is indicative of it being too easy for projects that are not ready to proceed or that are not commercially viable from being able to enter the interconnection queue”). Lacking such a demonstration of readiness, an interconnection customer should not be able to execute a GIA in the hope that its project will become commercially viable at a later date, and then delay making the payments needed to move the required transmission facilities to completion.

late-stage higher queued interconnection customer exits the queue.”²⁰ In so doing, the Commission acknowledged that requiring a project to meet obligations to demonstrate its readiness to proceed in order to remain in the queue would reduce this risk of cost shifting from late-stage terminations. The Commission also accepted other increased requirements to retain a queue position as consistent with this rationale and with the Commission’s guidance to expedite the processing of the queue and to “increase the likelihood that only projects that are likely to be commercially viable are in the queue.”²¹ Specifically, MISO’s GIP now requires an “Initial Payment” milestone soon after execution of a GIA to demonstrate readiness as a means to limit this risk of late-stage termination. This Initial Payment milestone prevents customers from building long lead times into projects, executing a GIA, and then deciding to withdraw much later when those payments come due.²² After reviewing the evidence, the Commission “agree[d] with MISO that the customer’s ability to build long lead times into its milestones while taking no action towards achieving commercial operation coupled with the lack of a financial commitment to reach commercial operation *has significantly contributed to the problem of late-stage terminations and the potential for cascading and iterative restudies.*”²³

This potential for cascading restudies represents a second harm to lower queued projects and projects in the same Group Study. A project in Default that remains in the queue harms others by increasing the uncertainty that a restudy for other projects will be needed. When a project withdraws, it may trigger a restudy which could result in a different set of upgrades being needed for other projects lower in the queue or in the same group study as the withdrawn project.

²⁰ *June 27 Rehearing Order*, 139 FERC ¶ 61,253 at P 71 (explaining the “documented harm” as justification for upholding the M2 milestone “cash at risk” payment as an indicia of a project’s readiness to proceed) (emphasis added). MISO provided evidence of the impact of late-stage terminations in its filings in Docket No. ER12-309. *See id.* at P 70 (citing evidence); *Queue Reform III Order*, 138 FERC ¶ 61,233, at PP 63-68 (discussing evidence of backlog in the queue). *See also Lakeswind Rehearing Order*, 141 FERC ¶ 61,097 at P 33 (discussing these revisions to the Tariff and noting that the outcome in the *Lakeswind* proceeding is “limited to the particular facts presented[,]” and “acknowledg[ing] that there are backlogs in MISO’s interconnection queue that would be exacerbated by interconnection customers seeking to delay progress of their interconnections.”).

²¹ *Queue Reform III Order*, 138 FERC ¶ 61,233 at P 147.

²² *Id.* at P 170 & 178. The *Queue Reform III Order* also introduced a new capital contribution requirement (the “M2 milestone payment”) when a project entered the Definitive Planning Phase. *Queue Reform III Order*, 138 FERC ¶ 61,233 at P 119. The “M2 milestone payment” is now due when a project enters the Definitive Planning Phase (“DPP”). The *Queue Reform III Order* further concluded that “as stated previously, the consequence of late-stage terminations can be multiple and iterative restudies for lower-queued customers. Thus, if the proposed M2 milestone succeeds in significantly reducing such late-stage terminations, we anticipate that projects with viable business plans will more easily and quickly reach commercial operation.” *Id.* at P 147.

²³ *Id.* at P 178 (emphasis added); *see id.* at P 179 (“While underfunded projects may decide to withdraw from the queue, independent developers that have properly funded their projects should benefit from the increased efficiency of the interconnection process.”).

Because the MISO queue often uses group studies, if a project in Default under its GIA is allowed to remain in the queue and then withdraws at a very late stage (*i.e.*, it becomes a “late-stage termination”), there is an increased chance that such a withdrawal will trigger “cascading” restudies for numerous projects lower in the queue.²⁴ As explained in the *Queue Reform III Order*, when one project withdraws, MISO must consider the impact of the withdrawal on projects in the same group study and lower-queued projects. Often, withdrawals lead to “cascading” restudies that involve restudy of these other projects.²⁵ Such restudies may change the network upgrades needed to support the interconnection of the remaining projects in the group or lower-queued projects. As a result of these changes, other projects may then decide to withdraw thereby triggering a cycle of further cascading restudies impacting projects even lower in the queue. The decisions of higher-queued projects to withdraw or not pursue their projects are beyond the control of MISO. However, permitting projects to remain indefinitely in the queue is incompatible with effective processing of the queue.²⁶ Therefore, the appropriate method for the Commission to limit this uncertainty is to follow the terms of the executed Interconnection Agreement, hold the Interconnection Customer responsible for its obligations under the agreement, and accept the Notice of Termination when the Interconnection Customer is in Default. If the Commission does not do so and allows projects to linger in the queue after an uncured Default has demonstrated they are not viable, it would undermine the Commission’s own goals and MISO’s queue reform efforts to implement them.²⁷

These two harms to other projects justify termination of the Interconnection Agreement and the Commission need not require a showing of a direct cost to a specific project caused by this project remaining in the queue to accept termination of the Interconnection Agreement based on the risk of upgrade costs and restudies for other projects lower in the queue or in the same Group Study. The Commission has considered harm to lower queued projects as a factor in past cases to support additional time for a project to develop.²⁸ However, a direct harm is difficult to quantify and requiring such a finding prior to accepting a notice of termination would encourage delay by projects that are not prepared to proceed at the expense of those who are ready to

²⁴ *Queue Reform III Order*, 138 FERC ¶ 61,223 at PP 68 & 178 (discussing the problems caused by “late-stage terminations” and “cascading restudies”).

²⁵ *Id.* at PP 68 & 178.

²⁶ *See Midwest Independent Transmission System Operator, Inc.*, 141 FERC ¶ 61,050 at P 34 (2012) (“*October 19 Order*”) (explaining that MISO cannot reasonably anticipate all of the permutations of required facilities that might result as projects withdraw from a group study and that the upgrades required may change as a result of restudies).

²⁷ *Queue Reform III Order*, 138 FERC ¶ 61,223 at P 30, 68 & 178 (discussing the role of withdrawals in causing cascading and iterative restudies).

²⁸ *See Lakeswind*, 137 FERC ¶ 61,008 at P 25 (listing factors that the Commission has considered in determining whether to extend milestones or to grant or extend a suspension under a GIA). Neither of these options is available here. *See* notes 11-14, *supra*, and accompanying text.

proceed.²⁹ For example, other viable projects may have already decided to withdraw based on the ongoing uncertainty created by this project's Default. Such a result is difficult to trace to a given project and the exit of a potentially viable generator would have already occurred based on the ongoing uncertainty created by Interconnection Customer's Default. In addition, transmission owners face harm because resources used in planning to meet construction timelines under a GIA are potentially wasted if an interconnection customer defaults and does not meet its obligations. After a GIA is executed, the transmission owner would typically need to assign engineers and work crews to begin planning for actual construction to meet the transmission owner's obligations under the GIA. These resources would need to be reassigned if the interconnection customer defaults on its obligations under the GIA. If the project lingers in the queue, the transmission owner must continue to account for the fact that the project may go forward which complicates planning and consumes resources that could be better spent on viable projects. Similarly, MISO must continue to account for the project in its study processes. Again, these impacts are difficult to trace to a specific project, but the Commission has recognized the aggregate harm to the queue from speculative projects and the increased risk of "late-stage termination" by such projects and should consider the impact on the transmission owner and MISO resources.³⁰

At some point, this uncertainty for other interconnection customers (particularly, those in the same Group Study), the transmission owner, and MISO should end; and a project's GIA should be terminated when obligations are not being met. The appropriate measure of whether a project with a GIA is "speculative" must consider whether a project, having executed a GIA is *currently* meeting its obligations regardless of past investment in the project.³¹ Projects that

²⁹ Under *Lakeswind*, the Commission need not consider further delay for the project if it is incompatible with the MISO Tariff, but only needs to determine whether "the proposed termination is not unjust, unreasonable, unduly discriminatory or preferential, or if it is consistent with the public interest." *Lakeswind*, 137 FERC ¶ 61,008 at P 25. The Commission has permitted such delays in the past, but such a process is no longer compatible with the MISO GIP. See, e.g., *Illinois Power Co.*, 120 FERC ¶ 61,237, at P 25 (2007) (stating that "it is important to ensure that interconnection queues do not become clogged with speculative projects.") ("*Illinois Power*"). In *Illinois Power*, the Commission recognized the danger of speculative projects, but rejected a notice of termination and directed the Interconnection Customer to make periodic filings every six months to update the status of its project. *Id.* To MISO's knowledge, no such filings were ever made and the project continued to create uncertainty in the queue until it was later withdrawn. Utilizing such a "wait and see" solution as was applied in 2007 is not compatible with the current "first ready, first served" methodology implemented in the MISO GIP since 2008 and the Commission's more recently articulated goals of "getting projects that are not making progress toward commercial operation out of the queue, and helping viable projects achieve commercial operation as soon as possible." *Queue Reform III Order*, 138 FERC ¶ 61,223 at P 30.

³⁰ See notes 20-27, *supra*, and accompanying text (discussing the "documented harm" from late-stage terminations that supported revisions to the MISO Tariff to minimize the risk of interconnection customers terminating their projects at a late-stage).

³¹ In *Illinois Power*, the project stated that it had spent "tens of millions of dollars" in development, but was unable to proceed due to legal challenges. *Illinois Power Co.*, 120 FERC ¶ 61,237, at P 24. However, a

have reached the stage of executing a GIA with binding obligations will have committed a certain amount of time and resources to the project. However, the Commission has found that “simply having an executed GIA was not sufficient to demonstrate a commitment to achieve commercial operation.”³² As long as a project meets its obligations under the GIA, it has demonstrated continuing progress towards completion. However, it is self-evident that a project that does not meet its contractual obligations has demonstrated by its inaction that it is not making progress toward timely commercial operation and termination of its GIA is just and reasonable.

The choice to terminate this Interconnection Agreement due to Interconnection Customer’s Default is also not unduly discriminatory under the *Lakeswind* standard. Default under an executed GIA provides a reasonable distinction upon which to pursue termination of the Interconnection Agreement because a project that is in Default is not “similarly situated” with those projects that continue to meet their GIA obligations so the acceptance of a Notice of Termination of this Interconnection Agreement is not undue discrimination.³³ Specifically, the Commission has found that meeting obligations under a GIA is a reasonable requirement to show a project’s readiness to proceed and that viable projects should be prepared to proceed after they have executed a GIA. The Commission explained as follows:

We do not dispute that developers face challenges in order to proceed through the interconnection process and to achieve commercial operation. However, we believe that viable projects would have been laying the groundwork and marketing their projects well ahead of executing a GIA. ***That is, for projects that are truly viable, the negotiations necessary to finalize business arrangements should be nearly finalized well prior to the actual execution of the GIA such that once the GIA is executed, the other arrangements necessary to obtain funding should be able to be finalized and executed soon after the GIA is executed.***³⁴

Once an interconnection customer has executed a GIA, it should be prepared to proceed to meet those obligations and termination of the GIA for an uncured Default is consistent with Commission precedent cited above regarding elimination of “speculative” projects because

large investment ultimately did not prevent the withdrawal of that project and provides a less accurate measure of project readiness to proceed to commercial operation than the binding commitments in the GIA.

³² *June 27 Rehearing Order* 139 FERC ¶ 61,253 at P 34; *see* note 16, *supra*.

³³ *See, e.g., Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007) (“the [Federal Power Act] does not prohibit all discrimination, only undue discrimination. In general, discrimination is ‘undue’ when there is a difference of rates, terms or conditions among similarly situated customers. The Commission has broad discretion in determining when discrimination is undue.”) (internal citations omitted).

³⁴ *Queue Reform III Order*, 138 FERC ¶ 61,223 at P 179 (emphasis added).

Default demonstrates that the project is not commercially viable at this time.³⁵ Under MISO's GIP, the project's own readiness determines whether it remains in the queue for further study or moves more swiftly to a GIA.³⁶ Similarly, a project's own lack of progress under a GIA can fairly determine that the project is not "truly viable" and should be terminated for Default under the terms of its GIA.³⁷ Such action enforces the terms of an existing contract and there is no undue discrimination in taking action to terminate this Interconnection Agreement because Interconnection Customer has not met its obligations.

2. Termination of the Interconnection Agreement is just and reasonable, not unduly discriminatory, and consistent with the public interest because it will benefit viable lower queued projects by protecting them from uncertainty and minimizing their risk.

The Commission should also consider the benefits to other projects as part of its finding that the "proposed termination is not unjust, unreasonable, unduly discriminatory or preferential, or if it is consistent with the public interest."³⁸ Termination of the Interconnection Agreement when the Interconnection Customer is in Default meets this standard because termination benefits viable projects by making it easier for them to successfully reach commercial operation. One of the public interest goals of Order No. 2003 was to "expedite the development of new generation."³⁹ In discussing MISO's queue reforms to implement this goal, the Commission has described the correlation between removing speculative projects from the queue and protecting viable projects from uncertainty. The *Queue Reform III Order* explained that "reform is necessary due to the fact that MISO continues to experience a backlog in the queue and has seen an increase in the number of projects withdrawing in the later stages of the interconnection process."⁴⁰ As discussed above, many of the reforms adopted in the *Queue Reform III Order* increased the requirements on projects to remain in the queue in order to remove speculative

³⁵ *Id.*; see *Queue Reform III Order*, 138 FERC ¶ 61,223 at P 30 (noting the goals of queue reform include "getting projects that are not making progress toward commercial operation out of the queue"); see also *Lakeswind*, 137 FERC ¶ 61,008, at P 25 (noting that the Commission will consider "any uncertainty that speculative projects may present to other projects in the queue"); *Illinois Power Co.*, 120 FERC ¶ 61,237, at P 25 (2007) (stating that "it is important to ensure that interconnection queues do not become clogged with speculative projects."); accord *Virginia Electric & Power Co.*, 104 FERC ¶ 61,249, at P 17 (2003).

³⁶ *Queue Reform III Order*, 138 FERC ¶ 61,223 at PP 108-09 & 116-17 (discussing the "two queue" revisions to the GIP that permit a project to remain indefinitely in the System Planning and Analysis Phase provided it "refreshes" its system impact study once every 18 months).

³⁷ *Id.* at P 179.

³⁸ *Lakeswind*, 137 FERC ¶ 61,008 at P 25 (citations omitted).

³⁹ *Queue Reform III Order*, 138 FERC ¶ 61,223 at P 29.

⁴⁰ *Id.* at P 30.

projects so that viable projects could move forward. The Commission noted that “[w]hile underfunded projects may decide to withdraw from the queue [in response to the reforms accepted in the *Queue Reform III Order*], independent developers that have properly funded their projects should **benefit** from the increased efficiency of the interconnection process.”⁴¹ This finding demonstrates that the termination of a project that has not met its milestones under a GIA should benefit other projects and “is not unjust, unreasonable, unduly discriminatory or preferential” as well as “consistent with the public interest.”⁴²

As far back as 2008, Commission orders have noted the benefit to lower queued projects of removing uncertainty regarding whether or not a higher queued project will meet obligations under its executed GIA.⁴³ As explained in the Commission’s 2008 *Queue Reform I Order*, “[MISO’s] new interconnection procedures are designed so that **once a customer executes an interconnection agreement, the network upgrades will be built**. In this manner, lower-queued projects of all varieties (*i.e.*, affiliated generators, independent developers, wind, non-wind, etc.) are assured that the network upgrades that they are relying on to be built do in fact get built.”⁴⁴ MISO raised similar arguments in the *Lakeswind* proceeding which the Commission did not address on rehearing, but prompted MISO to raise in future termination filings.⁴⁵ Specifically, MISO reiterates here that in accepting these limitations on suspension in the *Queue Reform I Order*, the Commission recognized the pernicious effect that uncertainty caused by “speculative” projects had on lower queued projects and the harm to the entire process. In so doing, the Commission rejected the rationale that an interconnection customer should have additional time beyond the nine-month period provided in the GIP to develop its project and market its energy.⁴⁶

⁴¹ *Queue Reform III Order*, 138 FERC ¶ 61,223 at P 179 (emphasis added); *see id.* at P 147 (noting that because late-stage terminations can lead to multiple and iterative restudies for lower-queued customers, the Commission would anticipate that reducing the number of projects at risk for a “late-stage termination” would permit “projects with viable business plans will more easily and quickly reach commercial operation.” *Id.* at P 147. In other orders, the Commission has reiterated that the changes adopted by the *Queue Reform III Order* which, among other things, impose greater financial obligations upon customers to proceed through the queue should also “**better protect viable projects** from the impact of the withdrawal of speculative projects [and] help minimize this risk [of restudy based on another project’s withdrawal] for interconnection customers going forward.” *October 19 Order*, 141 FERC ¶ 61,050 at P 34 (emphasis added). Acting to terminate this project implements Commission policy and will “protect viable projects from the impact of the withdrawal of speculative projects” consistent with Commission policy. *Id.*

⁴² *Lakeswind*, 137 FERC ¶ 61,008, at P 25 (quoted above).

⁴³ *See Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183 at P 105-111 (2008) (discussing the rationale for accepting limitations on suspension under a GIA so that other projects will have the benefit of increased certainty that upgrades of higher queue projects will actually be built) (“*Queue Reform I Order*”).

⁴⁴ *Id.* at P 109 (emphasis added).

⁴⁵ *Lakeswind Rehearing Order*, 141 FERC ¶ 61,097 at P 35.

⁴⁶ The Commission summarized the nine month time period in MISO’s *Queue Reform I* proposal as follows:

In Paragraph 109 of the *Queue Reform I Order*, the Commission rejected challenges to this timeline under the GIP and explained as follows:

109. *We do not agree with intervenors who argue that the reduction of the maximum period during which an interconnection customer can further develop its project without having to pay for network upgrades from three years to only nine months is disproportionately burdensome on independent developers.* As we stated previously, queue reform should not result in undue discrimination between types of developers. Under the current interconnection procedures, when a customer suspends its project, it does not have to make payments for network upgrades. This means that those network upgrades do not get built even though lower-queued projects may be depending on them. *Under the proposed procedures [now accepted pursuant to the Queue Reform I Order], the interconnection customer will have up to nine months plus the actual time necessary for completion of the Facilities Study during which to make commercial and economic arrangements (i.e., to market its energy) and to file the interconnection agreement. The new interconnection procedures are designed so that once a customer executes an interconnection agreement, the network upgrades will be built. In this manner, lower-queued projects of all varieties (i.e., affiliated generators, independent developers, wind, non-wind, etc.) are assured that the network upgrades that they are relying on to be built do in fact get built.* If an interconnection customer needs additional time to make commercial and economic arrangements, it may build long lead times into the Appendix B timetable for construction of network upgrades in its interconnection agreement. However, the new interconnection procedures will not allow it to avoid paying for network upgrades.⁴⁷

The interconnection customer's time frame for meeting the M3 milestone [in Section 11.3 of the GIP], which includes proof of power off-take agreements, contracts for construction, permit applications, or other commercial milestones, is extended to six months rather than the current 15 days. The six-month grace period is then added to the existing three-month period between the completion of the Facilities Study and the signing of the Interconnection Agreement. Thus, an interconnection customer will have *up to nine months plus the actual time needed to conduct the Facilities Study between completion of the System Planning and Analysis Review and the time when it must file the interconnection agreement.* Midwest ISO believes that this amount of time suffices to eliminate the need for economic suspension.

Queue Reform I Order, 124 FERC ¶ 61,183 at P 91 n. 82 (emphasis added).

⁴⁷ *Id.* at P 109 (emphasis added).

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As explained in Exhibit 1, any potentially relevant suspension time for G519 has been exhausted and to allow G519 to retain its queue position while not meeting obligations or proceeding under its filed LGIA presents the same problems as other projects which delay absent suspension rights under the GIP.⁴⁸ Permitting an interconnection customer to remain in the queue after it has failed to meet obligations under its executed GIA is contrary to this GIP procedure limiting suspension rights under the GIA to ensure the certainty that “once a customer executes an interconnection agreement, the network upgrades will be built.”⁴⁹ Default under an executed GIA has the same delaying effect as the previously permitted suspension (*i.e.*, “when a customer suspends its project, it does not have to make payments for network upgrades.”) and cannot be permitted if the GIP revisions eliminating suspension absent a Force Majeure event are to be effective.⁵⁰ Such Defaults raise the same concerns that prompted the need for MISO to propose (and the Commission to accept) limits on the suspension rights under the *pro forma* GIA, namely the concern that when a project could suspend its obligations, its assigned “network upgrades do not get built even though lower-queued projects may be depending on them[.]”⁵¹

Because MISO’s studies of lower queued projects must include as assumptions the network upgrades to be built by higher queued projects with GIAs, the uncertainty for lower queued projects includes the possibility of restudy if a higher queued project does not proceed.⁵² Accordingly, numerous lower queued projects “are relying on” Interconnection Customer to fund the upgrades identified in its Interconnection Agreement because they face the risk of further restudy if the GIA obligations are not fulfilled.⁵³ The removal of the uncertainty and the corresponding benefit of increased certainty for viable lower queued projects contemplated in the *Queue Reform I Order* can only be realized if the Commission accepts this Notice of Termination to permit the termination of the Interconnection Agreement due to Interconnection Customer’s Default. To permit Interconnection Customer to evade the limits in the suspension provision of the *pro forma* GIA undercuts these revisions and threatens to recreate the problems addressed by the *Queue Reform I Order* by endorsing a “*de facto* suspension.”⁵⁴

⁴⁸ See Exh. 1.

⁴⁹ *Queue Reform I Order*, 124 FERC ¶ 61,183 at P 109.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See notes 23-24, *supra*, and accompanying text (discussing the harm of potential “cascading” restudies when a higher queued project withdraws).

⁵³ See *Queue Reform I Order*, 124 FERC ¶ 61,183 at P 109. See *id.* at PP 107-08 (discussing the harm under the previously effective three-year suspension period). Currently, a project may only suspend its GIA for a *force majeure* event, but must still provide security to permit the necessary network upgrades to be constructed). *Id.* at P 91 & 111.

⁵⁴ *Id.* at P 109-11; see note 12, *supra* (citing discussion of the shorthand term “*de facto* suspension” in the *Lakeswind Rehearing Order*, 141 FERC ¶ 61,097 at P 32).

Finally, the Commission should recognize that the termination of this Interconnection Agreement does not necessarily terminate the project for all time and may, in fact, benefit the project by permitting it to continue at a later time when it is ready to proceed. Although the termination of the Interconnection Agreement will remove this project from the queue, Interconnection Customer may submit a new interconnection request and re-enter the queue at any time under MISO's new GIP. Under the "two queue" innovation in MISO's GIP, a project with a new interconnection request may elect to proceed more swiftly through the process to the Definitive Planning Phase if it is prepared to proceed or remain in its new lower queue position in the System Planning and Analysis ("SPA") Phase at a minimal cost.⁵⁵ The option to wait in the SPA phase with a new interconnection request is designed to provide an interconnection customer with the opportunity to explore alternative options without subjecting others projects to unnecessary uncertainty.⁵⁶ Alternatively, if the project re-enters the queue and believes that it needs little new information, it may choose to move into the DPP and obtain a new Generator Interconnection Agreement after it is studied. Either of these options could potentially benefit this Interconnection Customer while still providing increased certainty to others in the queue by eliminating the uncertainty created by Interconnection Customer's Default under the current Interconnection Agreement. In contrast, the alternative of retaining Interconnection Customer's project in the queue while in Default under the Interconnection Agreement only prolongs uncertainty for other projects and does little to help Interconnection Customer's project decide whether to move forward to commercial operation. Because the termination of the Interconnection Agreement will increase certainty for others and may provide more certainty for this project, acceptance of the Notice of Termination is just and reasonable, not unduly discriminatory, and consistent with the public interest.⁵⁷ Accordingly, MISO respectfully requests that the Commission accept the Notice of Termination for the reasons discussed herein.

III. EFFECTIVE DATE

Consistent with Section 35.15 of the Commission's regulations, MISO seeks an effective date of May 4, 2013 for the termination.

⁵⁵ *Queue Reform III Order*, 138 FERC ¶ 61,223 at P 116-17 (accepting "two queue" revisions to MISO's Attachment X to permit projects to choose to enter the "Definitive Planning Phase ("DPP")" if they are ready to proceed or remain in the SPA Phase at a minimal cost until they are ready to proceed). A project that re-entered the queue would be subject to "readiness" milestones discussed above under the currently effective GIP, but could also elect to remain in the SPA phase at a minimal cost.

⁵⁶ *Id.* at P 116 (noting that remaining in the SPA phase would give an interconnection customer the opportunity to obtain additional information on cost and risk that it believes is necessary to proceed to the DPP).

⁵⁷ *See Lakeswind*, 137 FERC ¶ 61,008 at P 25 (quoted above).

IV. DOCUMENTS SUBMITTED IN THIS FILING

The documents being submitted with this filing include this transmittal letter and a public and non-public versions of the exhibits in accordance with the parties' designation of materials as confidential and CEII under the Commission's rules. 18 C.F.R. §§ 388.112 & 388.113 (2012). In addition, MISO generally considers individual communications with interconnection customers regarding their projects to be non-public Confidential Information under its GIP in Attachment X of its Tariff. Accordingly, the communications regarding the breach and default are designated as non-public and MISO requests confidential treatment of the non-public version of this filing as CEII and non-public pursuant to the Commission's rules. MISO submits a non-public version of this filing in a separate contemporaneous filing. The documents being submitted with this filing include this transmittal letter,

- Notice of Termination,

- Exhibit 1 – Non- Public Timeline of events

- Exhibit 2 – Non- Public Non-public Interconnection Agreement

- Exhibit 3 – Non- Public Notice to Suspend from Excelsior Energy to MISO and Minnesota Power

- Exhibit 4 – Non- Public Letter notifying MISO and Minnesota Power of project recommencement

- Exhibit 5 – Non- Public Notice to Suspend from Excelsior Energy to MISO and Minnesota Power

- Exhibit 6 – Non- Public Email from MISO to Excelsior re: G519 being out of suspension time

- Exhibit 7 – Non- Public Notice of Breach

- Exhibit 8 – Non- Public Letter from Excelsior to MISO and Minnesota Power regarding Notice of Breach
- Exhibit 9 – Non- Public Letter from MISO to Excelsior responding to Excelsior’s Exhibit 8 letter
- Exhibit 10 – Non- Public Notice of Default

V. COMMUNICATIONS

Correspondence, pleadings and other materials regarding this filing should be addressed to the following persons:

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VI. NOTICE AND SERVICE

MISO has served a copy of this filing electronically, including attachments, upon all Tariff Customers, MISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the MISO Advisory Committee participants, as well as, state commissions within the Region. In addition, the filing has been posted electronically on MISO’s website at <https://www.misoenergy.org/Library/FERCFilingsOrders/Pages/FERCFilings.aspx> for other interested parties in this matter.

VII. CONCLUSION

In summary, as a result of the delay caused by the Breach and continuing Default of Interconnection Customer under its Interconnection Agreement, other lower queued projects are forced to proceed with the uncertainty that they may bear responsibility for additional Network Upgrades or face additional restudies. These lower-queued projects, the Transmission Owner, and MISO also must expend additional resources to account for the Default of Interconnection

Customer.⁵⁸ Other projects in the queue would also benefit from increased certainty if this Interconnection Agreement is terminated and Interconnection Customer could submit a new interconnection request if it sought to pursue the project. For all of the reasons discussed above, acceptance of the Notice of Termination is “not unjust, unreasonable, unduly discriminatory or preferential,” and is “consistent with the public interest.”⁵⁹ Therefore, pursuant to Articles 2.3.1 and 2.3.2 of the Interconnection Agreement, MISO respectfully requests that the Commission accept the Notice of Termination to terminate the Interconnection Agreement, effective on May 4, 2013.

Sincerely,

/s/ Matthew R. Dorsett

Matthew R. Dorsett
Attorney for the Midwest Independent
Transmission System Operator, Inc.

Attachment

cc:
Michael Donahue, Minnesota Power
Daniel L. Carlson, Minnesota Power
Richard Stone, Excelsior
Eric Laverty, MISO

⁵⁸ Exhibit 1 discusses the specific circumstances of Interconnection Customer’s Default.

⁵⁹ *Lakeswind*, 137 FERC ¶ 61,008 at P 25.