Appendix A1

REVISED Rebuttal Testimony of Michael R. O'Connell - Rate 531

In Opposition to the Proposed Settlement

1 Introduction

Q1. Please state your name and the state your business is in.

A1. Michael R. O'Connell. My business is in the state of Indiana.

Q2. Are you the same Michael R. O'Connell who submitted direct testimony in this Cause?

A2. Yes.

Q3. On whose behalf are you appearing in this proceeding?

A3. The Midwest Industrial User's Group ("MIUG"). MIUG members purchase electric services from Northern Indiana Public Service Company ("NIPSCO") and have industrial facilities directly connected within the Midcontinent Independent System Operator, Inc. ("MISO") transmission system.

Q4. What is the purpose of your rebuttal testimony?

A4. I address NIPSCO's proposed Rate 531 and Rider 577 in opposition of the recent Rate Case Settlement NIPSCO and other intervenors agreed to or choose not to oppose. My silence with respect to anything in NIPSCO's direct case in this proceeding should not be taken as an endorsement of any position taken by NIPSCO. Rebuttal testimony related to the proposed Rates 526, 532 and 533 are in a separate testimony submitted March 31, 2023: Rebuttal Testimony of Michael R. O'Connell - Rates 526 532 533.

Q5. Identify the different regulatory Commissions you will be referencing in your testimony.

A5. I will reference the Indiana Utility Regulatory Commission ("IURC") and the Federal Energy Regulatory Commission ("FERC") in this testimony.

Q6. Identify the different types of NIPSCO customers you will address in your testimony.

A6. For clarity in this testimony, NIPSCO customers will be divided into the following categories:[1]

1. **LARGEST CUSTOMERS:** NIPSCO's current Rate 831 or proposed Rate 531 customers ("NIPSCO's Largest Customers" or "Largest Customers"). These are NIPSCO's seven (7) largest customers.
2. **QUALIFIED CUSTOMERS:** NIPSCO's customers who qualify under FERC Order No. 888[2] to have non-discriminatory access to unbundled retail transmission services that are connected at the same voltage levels identified in Rate 831 ("Qualified Customers"). These customers are not currently on Rate 831, or will not be on the proposed Rate 531, because of arbitrary barriers that increase the cost of accessing the wholesale power market available to NIPSCO's Largest Customers. Qualified

[1] Understanding the difference between these customers is critical to this testimony.
[2] FERC Final Rule issued 24 April 1996 and published in the Federal Register Vol. 61, No. 92

Customers include some of NIPSCO's largest industrial and commercial customers not included in Rate 831 today.

3. **SMALLER CUSTOMERS:** NIPSCO's customers who do not qualify under FERC Order No. 888 to have non-discriminatory access to unbundled retail transmission services since they are not connected to the same voltage levels identified in Rate 831 ("Smaller Customers"). These customers may be residential, small commercial or small industrial customers.

Q7. What are the arbitrary or discriminatory barriers in the proposed Rate 531 as it relates to FERC Order No. 888?

A7. The following items are arbitrary and discriminatory barriers:

1. Requiring Transmission or Subtransmission customers to contract for a definite amount of electrical demand of at least 10,000 kW to qualify for this rate.
2. Requiring Transmission or Subtransmission customers to have a least one meter with a load of at least 10,000 kW to be able to aggregate multiple premises for billing purposes.
3. Requiring Transmission or Subtransmission customers contract for at least 10,000 kW of demand of Tier 1: Firm Service to qualify for this rate. Only then can customers benefit from wholesale power pricing on Tier 2 (i.e., Day Ahead LMP guaranteed pricing) or Tier 3 services (i.e., MISO Settlement Charges).

Q8. Are MIUG members similarly situated to NIPSCO's Largest Customers on Rate 831 today?

A8. Yes. All MIUG members are classified as industrial customers[3] and are connected to the voltage levels required to be on Rate 831 today. MIUG members' production is energy-intensive, their operations are highly sophisticated, and they compete directly or indirectly in global markets. Some MIUG members compete in the same industry as NIPSCO's Largest Customers who are currently benefitting from Rate 831 wholesale power access.

Q9. Do MIUG members have the ability to perform the key tasks required to take Rate 831/531 Tier 2 or Tier 3 services?

A9. Yes. MIUG members have two choices to perform these key tasks. The first choice is to perform the necessary work "in-house". If MIUG members decline to perform the tasks necessary for Rate 831/531 in-house, each member of MIUG can contract with a power marketer, or similar service provider, to perform any of the standardized tasks necessary to be on Rate 831/531 at a competitive price, particularly when we have observed rates of $0.50 or less per MWh.

While each MIUG member must perform their own cost-benefit analysis, the following example is meant to illustrate the viability of meeting the operational requirements for accessing Rate 831 Tier 2 and Tier 3.

Consider a Qualified Customer with a peak demand of 9 MW and a continuous consumption of 9 MWh throughout the year (8,760 hours). This would result in an annual consumption of 78,840 MWh. If this customer contracted a power marketer to handle the

[3] **Industrial Customer**. Any Customer who is engaged primarily in a process that creates or changes raw or unfinished materials into another form or product. Source: NIPSCO 800 Series Tariff Original Sheet No. 11

operational and administrative tasks required in Rate 831/531, the annual marginal cost would be approximately $40,000 in service fees (78,840 MWh x $0.50 = $39,420).

Accordingly, the cost of hiring a power marketer is immaterial compared to the hundreds of thousands or millions of dollars in cost savings that could be achieved by accessing wholesale electric rates on Rate 831/531 with the arbitrary barriers removed. In my opinion, any of NIPSCO's Qualified Customers are sophisticated enough to perform a cost-benefit analysis that compares the cost of implementing tasks required by Rate 831/531 and the potential savings achievable with this Rate.

Q10. In Mr. O'Connell's Cases-in-Chief, he made reference to the possibility of NIPSCO's Qualified Customers leaving the NIPSCO system in various ways if NIPSCO did not remove the arbitrary barriers that are embedded in Rate 831/531. Please provide additional information on how MIUG members are considering reducing load on the NIPSCO system without impacting their industrial production.

A10. Yes, as of earlier this month multiple MIUG members are exploring behind-the-meter generation ("BTMG") or self-generation options. Completion of self-generation projects would lead to a reduction of all or a portion of their future electric service purchases from NIPSCO.

Additionally, if Rate 831/531 is not opened to the MIUG members, or to Qualified Customers who are similarly situated, they could consider purchasing any shortfall of energy from the MISO wholesale market through MISO Financial Schedules.[4]

Q11. Was NIPSCO notified that if arbitrary barriers were not removed from Rate 831/531, Qualified Customers could potentially leave NIPSCO's system? Additionally, what are the potential negative consequences to NIPSCO customers if their Qualified Customers reduce their load on NIPSCO's systems through self-generation in the future?

A11. Yes, in Mr. O'Connell's Cases-in-Chief Testimony, he explained that if NIPSCO continued to maintain arbitrary barriers that prevent Qualified Customers from accessing MISO wholesale power market pricing, those customers would explore self-generation options.[5]

Due to factors such as permitting, design and construction, the shift off the NIPSCO system could take more than a year to complete. During this time, NIPSCO would continue to rate-base excess generation assets. However, once NIPSCO's Qualified Customers have completed their self-generation infrastructure, NIPSCO could be forced to reallocate stranded generation resources to its Smaller Customers, particularly residential customers who have fewer alternatives.

This reallocation would result in an increase in residential customers' bills and potentially incentivize higher net worth residential customers to procure rooftop solar + batteries or

[4] Refer to Appendix A to understand how MISO Financial Schedules work.

[5] Rate 831 currently allows NIPSCO's Largest Customers to procure energy and capacity from the MISO wholesale power market as admitted by Mr. Campbell numerous times – **See Appendix B.**

Virtual Power Plants, thereby further shifting stranded generation costs to NIPSCO's most vulnerable residential customers. The passage of the Inflation Reduction Act ("IRA") in 2022 was in part designed to lower energy costs by subsidizing residential, commercial, and industrial self-generation. Additionally, with the passage of the IRA and FERC Order No. 2222[6], self-generation is not only increasingly more economical, but the adoption rate is expected to be faster than ever before.

Q12. As encouraged by the IURC, did MIUG and NIPSCO attempt a good faith effort to come to a settlement during this proceeding?

A12. Yes, my understanding is that the parties' legal counsel met on multiple occasions in a good faith effort to reach a settlement.

Q13. Please summarize your conclusions regarding the proposed Rate 531.

A13. As demonstrated in this testimony and previous submissions, the structure of the proposed Rate 531 allows for NIPSCO's Largest Customers to continue to access the MISO wholesale power market through unbundled retail transmission in the Tier 2 and Tier 3 services, either directly or through a "sale for resale" arrangement. At the same time, the proposed Rate 531 places arbitrary barriers to prevent NIPSCO's Qualified Customers from accessing the same wholesale power market.

Conclusion 1: Proposed Rate 531 contains arbitrary barriers to Qualified Customers that should be removed.

[6] FERC Order No. 2222 encourages the participation of distributed energy resources (DERs) in wholesale electricity markets, which could include self-generation resources.

- The proposed Rate 531 should be evaluated within the context of FERC Order No. 888 regulations, due to the Rate's impact on interstate and international commerce throughout the central United States and parts of Canada.[7] Rate 531 meets the requirements for two of the FERC jurisdictional tests: 1) the sale of electric energy at wholesale in interstate commerce and 2) unbundled retail and wholesale transmission.[8] These concepts and their application are explained in depth later in this testimony.

Conclusion 2: Proposed Rate 531 violates Indiana Code 8-1-2-4.

- Allowing Rate 831 Tier 2 and Tier 3 Customers unequal access to the FERC-regulated MISO wholesale power market could lead to rate disparities among similarly situated customers. Discrimination through rate disparities would be a violation of the "just and reasonable" rates and terms of service principles bound by the IURC.
- The terms of Rate 831 Tier 2 service guarantees said customers access to the Day-ahead FERC-regulated MISO LMP pricing at a daily $67.2 million risk to all non-Rate 831 customers (Qualified and Smaller Customers). Imposing this level of risk, especially when its $67.2 million daily, that NIPSCO's non-Rate 831 customers would incur is not "just and reasonable" to these customers.

Conclusion 3: Proposed Rate 531 violates Indiana Code 8-1-2.5-6 and 8-1-2.5-5(b).

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[7] The electric transmission system operated by the Midcontinent Independent System Operator (MISO) covers all or parts of 15 states and the Canadian province of Manitoba.
[8] Federal Power Act of 1935

- Since the FERC already effectively regulates all unbundled transmission and sales of electric energy in interstate commerce via its authority under FERC Order No. 888. Having the IURC regulate it is a duplicative task and a waste of state resources. I explained this in greater detail in my Cases-and-Chief testimony and later in this testimony.

Q14. Please summarize additional recommendations regarding the proposed Rate 531.

A14. Recommendation 1: Order NIPSCO to remove all arbitrary barriers embedded in Rate 831 and the proposed Rate 531 that prevent Qualified Customers from accessing the MISO wholesale power market:[9]

- Modify the arbitrary minimum demand requirement from 10,000 kW[10] to 1 kW and allow meter/premises aggregation for all customers, not just customers who have at least one (1) meter with 10,000 kW of demand.
- My original Cases-and-Chief testimony contains more recommendations, but I believe it is more appropriate to focus the rebuttal on these key issues for this testimony. Please see Question #26 of my Direct Testimony filed on January 20, 2023.

[9] Note: The recommendation would only pertain to NIPSCO's Largest Customers and their Qualified Customers. They do not pertain to its Smaller Customers.

[10] The 10,000 kW demand requirement was created out of a settlement with NIPSCO's Largest Customers and NIPSCO. There has been no evidence offered to demonstrate that these minimum demand requirements were developed using a just and reasonable methodology. The requirements for each Tier within Rate 831 appear designed to preferentially allow wholesale power access to NIPSCO's favored Largest Customers with the intent of excluding less powerful and less influential transmission customers.

Recommendation 2: Acknowledge that due to the regulatory risk of Rate 531 impacting interstate commerce, the FERC should review the proposed Rate 531 to ensure compliance with federal regulations.

- FERC Order No. 888 establishes the FERC's authority to regulate the transmission and sale (or sale for resale) of electric energy in interstate commerce, and its jurisdiction extends over electric utilities engaged in such commerce. Furthermore, the U.S. Supreme Court has held that the FERC has exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce," including both wholesale electric rates and any rule or practice "affecting" such rates. (see FERC v. Electric Power Supply Assn., 577 U.S. ___ (2016)).

2 FERC Jurisdiction

Q15. How do you plan to approach this testimony and why are you choosing to take that approach?

A15. I plan to approach this testimony by citing past statements from NIPSCO, FERC, IURC, Department of Justice ("DOJ"), the Supreme Court of the United States ("SCOTUS") and other relevant agencies. This will also contain the actual language in the Rate 831/531 Tariffs.

My objective is to clarify the regulatory consequences of Rate 831/531 as it is designed to arbitrarily block Qualified Customers from accessing Tier 2 and Tier 3 of this rate. Because NIPSCO voluntarily allowed its Largest Customers to separately access and acquire electric service components (i.e., capacity and energy) from the FERC-regulated

MISO wholesale power market, NIPSCO has altered the market structure and impacted interstate commerce so significantly that FERC regulations should now be the primary framework when determining any new rates/tariffs for NIPSCO's Largest and Qualified Customers.

Unfortunately, in NIPSCO's latest rebuttal testimonies from Andrew Campbell and Erin Whitehead, NIPSCO appears to contradict numerous past statements indicating that certain Large Customers now have access to the FERC-regulated MISO wholesale power market.[11] While avoiding direct FERC regulation may benefit NIPSCO shareholders, this creates anti-competitive practices in Northwest Indiana and will negatively impact our industrial base for years to come.

Q16. Is there any language in the Rate 831/531 Tariff that explicitly grants access to the FERC-regulated MISO wholesale power market for NIPSCO's Largest Customers to meet their energy and capacity needs as separate components, or alternatively that they are following the MISO Business Practice Manual ("BPM")?

A16. Yes. In NIPSCO's Rate 831/531 Tariff, there are approximately 100 references indicating Rate 831/531 customers now have access to the FERC-regulated MISO wholesale power market to meet their energy and capacity needs. Additionally, the Rate 531 Tariff references that NIPSCO's Largest Customers are following the MISO BPM. Accordingly, the IURC is now directly regulating the electric rates, terms, and conditions

[11] See Appendix B for past statements made by NIPSCO witnesses under oath stating or implying, Rate 831/531 Tier 2 and Tier 3 services are allowing its Largest Customers access to the FERC-regulated MISO wholesale power market to procure their energy and capacity needs.

impacting the MISO wholesale market that extends across parts of 15 states and into Canada.

Q17. What is FERC's definition of "Sale for Resale"?

A17. From the FERC's Glossary: "A type of wholesale sales covering energy supplied to other electric utilities, cooperatives, municipalities, and Federal and state electric agencies for resale to ultimate consumers."

Similarly, the FERC defines "sale for resale" as the sale of electric energy by one public utility[12] to another public utility for resale to ultimate consumers.

When one public utility sells electric energy (i.e., an investor-owned utility or Wholesale Generator) to another public utility (i.e., NIPSCO) for resale to end-use customers (i.e., NIPSCO's Largest Customers), this is considered a "sale for resale" transaction. FERC has jurisdiction over these transactions because they involve the sale of electric energy in interstate commerce, and FERC is responsible for regulating all unbundled transmission and sale of electric energy in interstate commerce.

FERC requires public utilities to file tariffs that set forth the rates, terms, and conditions for the sale of electric energy, including sales for resale in interstate commerce. These tariffs are subject to FERC review and approval, and FERC has the authority to investigate and take enforcement action against public utilities that violate its regulations regarding sales for resale in interstate commerce.

[12] According to FERC regulations, a "public utility" is any person or entity that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce, or for the generation or sale of electric energy for resale in interstate commerce.

Q18. Under what authority does the FERC have jurisdiction over Tariffs that include the Sale of Electric Energy at Wholesale in Interstate Commerce?

A18. The Federal Power Act ("FPA") authorizes the FERC to regulate the sale of electric energy at wholesale in interstate commerce under Section 205 of the Act.[13]

Section 205(a) of the FPA states that "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

This provision gives FERC the authority to regulate the wholesale rates and charges for the unbundled transmission and sale of electric energy in interstate commerce, including the power that is bought and sold by utilities, power marketers, and other entities in the wholesale markets. FERC's jurisdiction extends to the rates and charges of all public utilities engaged in interstate commerce. Of note, the scope of FERC's regulatory authority under the FPA has been repeatedly affirmed by the Supreme Court of the United States ("SCOTUS"), including as recently as 2016 in FERC v. Electric Power Supply Association.[14]

Q19. Do you believe that the FERC has jurisdiction over Tariffs when that Tariff allows customers to access the MISO wholesale power market?

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[13] Section 205 of the Federal Power Act (FPA) can be found in 16 U.S.C. § 824d.

[14] The Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (FERC) to regulate "the sale of electric energy at wholesale in interstate commerce," including both wholesale electric rates and any rule or practice "affecting" such rates. Source: SCOTUS

A19. Yes. FERC will have jurisdiction over certain aspects of the provision of electric service to industrial customers if the service involves any unbundled transmission[15] of electric energy in interstate commerce or "the sale of electric energy at wholesale in interstate commerce," including both wholesale electric rates and any rule or practice "affecting" such rates.

Q20. Do you believe that the Rate 831/531 terms constitute "Sale of Electric Energy at Wholesale in Interstate Commerce" and should therefore fall under FERC jurisdiction?

A20. Yes. NIPSCO is allowing its Tier 2 and Tier 3 customers to receive rates that are determined by the FERC-regulated MISO wholesale power markets, which constitutes the sale of energy at wholesale in interstate commerce as explained in the previous answers of this testimony.

Whether it is 1) Day-ahead LMP for Tier 2 services or 2) Day-ahead LMP and Real-time LMP for Tier 3 services, both Tiers are receiving actual energy and pricing from the MISO Day-ahead or Real-time wholesale power markets. This is indisputable since it is specified in their Tariff and has been acknowledged by NIPSCO on multiple occasions. Tellingly, NIPSCO's Rate 831 Tier 3 service allows customers to enter the MISO Market Portal and submit their own energy demand bids (refer to Rate 831 tariff extract below).

[15] Wholesale or Unbundled Retail Transmission

RATE 831
RATE FOR ELECTRIC SERVICE
INDUSTRIAL POWER SERVICE - LARGE

Sheet No. 6 of 13

DEMAND BIDS

For a Customer electing Tier 3 service, the Customer will have the ability to submit Day-Ahead Demand Bids for a portion or all of their Tier 3 daily demand through the MISO Market Portal. Day-Ahead Demand Bids not received by MISO in accordance with the MISO BPM will be settled at Real Time LMPs and assessed any applicable additional MISO charges. Refer to the Demand Bid section of the MISO BPM for details on the requirements of the Demand Bid.

Let us consider a scenario where a Tier 3 customer submits a demand bid in the MISO Market Portal. This demand bid by a NIPSCO customer would have a direct impact on the wholesale price of the Day-ahead pricing or Real-time pricing. Any rule or practice that has an "affect" on the sale of electric energy at wholesale in interstate commerce falls under the jurisdiction of the FERC.

Q21. What is the regulatory impact of a public utility voluntarily choosing to unbundle its previously bundled retail transmission services?

A21. As shown in previous testimony and further clarified here, FERC has jurisdiction over voluntarily unbundled retail transmission services. This is codified in FERC Order No. 888 and affirmed by SCOTUS in FERC v. New York (2002).[16]

Legal brief from the Department of Justice on FERC v. New York (2002):

"FERC further clarified several other aspects of its exercise of jurisdiction over unbundled transmission for retail sale. First, FERC emphasized that in exercising jurisdiction over the rates, terms, and conditions of the transmission component of unbundled retail transactions, it was not asserting authority either to order the

[16] The following link is a legal brief from the Department of Justice (DOJ) of FERC v. New York (2002): New York v. FERC - Opposition | OSG | Department of Justice

unbundling of retail transactions or to order retail transmission to an ultimate consumer. ***Rather, its jurisdiction attaches only if retail transmission has been unbundled from the retail sale, either voluntarily by the utility or as a result of a state-ordered retail program.*** *Pet. App. D44.*

Second, FERC clarified that its jurisdiction over the rates, terms, and conditions of unbundled retail transmission would not affect matters traditionally left to the States, "including authority to regulate the vast majority of generation asset costs, the siting of generation and transmission facilities, and decisions regarding retail service territories." Id. at D12; see also id. at D46 & n.544."

Additional Support: Final Rule of Order No. 888 issued by the FERC (Docket No. RM95-8-000 and RM94-7-001)[17]

Finally, we have reconsidered our NOPR position that would have limited eligibility to wholesale transmission customers. As we explained in the NOPR, the Commission's jurisdiction extends to all unbundled transmission in interstate commerce by public utilities. It is irrelevant to the Commission's jurisdiction whether the customer receiving the unbundled transmission service in interstate commerce is a wholesale or retail customer. ***Thus, if a public utility voluntarily offers unbundled retail access in interstate commerce or a state retail access program results in unbundled retail access in interstate commerce by a public utility, the affected retail customer must obtain its unbundled transmission service under a non-discriminatory transmission tariff on file with the Commission.*** *Though the Commission may approve a separate retail transmission tariff when some variation is necessary or appropriate to meet local concerns, 289/ we generally see no reason why retail transmission tariffs necessarily must be different from wholesale transmission tariffs. For that reason, we anticipate that in many circumstances the same open access tariff that serves wholesale customers will be equally appropriate for retail transmission customers.*

Therefore, unless the Commission has specifically permitted a separate retail tariff, eligible customers under Final Rule pro forma tariff must include unbundled retail customers (290/). The rates, terms, and conditions of all unbundled transmission services are subject to a Commission-authorized tariff. However, in appropriate circumstances, FERC will defer to state recommendations regarding rates, terms, and conditions for retail transmission service or the proper transmission cost allocation to be used between retail and wholesale customers when state recommendations are consistent with open access policies.

[17] Note: The "Commission" in this statement cited by the FERC, is referring to the FERC, not the IURC.

Q22. What is FERC's definition of Retail Unbundling?

A22. FERC defines Retail Unbundling in their online glossary in the following way:

"Disaggregating electric utility service into its basic components and offering each component separately for sale with separate rates for each component. For example, generation, transmission, and distribution could be unbundled and offered as discrete services."

Simply put, retail unbundling refers to the separation of retail electric services into their component parts, such as generation, transmission, and distribution, and the offering of each service separately to customers. FERC primarily focuses on regulating all unbundled transmission and sale of electric energy in interstate commerce. FERC has recognized the potential benefits of retail unbundling, such as increased competition and customer choice.

Furthermore, the FERC clarifies its jurisdiction in Order No. 888 in the following ways as published in the Federal Register final order issued 24 April 1996:

"The Commission's jurisdiction extends to all unbundled transmission in interstate commerce by public utilities. It is irrelevant to the Commission's jurisdiction whether the customer receiving the unbundled transmission service in interstate commerce is a wholesale or retail customer. Thus, if a public utility voluntarily offers unbundled retail access in interstate commerce or a state retail access program results in unbundled retail access in interstate commerce by a public utility**, the affected retail customer must obtain its unbundled transmission service under a non-discriminatory transmission tariff on file with the Commission".**

This means that if a public utility allows a customer to purchase their retail transmission service from them and also permits the customer to procure their energy and capacity needs from another supplier(s), then the retail transmission services are unbundled.

Q23. How did NIPSCO voluntarily unbundle its retail transmission services and are some NIPSCO retail customers' electric service components such as energy and capacity being procured separately from transmission on a wholesale market?

A23. In December 2019, the IURC approved a settlement between NIPSCO and its Largest Customers creating Rate 831 that allowed these customers to separately procure their energy and capacity electric service components from the FERC-regulated MISO wholesale power market. This settlement was voluntary and was not mandated by the state of Indiana or the FERC. To demonstrate this, we will refer to past statements from NIPSCO that were made under oath.

In the Cases-in-Chief- Question 33 – Cause No. 45159 – Andrew Campbell stated:

> **"Generally, for Industrial Customers choosing Tier 3 service, NIPSCO will no longer procure energy nor capacity for their Tier 3 loads."**

Accordingly, these electric service components have been separated, or unbundled. In this way, Industrial Customers taking Tier 3 service can acquire energy, capacity, and transmission services from the three separate suppliers.[18]

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[18] Tier 2 customers can procure their own capacity in the MISO wholesale power market or a third-party generator. They also receive their energy as a "Sale for Resale" through the MISO Day-ahead market, whereby NIPSCO purchases the energy for them and resells it to them with no mark up. This is a "Sale for Resale" and would be consider a wholesale transaction by federal regulation.

Additionally, in NIPSCO's proposed Rate 531 Tariff, NIPSCO states on multiple occasions that Tier 2 and Tier 3 service allows customers to gain access to the FERC-regulated MISO wholesale market for energy and capacity. In Sheet No.12 of 13, NIPSCO has a section entitled "Third Party Contracts"[19] that plainly states Rate 531 will allow NIPSCO's Largest Customers to procure their own energy and capacity needs. The quote plainly states the following: **"Any Third Party Contracts for energy under Tier 3 and/or capacity under Tier 2 and/or Tier 3 shall..."**

Finally, in Erin E. Whitehead's Rebuttal testimony (p. 43), she states the following in part: **"Although Rate 831 customers can purchase energy based on MISO Day Ahead locational marginal pricing[20]..."**. In this statement, she clearly admits that Rate 831 customers can purchase energy based on the MISO Day-ahead[21] locational marginal pricing. As stated previously in this testimony, SCOTUS has confirmed FERC has jurisdiction over "the sale of electric energy at wholesale in interstate commerce," including both wholesale electric rates and any rule or practice "affecting" such rates. This has been repeatedly affirmed by SCOTUS. By allowing Rate 831 customers to purchase energy based on the FERC-regulated MISO Day-ahead locational marginal pricing, this is at least one rule or practice "affecting" wholesale energy rates in interstate commerce.

[19] Source: NIPSCO's proposed Rate 531 included in the direct testimony of Erin E. Whitehead.

[20] **Locational Marginal Price(s) (LMP or LMPs).** The market clearing price for Energy, established by MISO on a day ahead and real-time basis, at the established NIPSCO Load Commercial Pricing Node(s). Source: NIPSCO 800 Series Tariff (p. 11)

[21] **Day-Ahead LMP.** The day-ahead market clearing price for Energy as defined in the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff or its successor at the established NIPSCO load commercial pricing node(s). Source: NIPSCO 800 Series Tariff (p. 9)

There are many more statements like this from NIPSCO, current and past intervenors and the IURC. Plainly, NIPSCO effectively unbundled retail transmission service by allowing a select few customers to procure their energy, capacity and retail transmission from separate suppliers. Please see excerpts and citations in Appendix B.

Q24. For the FERC to have jurisdiction over Rate 831/531 does the Tariff have to meet the FERC requirements of both: 1) Sales of Electric Energy at Wholesale in Interstate Commerce and 2) unbundled transmission in interstate commerce (Retail and Wholesale)?

A24. No. While Rate 831/531 clearly affects both Sales of Electric Energy at Wholesale in Interstate Commerce and unbundled transmission in interstate commerce (Retail and Wholesale), the Tariff would only need to meet one of the two requirements for FERC to have jurisdiction over Rate 831/531.

Q25 Given that NIPSCO has voluntarily unbundled retail transmission and allows its Largest Customers to directly purchase wholesale power or provides for wholesale power in a sale for resale transaction, do you believe the FERC should have jurisdiction over Rate 831/531?

A25. Yes. FERC Order No. 888 is clear in that the FERC has jurisdiction over all wholesale transmission and all unbundled retail transmission in interstate commerce and "the sale of electric energy at wholesale in interstate commerce," including both wholesale electric rates and any rule or practice "affecting" such rates. This has been repeatedly affirmed by SCOTUS. As discussed previously, Rate 831/531 meets both criteria separately.

Rate 831/531 have put in rules or practices that clearly “affect” the FERC-regulated MISO wholesale Day-ahead, Real-time[22], and Planning Resource Auction markets at a minimum. In addition, if each Rate 831/531 customer does not procure enough capacity to meet the MISO Planning Server Margin Requirement[23], they will be registered as a MISO Load Modifying Resource.[24]

Q26. Has FERC made a public statement or filed an opinion on what they would do if they came across any rule, regulation, practice, or contract affecting wholesale energy rates or unbundled transmission services that are unduly discriminatory or preferential?

A26. Yes, in the Final Rule of Order No. 888, issued by the FERC (Docket No. RM95-8-000 and RM94-7-001), it is clearly stated what measures will be taken if they identify any rule, regulation, practice, or contract that has an undue discriminatory or preferential effect on wholesale energy rates ("Sale for Resale") or transmission services (including all unbundled services, both retail and wholesale) in interstate commerce.

Citation: Final Rule of Order No. 888 issued by the FERC (Docket No. RM95-8-000 and RM94-7-001)[25]

[22] **Real-Time LMP.** As defined in the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff, or its successor, at the established NIPSCO Load Commercial Pricing Node(s). Source: NIPSCO 800 Series Tariff (p. 11)

[23] **Planning Reserve Margin Requirement (PRMR).** The amount of capacity required for the forecasted Coincident Peak Demand of a Customer to meet the MISO Resource Adequacy Requirements (Module E-1 of the MISO Tariff). Source: NIPSCO 800 Series Tariff (p. 13)

[24] **Load Modifying Resource (LMR).** Consistent with the definition contained in Module A of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff, or its successor, LMR is the MISO designation for a Demand Resource or Behind the Meter Generation Resource (p. 12)

[25] Note: The Commission in this statement cited by the FERC, is referring to the FERC, not the IURC.

> *"There can be no question that the Commission has the authority to remedy undue discrimination.* ***Sections 205 and 206 of the FPA mandate that we ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. Under these sections, we must determine whether any rule, regulation, practice, or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and we must disapprove those contracts and practices that do not meet this standard.*** *Our discretion is at its zenith in fashioning remedies for undue discrimination. 231/*
>
> *Some commenters, however, challenge our authority to order industry-wide non-discriminatory open access as a remedy for the undue discrimination we have found in the industry. As summarized above, they essentially assert that we are prohibited by court precedent, the legislative history of the FPA, and sections 211 and 212 of the FPA from ordering wheeling as a remedy for undue discrimination.* ***We disagree and conclude that we have the authority -- indeed, a responsibility -- to require non-discriminatory open access transmission as a remedy for undue discrimination***."

Q27. Does NIPSCO and its Largest Customers have a "distinctive contractual relationship" due to their negotiation developing Rate 831/531?

A27. Yes, it is evident that NIPSCO and at least one of its Largest Customers through the 2019 Settlement had designed Rate 831 in such a way that it granted exclusive access to the MISO wholesale power market for NIPSCO's Largest Customers. This arrangement involved the imposition of arbitrary barriers, which prevented NIPSCO's Qualified Customers from accessing wholesale economics and forced them to continue purchasing electric services at higher-cost bundled retail rates from NIPSCO.

Moreover, Erin Whitehead from NIPSCO acknowledged in her Rebuttal Testimony[26] that there is a "distinctive contractual relationship" between NIPSCO and the Largest Customers on Rate 831 today.

[26] Question 34 of Erin Whitehead's Rebuttal Testimony (Cause No. 45772)

Q28. Does the FERC have the power to enforce non-discriminatory practices by public utilities? If so, what are these powers?

A28. Yes. Under Order No. 888, FERC has the power to enforce non-discriminatory practices by public utilities by requiring them to file open access transmission tariffs (OATTs) that ensure nondiscriminatory access to all unbundled transmission service. FERC has the authority to review, approve, and enforce these tariffs, and can investigate and take enforcement action against utilities that engage in discriminatory practices or violate the terms of the OATT. This includes the power to impose civil penalties, order refunds, and direct utilities to take corrective actions. Additionally, FERC has the power to address complaints of discriminatory conduct and to initiate investigations on its own.

3 Indiana Code 8-1-2-4

Q29. Do you believe that NIPSCO's practice of allowing its Largest Customers access to the MISO wholesale power market, or third-party generation, while requiring their Qualified Customers to continue to pay bundled retail rates due to arbitrary barriers embedded within the proposed Rate 531 violates Indiana Code 8-1-2-4 when it comes to discrimination against customers?

A29. Yes. Indiana Code 8-1-2-4 prohibits public utilities from discriminating against similar situated customers in their service territory. This means that public utilities are required to provide service to all customers within their service territory without discrimination. Allowing certain customers unimpeded access to the MISO wholesale power market or third-party generation while requiring other similarly situated customers to continue to pay higher retail rates would be considered discrimination and in violation of Indiana Code 8-1-2-4.

Providing unequal access to the MISO wholesale power market could lead to rate disparities among similarly situated customers. Discrimination through rate disparities would be a violation of the "just and reasonable" rates and terms of service principles bound by the IURC.

Q30. How does Rate 831/531 Tier 2 Services violate Indiana Code 8-1-2-4?

A30. Rate 831/531 Tier 2 Services allows customers on those services to obtain Day-ahead LMP at the NIPS. NIPS trading node, which is determined by the FERC-regulated MISO wholesale power market. However, NIPSCO fails to differentiate its Tier 2 services in its Day-ahead demand bid from its non-Rate 831 customers (Qualified Customers and Smaller Customers), placing these customers in jeopardy of incurring an unjust and unreasonable cost.

For example, NIPSCO customers that are not on Rate 831 are subject to a daily maximum risk of approximately $67.2 million. These Qualified and Smaller customers assume a cost risk daily to ensure NIPSCO's Rate 831 Tier 2 customers receive guaranteed Day-ahead LMP pricing.

Q31. Please explain further how NIPSCO guaranteeing Day-ahead LMP pricing to its Rate 831 Tier 2 customers is therefore imposing a daily risk of $67.2 million on its non-Rate 831 customers. Provide the calculation used to arrive at this figure.

A31. NIPSCO customers in its service territory collectively own approximately 800 MW of behind-the-meter generation or FERC Qualifying Facilities[27] ("BTMG" or "QF"), and many of those customers are currently on Rate 831. These BTMG assets are primarily used to serve the customer's own loads "behind-the-meter" and are not typically involved in the MISO Day-ahead market.

However, by guaranteeing its Tier 2 customers the Day-ahead LMP pricing, NIPSCO is exposing its Qualified Customers and Smaller Customers to a daily risk of up to $67.2 million in potential charges. This risk would be fully realized in the event that Real-time LMP pricing reaches its legal maximum of $3,500[28] per MWh due to a significant imbalance in supply and demand.

While numerous scenarios could cause this extreme imbalance, one event could be the unexpected removal of 800 MW from the QFs via tripping offline. Unfortunately, the current Tariff guarantees a stable price for Rate 831 Tier 2 customers, while subjecting NIPSCO to large potential price variations that would eventually be passed on to its other Qualified and Smaller Customers.

Summary of Scenarios

1. **Scenario #1** – In this scenario, I assume NIPSCO is placing one (1) demand bid for their non-Rate 831 customers[29] and Rate 831 Tier 2 customers. I assume all 800 MW of Tier 2 customers QFs **do not trip offline**, and they serve their BTM load as

[27] All FERC Qualifying Facilities are their characteristics are a matter of public record.
[28] $3,500 is the max amount an LMP can reach in MISO.
[2929] NIPSCO's non-Rate 831 are its Qualified and Smaller Customers

intended and do no place a demand bid in the Day-ahead market. Thus, all cost are being fairly allocated.

Scenario #2 – In this scenario, I assume NIPSCO is placing one (1) demand bid in for their non-Rate 831 customers and Rate 831 Tier 2 customers. I assume all 800 MW of Tier 2 customers QFs **do trip offline** causing an 800 MWh demand shock in the Real-time market resulting in Real-time LMPs to reach a maximum amount of $3,500 MWh. Normally, the 800 MWh Real-time market purchase should be charged to the Rate 831 Tier 2 customers. However, since NIPSCO designed this Tariff to guarantee Rate 831 Tier 2 customers the Day-ahead pricing ($35 MWh), NIPSCO's non-Rate 831 customers are allocated $2.8 million in costs per hour, or $67.2 million in a day, both are unjust and unreasonable.

As these charges to the non-Rate 831 customers are being used to absorb the Largest Customers financial risk. This risk of potentially allocating $67.2 million a day in charges to non-Rate 831 customers cannot be considered just and reasonable and appears unlawful as per the intent of Indiana Code 8-1-2-4.

I believe this issue is critical for the IURC to closely review, as it demonstrates plainly the level of monopolistic pricing NIPSCO is engaging in to unfairly prioritize its Largest Customers. This has led to the non-Rate 831 customers being forced to absorb financial risk in order to allow NIPSCO's Largest Customers to enjoy more stable, consistent and lower pricing.

The calculation provided below is an estimate:

DA LMP	$ 35					
RT LMP	$ 3,500					
	Scenario #1: All Tier 2 BTMG services its customers load.					
	MWh	MWh	MWh	MWh	@ $35 MWh	@ $3,500 MWh
	Forecast	**Actuals**	**DA Settlement**	**RT Settlement**	**DA Settlement**	**RT Settlement**
Rate 831 Tier 2 BTMG	-	-	-	-	$ -	$ -
Non-Rate 831 Demand Bid	2,000	2,000	2,000	-	$ 70,000	$ -
Rate 831 Tier 2 Demand Bid	500	500	500	-	$ 17,500	$ -
Total NIPSCO Demand Bid	2,500	2,500	2,500	-	$ 87,500	$ -
	Scenario #2: All Tier 2 BTMG trips offline and Tier 2 customers pulls on wholesale power for any shortfall. Note: Shortfall power will be priced at the DA LMP based on NIPSCO tariff.					
	MWh	MWh	MWh	MWh	@ $35 MWh	@ $3,500 MWh
	Forecast	**Actuals**	**DA Settlement**	**RT Settlement**	**DA Settlement**	**RT Settlement**
Rate 831 Tier 2 BTMG	-	800	800	-	$ 28,000	$ -
Non-Rate 831 Demand Bid	2,000	2,000	1,200	800	$ 42,000	$ 2,800,000
Rate 831 Tier 2 Demand Bid	500	500	500	-	$ 17,500	$ -
Total NIPSCO Demand Bid	2,500	3,300	2,500	800	$ 87,500	$ 2,800,000
			$ 2,800,000 (x)	24 Hours	$ 67,200,000	

Q32. How can NIPSCO prevent this daily $67.2 million risk to its non-Rate 831 customers in the future?

A32. NIPSCO should immediately start disaggregating its demand bid between its Rate 831 Tier 2 Customers and its non-Rate 831 customers, such as Qualified Customers and Smaller Customers. This is necessary to prevent the daily risk to their electric bill. In fact, to further reduce the risk to Tier 2 customers, it would be advisable for each Tier 2 customer to have their own demand bid if NIPSCO is planning to continue placing a demand bid for Rate 831 Tier 2 Customers in the future. This will ensure that only customers who own BTMG will be subject to the risk, rather than all of them. It should be noted, Rate 831 Tier 3 customers place their own demand bid in the MISO market portal.

Q33. Does the Indiana Code allow the IURC to regulate interstate commerce activity as it relates to all unbundled transmission or wholesale energy transactions?

A33. No. The IURC does not have the authority to regulate interstate commerce. As a state agency, the IURC is limited to regulating utilities within the state of Indiana and ensuring compliance with state laws and regulations. Regulation of interstate commerce falls under the jurisdiction of federal agencies, such as the FERC which regulates the wholesale sale and all unbundled transmission of electric power in interstate commerce.

4 Indiana Code 8-1-2.5-6 and 8-1-2.5-5(b)

Q34. Do you have any more comments on Rate 831/531 as it relates to Indiana Code 8-1-2.5-6 and 8-1-2.5-5(b)?

A34. Yes. The law suggests that if the federal government is already effectively regulating proposed rates, the Commission (IURC) should abstain from regulating them, as it would result in duplication of efforts and waste of state resources.

Q39. Does this conclude your rebuttal testimony?

A39. Yes.

VERIFICATION

I, Michael R. O'Connell, Vice President of Industrial Solutions at Midwest Wholesale Power Specialist LLC, affirm under penalties of perjury that the foregoing representations are true and correct to the best of my knowledge, information and belief.

Signature: ____________

Name: Michael R. O'Connell

Date: 04/20/2023

Appendix A

MISO Financial Schedules

> **Financial Schedules**
>
> The MISO Market facilitates the transfer of MWhs from one Market Participant to another through the use of Financial Schedules. Financial Schedules may be created for the financial transfer of MWhs in either the day-ahead or real-time market. Financial Schedules may be used by any Market Participant, and therefore apply to both the behind the meter and Hybrid Options.
>
> *For instance, if a* QF that is registered as a MISO Market Participant were to inject 10 MWh into MISO, it could create a Financial Schedule to sell those MWhs to another Market Participant. By selling the 10 MWh using a Financial schedule, it would net against the 10 MWh injection, *resulting in a $0 energy settlement with MISO.* In turn, the Market Participant buyer would pay the Seller for the MWh at the contracted rate agreed upon between the two parties. The financial schedule between the parties would assign responsibility for losses and congestion costs. *A QF Market Participant could thus use a Financial Schedule to make a bilateral sale to its* host utility.

Source: Qualifying Facilities (QF) Generator Readiness for MISO Reliability Coordination and Market Integration: Prepared by MISO (2012) - Page 14

Appendix B

Disclaimer: The following statements are excerpts from previous NIPSCO testimony that demonstrates NIPSCO's intent for Rate 831 Tier 2 and Tier 3 customers to procure their energy and capacity electric service components from the FERC-regulated MISO wholesale power market.

Due to space limitations, we have selected and presented key passages from the original Q&A. Additionally, any bold lettering was added for clarity and not in the original testimony.

1. **Cases-in-Chief – Cause No. 45159 – Andrew Campbell:**
    a. **Q15/A15:** Tier 2 Contract Demand is firm only to the extent that it is supported by **Customer-procured capacity.** NIPSCO, as the Market Participant, will register as an LMR at MISO that portion of the Customer's Tier 2 Contract Demand for **which capacity is not procured through MISO's PRA or contracted through a third party**. Such portion of a Customer's Tier 2 Contract Demand is non-firm, subject to MISO Curtailment.
    b. **Q16/A16**: If the Customer elects to take any Tier 3 Contract Demand, NIPSCO, as the Market Participant, will register that Customer as an Asset Owner at MISO….. If, **under the MISO Asset Owner framework, a Customer has not arranged for any third party Energy with NIPSCO as the contracting Market Participant, the Customer will take all Energy under this Tier 3 service at market price (LMP at the applicable Company Load Zone (NIPS.NIPS) plus all applicable MISO market settlement charges** plus the Transmission Charge within the Rate… The Customer will be responsible for all market settlement charges incurred by either NIPSCO as the Market Participant or **the Customer as Asset Owner for any third-party Energy or Capacity arrangements including, but not limited to, transmission charges to deliver energy**. MISO Market Portal access will be provided as required to carry out MISO Asset Owner functions… Tier 3 Contract Demand is firm only to the extent that it is supported by **Customer-procured capacity**.
    c. **Q18/A18:** Tier 2 is essentially a market price service for energy and allows for the "firming-up" of capacity through the MISO PRA or will be able to arrange third-party capacity arrangements… Tier 3 increases optionality available for Customers to optimize their demand in MISO. Tier 3 allows the Customer, with NIPSCO acting as the Market Participant, the ability to optimize their demand using available MISO market options…**This could include things like procuring all, or a portion, of their expected energy needs in the Day-Ahead Market, entering into third party bilateral energy arrangements (alternative**

generation), etc. Customers will also be able to procure capacity through the MISO PRA or will be able to arrange third-party capacity arrangements... Tier 2 and Tier 3 are similar in the sense that any demand not covered by a capacity purchase will be registered at MISO as a LMR and subject to MISO Curtailment. **Furthermore, Tier 2 and Tier 3 are both market-based options that are not backed by Company owned generation resources**.

d. **Q19/A19:** NIPSCO will register all qualified Industrial Customers at MISO as an "Asset Owner." The term "Asset Owner" is defined in Module A of the MISO Tariff as: "an entity identified by a Market Participant through the Transmission Provider registration process that is eligible to be represented by the Market Participant in Market Activities." Customers eligible for Rate 831 Tier 3 service will follow MISO's quarterly network model update cycle. During quarterly network model updates, the Company will request registration of a Commercial Pricing Node ("CP Node") which is required for participation as an Asset Owner under this Rate Schedule. **The CP Node will be mapped to MISO Elemental Pricing Nodes ("EP Node") in the same manner as the NIPS. NIPS CP Node to the extent model modifications are allowed under MISO rules. Refer to market registration within MISO's Business Practices Manual ("BPM") for details on the data required to register.**

e. **Q21/A21:** Recognizing that the term is confusing, **Asset Owner is the term used in the MISO Tariff and in the BPM. Asset Owner is also a term used in the MISO Commercial Model, which is used to facilitate both operations and Market Settlements**.

f. **Q22/A21: The MISO Network Model has a hierarchy that starts with Market Participants (e.g., Generation Owners, Load Serving Entities, or Marketers) and goes down to Asset Owners (can be a Generation or Load Owner, or Other) and then down to CP Node.** Market Settlements utilize CP Nodes to calculate the LMPs that are published and used for Settlements. CP Nodes are designated for each Asset Owner.

g. **Q23/A23: In order to facilitate the Asset Owner arrangement, meter volumes associated with Tier 3 need a separate designation within the network model. This is the primary means by which the Tier 3 demand is carved out for operational and MISO Settlements purposes.**

h. **Q28/A28:** However, the proposed tariff creates a direct link that makes the Tier 3 customers wholly responsible for all of the costs associated with their activity in the MISO Market. **The Asset Owner arrangement allows for a clear carve out of the individual customer activity. As such, the Tier 3 customers receive the full benefits and risks associated with activity in the MISO Market.**

i. **Q33/A33:** Does NIPSCO plan to alter its participation within the MISO Market as a result of the new industrial service structure proposed in Rate 831? -
Yes. **Generally, for Industrial Customers choosing Tier 3 service, NIPSCO will no longer procure energy nor capacity for their Tier 3 loads.**

j. **Q34/A34: Tier 3 Customers will also be able to pre-arrange third party / bilateral energy contracts prior to or shortly after an order is issued.** Energy contracts do not have any restrictions requiring alignment to MISO's Planning Year. As such, there is no implementation risk as energy contracts can start and stop in line with the negotiated terms of the contract.

k. **Q45/A45:** Proposed Rate 831 provides two (2) options of curtailable service (1) Tier 2 is "curtailments and/or MISO PRA capacity," and (2) Tier 3 is "curtailments, and/or MISO PRA capacity, and/or third-party capacity." **Both options allow a customer to procure capacity to reduce or eliminate the curtailable portion of its load. In either circumstance, the load is covered from a MISO Resource Adequacy perspective.**

2. Cases-in-Chief – Cause No. 45772 – Andrew Campbell

a. **Q27/A27: In exchange for taking a set amount of contract demand for a period of up to five years, NIPSCO's largest, most sophisticated customers were allowed to make more decisions regarding their energy procurement.**

b. **Q28/A28: The Customer chooses to procure additional capacity to reduce or eliminate its curtailable obligations as an LMR through the PRA or by purchasing capacity through a third-party bilateral agreement.** NIPSCO currently has seven large industrial customers taking service under Rate 831, all of whom have expressed an intention to continue to take service under the replacement of Rate 831 – Rate 531.

c. **Q29/A29:** Yes. Rate 831 has worked as originally intended. **Rate 831 provides increased optionality for industrial customers to manage their own energy needs.**

d. **Q30/A30:** Although some of the current Rate 831 customers were previously registered with MISO, **allowing these customers to directly access the wholesale market to meet their capacity and energy needs** has reduced NIPSCO's total firm load expectations by approximately 789 MWs... The progression and driving force behind the creation of Rate 831 outlined above suggest the need for a continued offering under Rate 831/531 is needed today more than ever.

e. **Q32/A32: As a practical matter, Rate 831 already has provisions linking to MISO Resource Adequacy and compliance with the MISO Tariff,** but NIPSCO's proposed change is to ensure that is very clear. Changes to Rate 831 should be limited in that the MISO process is expected to still be annual but have four separate seasons for which resource adequacy is required.

f. **Q33/A33:** Rate 831 provides two (2) options of curtailable service (1) Tier 2 is "curtailments and/or MISO PRA capacity," and (2) Tier 3 is "curtailments, and/or MISO PRA capacity, and/or third-party capacity." **Both options allow a customer to procure capacity to reduce or eliminate the curtailable portion of its load.**