

174 FERC ¶ 61,113
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Midcontinent Independent System Operator, Inc. Docket No. ER21-720-000

ORDER ACCEPTING UNEXECUTED FACILITIES SERVICE AGREEMENT

(Issued February 18, 2021)

1. On December 23, 2020, Midcontinent Independent System Operator, Inc. (MISO) submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),¹ an unexecuted Facilities Service Agreement (FSA) among Heartland Divide Wind II LLC (Heartland Wind) as interconnection customer, ITC Midwest LLC (ITC Midwest) as transmission owner, and MISO (collectively, the Parties). MISO designated the FSA as Original Service Agreement No. 3595 under its service agreements tariff. In this order, we accept the FSA for filing, effective February 22, 2021, as requested.

I. Background

2. MISO's *pro forma* Generator Interconnection Agreement (GIA) in Attachment X of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) describes the schedule for construction, the details of design, and the payment options for any network upgrades constructed for the interconnection customer by the transmission owner with which it directly interconnects. In MISO, an interconnection customer is responsible for 100% of network upgrade costs, with a possible 10% reimbursement for network upgrades that are 345 kV and above. The Tariff provides two options for funding the costs of network upgrades for generator interconnections.² Under the first option, the interconnection customer provides up-front funding for network upgrades and the transmission owner refunds the reimbursable portion³ of the payment, as applicable,

¹ 16 U.S.C. § 824d.

² See *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075, at P 2 (*Pro Forma FSA Order*), *order on reh'g*, 173 FERC ¶ 61,037, at P 4 (2020).

³ The reimbursable portion would be 10% of the cost of network upgrades 345 kV and above and zero percent of the cost of network upgrades less than 345 kV.

to the interconnection customer in the form of a credit to reduce the transmission service charges incurred by the transmission customer with no further financial obligations on the interconnection customer for the cost of network upgrades (the “Generator Up-Front Funding” option).⁴ Under the second option contained in Article 11.3 of MISO’s *pro forma* GIA, the transmission owner can unilaterally elect to provide the up-front funding for the capital cost of the network upgrades and assign the non-reimbursable portion of the costs of the network upgrades directly to the interconnection customer through a network upgrade charge that recovers a return on and of the transmission owner’s cost of capital (the “Transmission Owner Initial Funding” option). The details for repayment of the cost of network upgrades through the network upgrade charge are memorialized in MISO’s *pro forma* FSA, which the Commission accepted on April 27, 2020.⁵

3. In addition to MISO’s *pro forma* GIA, the Commission has also accepted a *pro forma* Facilities Construction Agreement (FCA) and *pro forma* Multi-Party Facilities Construction Agreement (MPFCA) for use in the MISO region.⁶ The *pro forma* FCA is an agreement for network upgrades on affected systems, i.e., network upgrades constructed for an interconnection customer by a transmission owner other than the transmission owner with which the interconnection customer directly interconnects. The *pro forma* MPFCA is used when multiple interconnection requests cause the need for construction of common network upgrades (network upgrades that are constructed by a transmission owner for more than one interconnection customer) on a directly-connected transmission system or an affected system. Pursuant to a decision from the U.S. Court of Appeals for the District of Columbia Circuit⁷ and a series of related orders, the Transmission Owner Initial Funding option was extended to FCAs and MPFCAs.⁸

⁴ MISO Tariff, attach. FF, § III.A.2.d.

⁵ *Pro Forma* FSA Order, 171 FERC ¶ 61,075.

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,301, at P 5 (2009).

⁷ *See Ameren Servs. Co. v. FERC*, 880 F.3d 571, 585 (D.C. Cir. 2018) (*Ameren*).

⁸ *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158, at PP 28-36 (2018) (order on remand addressing the *Ameren* decision, where the Commission reversed its prior determination in the vacated orders that transmission owners and affected system operators should not be allowed the unilateral right to elect to provide initial funding for interconnection-related network upgrades, providing for Transmission Owner Initial Funding for GIAs, as well as FCAs and MPFCAs, prospectively, and requesting briefing on the treatment of certain existing agreements), *order denying reh’g*, 169 FERC ¶ 61,233, at PP 1, 125, 136-41 (2019) (addressing, among other things, unilateral Transmission Owner Initial Funding for certain existing agreements), *order on reh’g and*

Specifically, Article 3.2.1 of the *pro forma* FCA and MPFCA was updated to allow for transmission owners and affected system operators to elect the Transmission Owner Initial Funding option.⁹

II. Filing

4. MISO states that the FSA conforms with the *pro forma* FSA.¹⁰ The FSA states that the Parties entered into an MPFCA dated January 29, 2020 for the purpose of facilitating the interconnection of Heartland Wind’s generating facilities by the construction of the necessary network upgrades to the transmission system. The FSA states that the network upgrades were identified as a result of Heartland Wind’s interconnection request for project number J583 for 200 MW. The FSA also states that the transmission owner elected the Transmission Owner Initial Funding option described in Article 3.2.1 of the executed MPFCA.¹¹ Article 1.2.4 of Appendix A of the executed MPFCA states that the “[t]ransmission owner will elect to fund the cost of the Network Upgrades as allowed in Article 3.2.1 of Appendix 9 of Attachment X, and as such, a Facilities Service Agreement (FSA) for the Network Upgrades’ costs covered in this MPFCA will be required.”

5. MISO states that Heartland Wind declined to execute the FSA and requested that the FSA be submitted unexecuted because of “continued legal uncertainty regarding” Transmission Owner Initial Funding and because Heartland Wind seeks to preserve its rights by requesting that the FSA be filed unexecuted. MISO also states that ITC Midwest has executed the FSA and asserts that unilateral election of Transmission Owner Initial Funding is proper.¹²

6. MISO requests an effective date of February 22, 2021.¹³

compliance, 172 FERC ¶ 61,248, at P 3 (2020).

⁹ See *Midcontinent Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,248 at PP 6, 29-30.

¹⁰ MISO Filing, Transmittal Letter at 1. See MISO Tariff, attach. X, app. 14.

¹¹ See MISO Filing, attach. A.

¹² *Id.*, Transmittal Letter at 1-2.

¹³ *Id.* at 1-3.

III. Notice and Responsive Pleadings

7. Notice of MISO's filing was published in the *Federal Register*, 85 Fed. Reg. 86,915 (Dec. 31, 2020), with interventions and protests due on or before January 13, 2021. Heartland Wind filed a motion to intervene and protest and ITC Midwest filed a motion to intervene and comments in support of the filing. On January 26, 2021, MISO filed an answer to Heartland Wind's protest.

A. Heartland Wind Protest

8. Heartland Wind states that it opposes unilateral Transmission Owner Initial Funding.¹⁴ Heartland Wind also states that it objects to the FSA requirement that security¹⁵ remain in place during the term of the agreement as there is no basis for security after the transmission owner has been paid for its upgrade costs.¹⁶ For these reasons, Heartland Wind states that it refused to execute the FSA and expressly reserves the right to file with the Commission to terminate the FSA if the Commission "reverts to its initial findings" regarding Transmission Owner Initial Funding so that Heartland Wind can be made financially whole.¹⁷ Heartland Wind further argues that it is reasonable to include language providing for such an outcome in the FSA. Heartland Wind requests that the Commission reject the FSA and require the Parties to amend it to state that the "changes will be undone if the legal premise for [Transmission Owner Initial Funding] is later eliminated."¹⁸ As an alternative, Heartland Wind requests that the Commission find at this time that if future Commission decisions lead to reversal of the unilateral election of Transmission Owner Initial Funding of network upgrades, then interconnection customers should be able to "retroactively annul and reverse [Transmission Owner Initial Funding] elections, terminating FSAs."¹⁹

¹⁴ Heartland Wind Protest at 3.

¹⁵ Under Article IV (Security) of MISO's *pro forma* FSA, the interconnection customer is required to provide the transmission owner with security in the form of irrevocable security in an amount equal to the initial capital cost, which remains with the transmission owner throughout the term of the FSA, though it may be reduced annually on a *pro rata* basis. MISO Tariff, attach. X, app. 14, art. IV (Security) (34.0.0).

¹⁶ Heartland Wind Protest at 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

B. ITC Midwest Comments

9. ITC Midwest argues that there is no basis to reject or condition the FSA.²⁰ ITC Midwest contends that Heartland Wind's assertions constitute a collateral attack on the Commission's orders allowing Transmission Owner Initial Funding and MISO's *pro forma* FSA, and the Commission should reject the arguments.²¹ Additionally, ITC Midwest claims that the fact that a Commission order has been appealed does not stay its effectiveness.²² ITC Midwest states that the FSA should be accepted without condition, reservation, or modification.²³

C. MISO Answer

10. MISO argues that there is no legal basis for rejecting the FSA because Heartland Wind does not identify any patent deficiencies in complying with applicable Tariff requirements and because the FSA reflects the Commission's directives.²⁴ MISO contends that a petition for review with a circuit court of appeals would not stay or modify Commission orders.²⁵ Therefore, MISO claims that Heartland Wind's proposal to memorialize its reservations in the FSA would be premature because any reversal or modifications on rehearing or appeal in the underlying dockets is speculative at this point.²⁶ MISO also claims that the Commission already rejected similar arguments in a previous FSA-related proceeding.²⁷

²⁰ ITC Midwest Comments at 3-4.

²¹ *Id.* at 4.

²² *Id.*

²³ *Id.*

²⁴ MISO Answer at 2-3 (citing 18 C.F.R. § 35.5(a) (2020)).

²⁵ *Id.* at 3-4 (citing 16 U.S.C. § 8251(c)).

²⁶ *Id.* at 4.

²⁷ *Id.* at 4-5 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,076 (2020)).

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept MISO's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

12. We accept the FSA for filing, to be effective February 22, 2021, as requested.²⁸ We disagree with Heartland Wind's argument that the Commission should direct the Parties to amend the FSA to include language providing that Heartland Wind may terminate the FSA and that the choice of Transmission Owner Initial Funding will be undone, if pending Commission or judicial decisions result in the elimination of the unilateral right of the transmission owner to elect Transmission Owner Initial Funding. We also disagree with Heartland Wind's alternative request that we hold at this time that we will allow interconnection customers to retroactively annul and reverse Transmission Owner Initial Funding elections should future Commission decisions lead to reversal of such unilateral elections. The FSA, which conforms with MISO's *pro forma* FSA, appropriately reflects the state of the law as of the date the agreement becomes effective. Neither a request for rehearing nor a petition for review stays the effectiveness or enforceability of a Commission order.²⁹

13. In addition, Article X.f of the FSA provides that “[n]othing in this Service Agreement shall limit the rights of the Parties or of [the Commission] under Sections 205 and 206 of the [FPA] and [the Commission's] rules and regulations thereunder.” The Commission will address any request to retroactively annul and reverse Transmission

²⁸ We note that ITC Midwest uses its 2018 Attachment O data to calculate the network upgrade charge in Exhibit I. We expect ITC Midwest will update this information in accordance with FSA article III.d: “Any adjustment to the inputs to Owner's Attachment O Formula Rate or successor rate under the Tariff used in the Formula shown in Exhibit I of this Service Agreement shall require a recalculation of the Formula set forth in Exhibit I for the period to which such adjustment applies and require revised Payment amounts and refunds or surcharges, as necessary.”

²⁹ 16 U.S.C. § 8251(c); 18 C.F.R. § 385.713(e) (2020).

Owner Initial Funding elections if and when an FPA section 205 or 206 filing making such a request is submitted.

14. Additionally, regarding Heartland Wind's objection to the FSA requirement that security remain in place during the term of the agreement, we note that this provision, Article IV.c., is unchanged from the *pro forma* FSA. In the *Pro Forma* FSA Order, the Commission accepted this provision as just and reasonable and found that "the posting of financial security is reasonable to protect the transmission owner and transmission service customers from the risk that an interconnection customer will stop making payments under an FSA and that the portion of the undepreciated costs would be borne by either the transmission owner or transmission customers, or assigned to another interconnection customer."³⁰

The Commission orders:

The FSA is hereby accepted, effective February 22, 2021, as requested, as discussed in the body of this order.

By the Commission. Chairman Glick is concurring with a separate statement attached. Commissioner Clements is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁰ *Pro Forma* FSA Order, 171 FERC ¶ 61,075 at P 32, *order on reh'g*, 173 FERC ¶ 61,037, at PP 20-23 (2020).

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GLICK, Chairman, *concurring*:

1. I support today's orders accepting the unexecuted Facilities Service Agreements (FSA) in the instant dockets, because they conform with MISO's *pro forma* FSA and reflect the state of the law today. However, I write separately to reiterate my concern that giving transmission owners the discretion to unilaterally choose whether to self-fund network upgrades constructed on behalf of affiliated and non-affiliated interconnection customers may be unjust and unreasonable and unduly discriminatory or preferential.¹ The Commission failed to meaningfully wrestle with these concerns in its orders allowing transmission owners the unilateral right to choose up-front funding.²

For these reasons, I respectfully concur.

Richard Glick
Chairman

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233 (2019) (Glick, Comm'r, dissenting), *order on reh'g*, 172 FERC ¶ 61,248 (2020) (Glick, Comm'r, dissenting).

² *Id.*

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CLEMENTS, Commissioner, *concurring*:

1. I concur in today’s order accepting the Facilities Service Agreement MISO filed in this proceeding because it conforms to the *pro forma* version of that agreement in MISO’s tariff. However, I write separately to highlight my concern that MISO’s underlying rules on network upgrade funding may not be just and reasonable and may be unduly discriminatory or preferential. The Commission’s August 2018¹ and December 2019² orders adopting the current interconnection rules do not adequately address the justifiable concern that those rules create an opportunity for generation-owning transmission owners to unduly discriminate between assets in which they have an ownership interest and assets in which they do not have such an interest. Because I explained this concern more fully in my concurring statement in *Midcontinent Independent System Operator, Inc.*,³ I will not repeat that explanation here, but I continue to believe MISO’s interconnection rules may well merit additional scrutiny in the near future.

For these reasons, I respectfully concur.

Allison Clements
Commissioner

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158 (2018).

² *Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233 (2019).

³ *Midcontinent Indep. Sys. Operator, Inc.*, 174 FERC ¶ 61,084 (2021) (Clements, Comm’r, concurring).