

142 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Rail Splitter Wind Farm, LLC

Docket No. EL12-11-000

v.

Ameren Services Company
and
Midwest Independent Transmission System Operator, Inc.

ORDER ON COMPLAINT

(Issued January 17, 2013)

1. On November 23, 2011, pursuant to section 206 of the Federal Power Act (FPA),¹ Rail Splitter Wind Farm, LLC (Rail Splitter) filed a complaint against Ameren Services Company (Ameren) and Midwest Independent Transmission System Operator, Inc. (MISO). Rail Splitter alleged that the assessment of a monthly carrying charge (Monthly Charge) against Rail Splitter by Ameren pursuant to the Facilities Service Agreement (FSA) between the two parties is unjust, unreasonable, and unduly discriminatory. Rail Splitter requests that the Commission order Ameren to refund “those amounts collected by Ameren in excess of the just and reasonable charge under the FSA,” effective March 22, 2011.² As discussed below, we deny the relief sought by Rail Splitter.

Background

2. Rail Splitter owns and operates a 101 MW wind-powered electric generation facility located in Tazewell and Logan counties, Illinois (Facility). In July 2009, Rail Splitter, Ameren and MISO entered into an Amended and Restated Large Generator Interconnection Agreement (LGIA), pursuant to which Ameren would construct the network upgrades necessary to accommodate interconnection of the Facility: a new 138

¹ 16 U.S.C. § 824e (2006).

² Rail Splitter Complaint at 9.

kV substation, two 138 kV lines, and tapping structures (Network Upgrades).³ Section 11.4.1 of the LGIA provides for responsibility for the costs of the Network Upgrades to be consistent with the terms of Attachment FF to MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).

3. At the time the LGIA was executed, section III.A.d of Attachment FF provided the transmission owner with a choice between two options for recovering the costs of network upgrades subject to participant funding. Under Option 1, the transmission owner repaid 100 percent of such network upgrade costs to the interconnection customer and then required the interconnection customer to pay the transmission owner the Monthly Charge to recover the costs of the upgrades subject to participant funding over a negotiated period of time. Specifically, the interconnection customer paid the Monthly Charge, which included: (1) return on rate base, including general and common plant; (2) operations and maintenance expense (O&M); (3) depreciation expense; (4) taxes other than income taxes; and (5) income taxes calculated under Attachment GG of the Tariff. Charges collected under Attachment GG were subtracted from the transmission owner's transmission revenue requirement under Attachment O of the Tariff. Under Option 2, the transmission owner retained the interconnection customer's initial payments for the costs of network upgrades subject to participant funding as a contribution in aid of construction and assessed no further charges to the interconnection customer. Section III.A.d left the choice between the two options to the transmission owner, but it stated that the transmission owner's election must be made on a non-discriminatory and consistent basis.

4. Ameren completed construction of the Network Upgrades to facilitate the interconnection of the Facility in July 2009. At that time, Rail Splitter had paid virtually all of the requisite costs, and the Facility itself was nearly complete, and Ameren informed Rail Splitter that it would elect Option 1 under Attachment FF of the Tariff. Although Rail Splitter informally raised concerns with Ameren's election of Option 1, it nevertheless entered into the FSA, which was filed with the Commission in January 2010 and accepted pursuant to authority delegated to the Commission's staff.⁴

5. Separately, on March 22, 2011, in Docket No. EL11-30-000, the Midwest Generation Development Group asked the Commission to order MISO to remove Option 1 from Attachment FF of the Tariff. The Commission granted the relief requested,

³ The LGIA conforms to MISO's *pro forma* Large Generator Interconnection Agreement that was in effect at the time.

⁴ *Ameren Servs. Co.*, Docket No. ER10-677-000 (Mar. 5, 2010) (delegated letter order). The FSA became effective January 1, 2010.

finding that Option 1 is unjust, unreasonable, and unduly discriminatory.⁵ Specifically, the Commission held that Option 1 was unjust and unreasonable because it “essentially allows transmission owners to avoid many of the risks and costs associated with financing a new construction project, while retaining benefits as if they did incur some of those risks and costs.”⁶ In addition, by granting transmission owners the sole discretion to elect between Option 1 and Option 2, the Commission concluded that Attachment FF created opportunities for undue discrimination.⁷ The Commission also affirmed that Option 2 is just and reasonable.⁸

Complaint

6. In its complaint, Rail Splitter seeks to apply the Commission’s decision in *E.ON* to its own FSA with Ameren, and it argues that the Monthly Charge required by the FSA is unjust, unreasonable, and unduly discriminatory. Rail Splitter requests that the Commission order Ameren to refund “those amounts collected by Ameren in excess of the just and reasonable charge under the FSA,” dating back to March 22, 2011.⁹

7. In support of its complaint, Rail Splitter argues that it is unjust and unreasonable to permit Ameren to recover a carrying charge of 15.34 percent on these Network Upgrades in light of the relative risks assumed by the parties.¹⁰ Rail Splitter asserts that it incurred all of the financing and construction risk associated with its Network Upgrades because it was required to pay for their construction up-front and Ameren simply constructed the upgrades. While Rail Splitter acknowledges that Ameren incurred a cost when it refunded the Network Upgrade costs, it did so voluntarily after the upgrades had already been placed into service. Moreover, Rail Splitter states that the risk associated with Ameren’s reimbursement was assumed with the knowledge that Ameren would recover that cost several times over through the term of the FSA. Therefore, Rail Splitter asserts that the degree of risk that Ameren assumed does not justify the Monthly Charge.

⁵ *E.ON Climate & Renewables N. Am., LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076, at PP 36-43 (2011) (*E.ON*), *reh’g denied*, 142 FERC ¶ 61,048 (2012).

⁶ *Id.* P 37.

⁷ *Id.* P 38.

⁸ *Id.* P 40.

⁹ Rail Splitter Complaint at 9.

¹⁰ *Id.* at 6.

8. Rail Splitter also argues that the Monthly Charge is unreasonable because it requires Rail Splitter to pay approximately \$12.64 million for the Network Upgrades, which cost approximately \$2.75 million to construct. Rail Splitter states that it does not receive any additional service or benefit in connection with the Monthly Charge, with the limited exception of “nominal [operations and maintenance] services that Ameren may recover through its transmission service rates.”¹¹ Rail Splitter therefore concludes that the Monthly Charge imposes an artificial cost that is unjust, unreasonable, unduly discriminatory, or preferential in contravention of sections 205 and 206 of the FPA.

9. If the Commission grants the requested relief, Rail Splitter requests that the Commission find that the refund effective date of March 22, 2011, established in *E.ON*, also applies to payments of the Monthly Charge under the FSA.¹² Rail Splitter argues that the Commission’s decision in *E.ON* applies to the Monthly Charge in this case because the FSA is a contract directly implementing Option 1 under Attachment FF, which the Commission found to be unjust and unreasonable. In the alternative, Rail Splitter requests refunds effective as of the date of its complaint.

Notice of Filing and Responsive Pleadings

10. Notice of Rail Splitter’s complaint was published in the *Federal Register*, 76 Fed. Reg. 75,542 (2011), with answers, interventions, and protests due on or before December 13, 2011.

11. Ameren filed an answer to Rail Splitter’s complaint (Ameren Answer), and MISO filed an answer and motion to dismiss Rail Splitter’s complaint (MISO Answer). Exelon Corporation; NextEra Energy Resources, LLC; E.ON Climate & Renewables North America, LLC (E.ON); and the Midwest ISO Transmission Owners filed timely motions to intervene.¹³

¹¹ *Id.* at 7.

¹² *Id.* at 7-8.

¹³ For purposes of this proceeding, the Midwest ISO Transmission Owners consist of: American Transmission Company LLC; Dairyland Power Cooperative; Duke Energy Corporation on behalf of Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company d/b/a/ ITC Transmission; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power and its subsidiary Superior Water, L&P; Missouri River Services; Montana-Dakota Utilities Co.; Northern Indiana Public

12. Rail Splitter filed an answer to the Ameren Answer and the MISO Answer (Rail Splitter Answer). E.ON filed an answer to the MISO Answer (E.ON Answer). On January 11, 2012, Ameren filed an answer to the Rail Splitter Answer (Ameren January 11 Answer).

1. MISO Answer

13. MISO argues the Commission should dismiss Rail Splitter's complaint because Rail Splitter has failed to carry its burden of proof under section 206 of the FPA.¹⁴ It also urges the Commission to dismiss Rail Splitter's complaint in order to avoid prejudging the outcome of the pending requests for rehearing of the Commission's ruling in *E.ON*. Specifically, MISO explains that parties have requested clarification of the effect of the Commission's decision in *E.ON* on service agreements entered into prior to March 22, 2011.¹⁵ For these same reasons, MISO also contends that the complaint is untimely and not ripe for review.

14. MISO asserts that the relief sought by Rail Splitter is precluded by the *Mobile-Sierra* doctrine.¹⁶ MISO states that the FSA is an "arm's-length contract," and that it may only be modified if the Commission finds that the contract seriously harms the public interest. In support of this assertion, MISO states that the FSA must be negotiated on a case-by-case basis because there is no *pro forma* facilities service agreement. Moreover, MISO states that Rail Splitter's failure to contest Ameren's election of Option 1 at the time the FSA was filed indicates that Rail Splitter accepted and agreed to abide by the terms of the FSA. MISO concludes that the Commission should dismiss Rail Splitter's complaint because Rail Splitter failed to address the *Mobile-Sierra* doctrine, and thus "fails to state a claim for which relief can be granted."¹⁷

Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a/ Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

¹⁴ MISO Answer at 7-8 (citing 16 U.S.C. § 824e(b)).

¹⁵ *Id.* at 8-9.

¹⁶ *Id.* at 10-12.

¹⁷ *Id.* at 12.

15. MISO argues that Rail Splitter's requested relief violates section 206 of the FPA, which prohibits retroactive relief. Specifically, MISO explains that the FSA was approved and effective before the March 22, 2011 refund effective date established in *E.ON*.

16. MISO also argues that, despite the Commission's holding in *E.ON*, Option 1 is a just, reasonable and non-discriminatory cost-recovery mechanism. MISO states that the Commission previously held that Option 1 was just, reasonable and not unduly discriminatory.¹⁸ Further, MISO argues that, contrary to Rail Splitter's assertion, Rail Splitter did not assume all risk associated with construction of the Network Upgrades. Rather, MISO argues that Ameren bears the risk of default if Rail Splitter fails to pay the Monthly Charge. Moreover, MISO contends that the risk placed on the interconnection customer is commensurate with the benefit conveyed by the Network Upgrades and that Option 1 ensures the transmission owner will not be worse off for owning the Network Upgrades. For the same reason, MISO argues, it is appropriate for Ameren to earn a return on the repayment amounts, contrary to Rail Splitter's contention.¹⁹

17. MISO contends that the difference in cost to interconnection customers between Option 1 and Option 2 is justified by various factors. For instance, MISO points out that under Option 1, interconnection customers receive a substantial initial reimbursement. Thus, MISO concludes that giving transmission owners a choice in how they recover the cost of Network Upgrades is not unduly discriminatory so long as the transmission owner "has a legitimate basis for selecting Option 1 over Option 2, . . . even if it results in different long-term costs for different generators."²⁰

18. MISO requests that the Commission make two clarifications if the Commission denies MISO's motion to dismiss the complaint.²¹ First, MISO seeks clarification that it has no responsibility for any refunds that the Commission may determine are owed to Rail Splitter because MISO is not a party to the FSA and has not received any benefit from the Monthly Charge. Second, to the extent that the Commission does not grant MISO's motion to dismiss the complaint and addresses the application of its decision in *E.ON* in this proceeding, MISO asks the Commission to establish a policy for the treatment of the numerous agreements signed prior to March 22, 2011 in which Option 1 was selected as the network upgrade reimbursement mechanism. MISO states that if the

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 14.

²⁰ *Id.* at 15.

²¹ *Id.* at 15-17.

Commission permits Rail Splitter's complaint to go forward, it is likely that other interconnection customers will bring similar complaints. To avoid the need to adjudicate such complaints, MISO requests that the Commission "definitively state whether it will entertain complaints from interconnection customers operating under [service agreements implementing transmission owners' election of Option 1], and whether such complaints will be controlled by the Commission's holding in *E.ON*."²² MISO also requests that the Commission explain how such complaints are to be assessed in light of the *Mobile-Sierra* doctrine.

2. Ameren Answer

19. Ameren argues that the *Mobile-Sierra* doctrine applies to the FSA and that Rail Splitter has not carried its burden under the public interest standard. Ameren asserts that the FSA is a negotiated agreement that "sets forth the charge for interconnection service."²³ Further, Ameren explains that the FSA does not authorize either party to seek unilateral abrogation from the Commission, and therefore, the FSA may only be modified if the public interest requires it.²⁴ Ameren concludes that Rail Splitter's complaint fails to satisfy the public interest standard because Rail Splitter would be the sole beneficiary if the Commission grants the relief requested. Furthermore, Ameren contends that the public interest would be harmed if Rail Splitter is relieved of its obligations under the FSA because Ameren treats the payments received by Rail Splitter as revenue credits that lower the revenue requirement paid by Ameren's transmission customers. Consequently, relieving Rail Splitter of its obligation to pay the Monthly Charge would require Ameren's transmission customers to pay higher rates.²⁵

20. Ameren also argues that the Commission's holding in *E.ON* does not entitle Rail Splitter to modification of the FSA. Ameren characterizes *E.ON* as limiting "the options that transmission owners may elect to recover interconnection costs under the tariff after March 22, 2011."²⁶ Ameren reasons that the FSA is separate and distinct from the MISO Tariff at issue in *E.ON* and that the Commission's determination in *E.ON* has no prospective effect on the FSA.²⁷ Moreover, Ameren argues that *E.ON* cannot be applied

²² *Id.* at 17.

²³ Ameren Answer at 4.

²⁴ *Id.* at 6.

²⁵ *Id.* at 7-9.

²⁶ *Id.* at 5.

²⁷ *Id.* at 9-10.

in this case because the Commission analyzed the complaint in *E.ON* under the just and reasonable standard, rather than the public interest standard that Ameren believes should apply in this case.

21. Furthermore, Ameren contends that the pricing provisions of new interconnection agreements are not always required to conform to the effective *pro forma* agreement.²⁸ As a result, Ameren urges the Commission to conclude that even if the public interest standard does not apply, the pricing provisions of the FSA need not conform to the terms provided in the Tariff. Ameren explains that the parties executed the FSA at a time when the Tariff provided for a specific pricing methodology. Ameren adds that the FSA embodies that methodology and did not reserve the right to make unilateral changes to the FSA.

22. Finally, Ameren takes issue with the remedy that Rail Splitter requests. Ameren argues that the filed rate doctrine and FPA section 206(b) permit the Commission to establish a refund effective date no earlier than the date the complaint was filed; as such, the Commission has no authority to establish the March 22, 2011 refund effective date Rail Splitter requests.²⁹ Furthermore, Ameren asserts that Rail Splitter's complaint does not meet the requirement for relief under section 206. Specifically, Ameren states that Rail Splitter's complaint does not explain how refunds might be calculated or how, if charges under the FSA are refunded, Rail Splitter would pay for the interconnection service for which it contracted.³⁰ Ameren argues that under no circumstances can Rail Splitter be simply relieved of paying the cost of the Network Upgrades required by the interconnection of the Facility.

3. Rail Splitter Answer

23. In its answer, Rail Splitter argues that the terms of the FSA do not preclude its filing its complaint pursuant to section 206 of the FPA. Rather, Rail Splitter observes that the FSA is silent with respect to the parties' filing rights.

24. Rail Splitter argues that the *Mobile-Sierra* standard does not apply to the FSA. Rail Splitter asserts that the *Mobile-Sierra* doctrine establishes a presumption that freely negotiated agreements are just and reasonable. However, Rail Splitter states that the *Mobile-Sierra* presumption cannot support a negotiated rate where the Commission has

²⁸ *Id.* at 10-11 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,019, at PP 16-26, *order on reh'g*, 125 FERC ¶ 61,210, at PP 17-26 (2008) (hereinafter, *Prairie State*)).

²⁹ *Id.* at 11-12.

³⁰ *Id.* at 13-14.

already determined that the underlying basis for the contract rate is unjust, unreasonable, or unduly discriminatory. Furthermore, Rail Splitter argues that even if the *Mobile-Sierra* doctrine does apply in this case, the Commission's determination in *E.ON* is sufficient to carry the burden under the public interest standard. Rail Splitter reasons that the Commission found Option 1 to be unduly discriminatory in violation of section 206 of the FPA. Further, Rail Splitter contends, "[t]he purpose behind section 206 is the protection of the public interest. The Commission has already found that Option 1 rates, such as those under the FSA, are not in the public interest. This finding clearly overcomes the *Mobile-Sierra* presumption and supports the relief requested" ³¹

25. Rail Splitter clarifies that it seeks prospective relief from the rates established by the FSA. It argues that the refund effective date established in *E.ON* "clearly applies to the FSA, because the FSA is a contract directly implementing Option 1." Moreover, Rail Splitter contends that this interpretation is consistent with section 206 of the FPA, which authorizes the Commission to determine the just and reasonable rate "to be thereafter observed." ³²

26. Rail Splitter further argues that the Commission should deny MISO's motion to dismiss and its request for clarification. Rail Splitter asserts that its complaint is both timely and ripe and that it is entitled to rely on *E.ON* because that order is effective despite the pending requests for rehearing. Furthermore, Rail Splitter reiterates its position that its complaint requests only prospective relief. Finally, Rail Splitter clarifies that its complaint does not seek to address the merits of the Commission's decision in *E.ON* and argues that MISO's requests for clarification of that decision are beyond the scope of the current proceeding.

Discussion

A. Procedural Matters

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the *E.ON* Answer or the Ameren

³¹ Rail Splitter Answer at 4-5 (citing *Town of Norwood v. FERC*, 587 F.2d 1306 (D.C. Cir. 1978)).

³² *Id.* at 5-6.

January 11 Answer and will, therefore, reject them. We will, however, accept the Rail Splitter Answer to the extent that it responds to MISO's motion to dismiss, which Rail Splitter is entitled to answer under our rules, and reject the Rail Splitter Answer to the extent that it responds to the Ameren Answer.³³

B. Substantive Matters

29. As discussed below, we deny the relief requested in Rail Splitter's complaint.

30. We find that the *Mobile-Sierra* presumption, as defined by the Supreme Court, does not apply to the FSA.³⁴ However, since Rail Splitter fails to justify modification of the FSA under the ordinary just and reasonable standard of review, we need not opine further on this issue.

31. The Commission has emphasized that it considers stability and regulatory certainty an important issue in its decision-making process. For example, the Commission made this point explicitly in Order No. 888,³⁵ which requires transmission owners to offer transmission service on an open and non-discriminatory basis.³⁶ More

³³ 18 C.F.R. § 385.213(a)(3) (2012) (permitting an answer to any pleading, if not prohibited by Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2)).

³⁴ *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.* 554 U.S. 527, 546 (2008); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S.Ct. 693, 700 (2010); *see also MidAmerican Energy Co.*, 138 FERC ¶ 61,028 (2012).

³⁵ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,663-66 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

³⁶ *Id.* at 31,664-65. We also remind the parties that interconnection service is a part of open access transmission service, and the procedures and agreements for such service are under the open access transmission tariffs of transmission owners and providers. *See Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), order on reh'g, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, order on reh'g, Order No. 2003-B,

recently, the Commission has stated, “Even a contract that can be revised under the just and reasonable standard (as opposed to the more stringent public interest standard) is not to be lightly revised. This is because a degree of stability and predictability is crucial to the functioning of businesses and markets and to attracting investment in the utility business.”³⁷

32. In this case, at the time that Ameren informed Rail Splitter that it would elect Option 1, section III.A.d of Attachment FF envisioned that the parties would execute a service agreement following such an election. That provision also authorized MISO to file such a service agreement with the Commission unexecuted. Rail Splitter states that it initially raised concerns regarding Ameren’s election of Option 1, but it acknowledges that it nevertheless executed the FSA, rather than bringing its objection to the Commission in a proceeding on an unexecuted FSA. Consequently, we agree with MISO that Rail Splitter’s execution of the FSA and its failure to avail itself of the procedural options available to it is an important factor in our denial of the complaint. Thus, even if we assume that Ameren’s election of Option 1 required Rail Splitter to pay significantly more for the network upgrades in question than it could have paid under Option 2, the obligation to pay according to Option 1 under the contract was insufficient to dissuade Rail Splitter from executing the FSA without protest or objection, and is insufficient now to persuade us to relieve Rail Splitter from its obligation to pay the Monthly Charge.

33. Moreover, the Commission’s recent holding in *E.ON* does not warrant abrogation of the preexisting, executed FSA or compel us to grant the relief requested by Rail Splitter. Consistent with the result in this case, the Commission clarified that its decision in *E.ON* will not apply to FSAs effective prior to March 22, 2011.³⁸

34. Because we deny the relief requested by Rail Splitter’s complaint, we need not address arguments raised by the parties concerning the appropriate refund effective date in this matter. Moreover, we will not address MISO’s requests for clarification of *E.ON*, as those requests are more appropriately addressed in the *E.ON* rehearing order issued concurrently with this order.

FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

³⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128, at P 26 (2006) (citations omitted).

³⁸ *E.ON Climate & Renewables N. Am., LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076, *reh’g denied*, 142 FERC ¶ 61,048 at P 34 (2012).

The Commission orders:

The relief requested by Rail Splitter's complaint is hereby denied as discussed in the body of this order.

By the Commission. Commissioners Moeller and LaFleur are concurring in part with a statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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MOELLER, Commissioner, *concurring in part*:

I join with Commissioner LaFleur, especially since the order fails to provide guidance on why the agreement is not entitled to the *Mobile-Sierra* presumption.

Accordingly, I respectfully concur.

Philip D. Moeller
Commissioner

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LaFLEUR, Commissioner, *concurring in part*:

I write separately today to note that, while I support the decision in this case to deny Rail Splitter's complaint, I would not reach the question of whether the Facilities Service Agreement is entitled to the Mobile-Sierra presumption. I do not believe the determination of this issue is necessary to the decision in this case.

Accordingly, I respectfully concur.

Cheryl A. LaFleur
Commissioner