

155 FERC ¶ 61,044  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

NorthWestern Corporation

Docket No. ER16-763-000

ORDER ACCEPTING NOTICE OF TERMINATION OF LARGE GENERATOR  
INTERCONNECTION AGREEMENT

(Issued April 21, 2016)

1. On January 22, 2016, NorthWestern Corporation (NorthWestern) filed a notice of termination of its Large Generator Interconnection Agreement (LGIA) with Southern Montana Electric Generation and Transmission Cooperative, Inc. (Southern Montana). In this order, we accept the notice of termination for filing, and find that NorthWestern is not required to make further reimbursements to Southern Montana for Network Upgrades.

**I. Background**

2. NorthWestern owns and operates electric and gas transmission and distribution facilities primarily located in Montana and South Dakota.<sup>1</sup> Southern Montana is a not-for-profit, member-owned electric generation and transmission cooperative that provides wholesale electric energy and related transmission services to three electric distribution cooperatives in Montana.

3. In August 2011, NorthWestern and Southern Montana executed the LGIA, under NorthWestern's Montana OATT, which governs the interconnection of Southern Montana's Highwood Generating Station (Highwood Station) to a new switchyard,

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<sup>1</sup> This order addresses transmission service under NorthWestern's Montana Open Access Transmission Tariff (OATT), which governs NorthWestern's Montana transmission facilities. NorthWestern's South Dakota transmission facilities are not physically interconnected with its Montana facilities and are located in a different electric reliability region.

constructed by NorthWestern on an existing 230 kV line between its Great Falls and Broadview substations. The costs of the new switchyard, and the costs of re-routing the existing 230 kV line and 50 percent of the costs to install a new 200 MVA autotransformer at the Great Falls substation, were defined as Network Upgrades under the LGIA.<sup>2</sup> NorthWestern indicates that the Network Upgrades were completed and placed in service in February 2012, and the cost of constructing the Network Upgrades was approximately \$5.47 million.

4. The Highwood Station generated a limited amount of power in February 2012, and between July and October 2013, during which time NorthWestern provided transmission service credits to Southern Montana. The remaining unreimbursed Network Upgrades costs, including interest, total approximately \$5.84 million. In June 2014, Highwood Station was decommissioned, dismantled, and sold for parts.

5. In November 2015, NorthWestern notified Southern Montana of its intention to terminate the LGIA pursuant to Article 2.3.1 of the LGIA because the Highwood Station had permanently ceased commercial operation. Subsequently, on December 23, 2015, Southern Montana confirmed that termination of the LGIA was appropriate because the Highwood Station had been sold and dismantled and would no longer generate power (December 23 Letter).

## **II. Filing**

6. On January 22, 2016, NorthWestern filed a notice of termination for the LGIA. First, NorthWestern requests Commission approval to terminate the LGIA under LGIA Articles 2.3.1 and 2.3.3, and under section 35.15 of the Commission's rules and regulations.<sup>3</sup> Specifically, NorthWestern requests termination of the LGIA, effective March 22, 2016, 90 days following Southern Montana's December 23 Letter confirming its termination of the LGIA. NorthWestern also seeks confirmation from the Commission that it not be required to make further repayments of Network Upgrade costs to Southern Montana.

7. NorthWestern states that its notice of termination is merited on two separate grounds under Article 2.3.1 of the LGIA. NorthWestern states that this article authorizes Southern Montana to terminate the LGIA after giving NorthWestern (as Transmission Provider) 90 calendar days advance written notice, which NorthWestern avers Southern

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<sup>2</sup> NorthWestern states that subsequently, in October 2011, Southern Montana filed a petition under Chapter 11 of the United States Bankruptcy Code.

<sup>3</sup> 18 C.F.R. § 35.15 (2015).

Montana did via its December 23 Letter. NorthWestern also states that the same article gives NorthWestern the unilateral right to terminate the LGIA by “notifying FERC after the Generating Facility permanently ceases Commercial Operation.”<sup>4</sup> NorthWestern maintains that the condition of permanent cessation of Commercial Operation is fulfilled because Southern Montana, through its trustee in bankruptcy, has decommissioned, dismantled, and sold in pieces the Highwood Station and all related equipment, including the physical interconnection between the Highwood Station and the NorthWestern transmission system.

8. NorthWestern also states that its filing comports with Article 2.3.3 of the LGIA, which provides that no termination of the LGIA shall be effective until the parties have complied with all applicable laws and regulations, including a filing with the Commission of a notice of termination of the LGIA, “which notice has been accepted for filing by [the Commission].”<sup>5</sup> NorthWestern asserts that section 35.15 of the Commission’s regulations—which requires a filing to cancel service agreements on file with the Commission—should apply to the instant filing, even though the LGIA was not separately filed with the Commission. NorthWestern states that this is so because the agreement constitutes a standard LGIA that was filed in NorthWestern’s Electric Quarterly Reports, consistent with the exception for standard form LGIAs enunciated in Order No. 2003.<sup>6</sup>

9. NorthWestern also argues that the notice of termination should be accepted without requiring NorthWestern to repay unreimbursed Network Upgrade costs under Article 11.4.1. NorthWestern asserts that termination of the LGIA eliminates its obligation to repay Southern Montana the remaining Network Upgrade costs.

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<sup>4</sup> NorthWestern Notice at 5 (citing LGIA Article 2.3.1).

<sup>5</sup> *Id.* at 5-6 (citing LGIA Article 2.3.3).

<sup>6</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 915 (2003), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at P 619, *order on reh’g*, Order No. 2003-B, 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) (stating “Order No. 2001 therefore found that if an interconnection agreement conforms with a Commission-approved standard form of interconnection agreement, the utility does not have to file it but must report it in the Electric Quarterly Reports”).

10. NorthWestern states that, in Order No. 2003, the Commission established the rules pertinent to a Transmission Provider's obligation to provide transmission service credits to reimburse Network Upgrade costs funded by interconnection customers.

NorthWestern asserts that the Commission should apply those rules because the LGIA conforms in all material respects to the *pro forma* LGIA.<sup>7</sup> More specifically, NorthWestern states that, in Order No. 2003, the Commission initially adopted a policy requiring the generator to initially fund Network Upgrades and receive credits against the cost of transmission service equal to the costs of the Network Upgrades plus interest and that unreimbursed Network Upgrade costs remaining after five years would need to be repaid with interest.<sup>8</sup>

11. NorthWestern further explains, however, that the Commission established two limitations on a transmission provider's obligation to repay unreimbursed Network Upgrade costs at the end of the five year period: first, a generator is not entitled to repayment unless it achieved commercial operation; and second, even if it achieves commercial operation, the transmission provider is not obligated to repay unreimbursed Network Upgrade costs unless the generator remains in operation through the five-year period. Therefore, NorthWestern contends that, if a generator never achieves commercial operation or temporarily achieves commercial operation but then ceases to operate before the end of the five-year period, the generator does not have the right to a refund of its upfront payment for Network Upgrades.<sup>9</sup>

12. NorthWestern states that, in Order No. 2003-A, the Commission made two changes to its policy regarding repayment of Network Upgrade costs for non-independent transmission providers. First, the Commission ruled that a generator may use its credits only for transmission service for the output of the generating facility, not for transmission service unrelated to its generating facility; and second, the Commission eliminated the obligation for the transmission provider to repay all unreimbursed Network Upgrade costs at the end of the five-year period.<sup>10</sup> NorthWestern also states that the Commission clarified that a generator that initially achieves commercial operation

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<sup>7</sup> NorthWestern Notice at 7.

<sup>8</sup> *Id.* at 7 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 720).

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 8 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at PP 615-616).

“continue[s] to operate as long as its interconnection agreement remains in full force and effect.”<sup>11</sup>

13. NorthWestern further states that the Commission, in Order No. 2003-B, expressly identified the policy objectives of protecting native load and other transmission customers while also promoting efficient investment decisions. NorthWestern states that, therefore, the Commission, in Order No. 2003-B, revised its ruling from Order No. 2003-A eliminating the five-year repayment deadline, and held that non-independent transmission providers must repay with interest any Network Upgrade costs that have not been reimbursed through transmission service credits that remain after a 20-year period.<sup>12</sup>

14. NorthWestern then asserts that the Commission, in Order No. 2003-C, clarified that a transmission provider’s obligation to repay unreimbursed Network Upgrade costs at the end of the 20-year period is not absolute, and explained how its crediting and repayment policies apply to an interconnection customer—like Southern Montana—that temporarily achieves commercial operation but then ceases operations before it is fully reimbursed for its Network Upgrade costs. NorthWestern quotes Order No. 2003-C:

[W]e clarify that the Affected System Operator, like the Transmission Provider, must reimburse the Interconnection Customer for its upfront payment even if the Generating Facility ceases Commercial Operation before the Interconnection Customer is completely reimbursed *as long as the Interconnection Agreement* between the Interconnection Customer and the Transmission Provider *remains in full force and effect.*<sup>[13]</sup>

15. NorthWestern explains that, in Order No. 2003-C, the Commission held that a generator—like Southern Montana—that temporarily achieves commercial operation, but then ceases operating before it is fully reimbursed for its Network Upgrade costs, is entitled to repayment only if its LGIA remains “in full force and effect,” and that, under this rule, Southern Montana is not entitled to a refund of its unreimbursed Network Upgrade costs after it permanently ceases commercial operation and its LGIA is terminated.

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<sup>11</sup> *Id.* (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 619).

<sup>12</sup> *Id.* (citing Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 at P 35).

<sup>13</sup> *Id.* at 9 (citing Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 at P 14 (NorthWestern’s emphasis)).

16. NorthWestern also argues that the Commission's policy of protecting native load and other transmission customers is directly applicable here, because, as the Network Upgrades at issue consist mainly of a new 230 kV Switchyard built solely to allow the Highwood Station output to be delivered to the grid, and because the Highwood Station has permanently ceased operation, the Switchyard serves no useful purpose and provides no value to NorthWestern's native load or other transmission customers.

17. Moreover, NorthWestern argues that this case is no different from one where Network Upgrades are placed in service but the generator never achieves commercial operation in the first place. In such a case, Order No. 2003 does not require a transmission provider to repay the Network Upgrade costs funded by the generator.

18. Finally, NorthWestern rebuts an assertion reflected in Southern Montana's December 23 Letter, that Article 2.6 of the LGIA requires NorthWestern to repay unreimbursed Network Upgrade costs. NorthWestern argues that Article 2.6 is a "survival" provision which provides that the LGIA shall continue in effect after termination to the extent necessary to provide for final billings and payments pursuant to the LGIA. NorthWestern argues that the rulings in Order Nos. 2003-A and 2003-C would not make sense if Article 2.6 were interpreted to require a transmission provider to pay unreimbursed Network Upgrade costs in this instance.

### **III. Notice of Filing and Responsive Pleadings**

19. Notice of NorthWestern's filing was published in the Federal Register, 81 Fed. Reg. 5733 (2016) with interventions and protests due on or before March 12, 2016. Southern Montana and Beartooth Electric Cooperative (Beartooth)<sup>14</sup> (together, Joint Protestants) filed a timely motion to intervene and protest. On February 29, 2016, NorthWestern filed an answer to the Joint Protestants' protest. On March 1, 2016, the Joint Protestants filed an answer to NorthWestern's answer.

#### **A. Protest**

20. The Joint Protestants contend that the plain language of the LGIA establishes Southern Montana's post-termination right to refund. The Joint Protestants state that principles of contract interpretation require that unambiguous terms be given their plain meaning and that the terms within an agreement be interpreted as consistent with the

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<sup>14</sup> Beartooth, a not-for profit electric distribution cooperative serving rural areas of counties in Montana and Wyoming, was a member cooperative of Southern Montana at the time the LGIA was executed, and advanced a portion of the funds for the Network Upgrades.

contract as a whole.<sup>15</sup> The Joint Protestants assert that LGIA Article 2.6 must thus be read to mean that transmission credit payment obligations survive termination.<sup>16</sup>

21. The Joint Protestants state that “a substantial portion of the value of the Network Upgrades remains due for payment in cash by [NorthWestern] to Southern [Montana], pursuant to Article 11.4.1 of the LGIA, now that no further power will be transmitted from the Highwood Plant.”<sup>17</sup> The Joint Protestants assert that, despite the provision of notice to terminate the LGIA, Article 2.6 of the LGIA provides that Southern Montana still holds the right to receive the payment and credit referenced for Network Upgrades in the LGIA’s Article 11.4.1.

22. The Joint Protestants argue that Article 11.4.3 stipulates that no provision of the LGIA shall be construed as foreclosing Southern Montana’s right to transmission credits as a result of transmission capacity created by the Network Upgrades.<sup>18</sup> Further, Article 11.4.3 provides that Southern Montana retains “the right to obtain cash reimbursements *or* transmission credits for transmission service that is not associated with” the Highwood Station.<sup>19</sup> The Joint Protestants contend that these provisions together demonstrate that Southern Montana is entitled to reimbursement in either cash or transmission credits for any transmission service, including service not associated with delivery of output from Highwood Station.

23. The Joint Protestants request that the Commission require NorthWestern to reimburse Southern Montana for unreimbursed Network Upgrade costs pursuant to Article 11.4.3, or continue providing transmission service credits corresponding to transmission service taken for delivery of purchased power to Southern Montana (and its member cooperatives) and Beartooth.

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<sup>15</sup> Protest at 7 (citing *ETC Tiger Pipeline, LLC*, 138 FERC ¶ 61,035, at P 40 (2012); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995); *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.*, 119 FERC ¶ 61,314, at P 19 (2007)).

<sup>16</sup> *Id.* at 8 (citing LGIA Article 2.6).

<sup>17</sup> Southern Montana December 23 Letter at 3 (appended to Northwestern Notice at Attachment B).

<sup>18</sup> Protest at 9 (citing LGIA Article 11.4.3).

<sup>19</sup> *Id.* (Joint Protestants’ emphasis).

24. The Joint Protestants next contend that the Commission's interconnection pricing policy requires that Southern Montana be repaid for advancing funds for network upgrades. The Joint Protestants contend that Order No. 2003-C specifically provides that the Transmission Provider must reimburse a customer "as long as the Interconnection Agreement between the Interconnection Customer and the Transmission Provider remains in full force and effect."<sup>20</sup>

25. The Joint Protestants request that, if the Commission interprets Order No. 2003-C to require that the LGIA remain in full force and effect for 20 years in order to entitle the Joint Protestants to a balloon refund payment, the Commission permit Southern Montana to withdraw its December 23 Letter and deny NorthWestern's unilateral termination request. The Joint Protestants contend that this directive would be appropriate because: (1) the Joint Protestants' good faith reading of the language of the LGIA was that the LGIA requires repayment of Southern Montana's loan to NorthWestern notwithstanding termination; and (2) Southern Montana's payments were effectively advanced payments for transmission service, and terminating NorthWestern's payment obligations, and thus denying Southern Montana credit, would be unjust, unreasonable, and unduly harm Southern Montana.<sup>21</sup>

26. The Joint Protestants refute NorthWestern's position that Highwood Station only achieved commercial operation on a technicality, and that the Commission should treat the Highwood Station as if it never achieved commercial operation.<sup>22</sup> The Joint Protestants explain that Commercial Operation is defined as "the status of a Generating Facility that has commenced generating electricity for sale, excluding electricity generated during Trial Operation."<sup>23</sup> The Joint Protestants contend that it is undisputed that the switchyard passed the Commission's bright-line test to qualify as a Network Upgrade, and therefore is eligible for transmission credits. The Joint Protestants state that NorthWestern has recognized that the Highwood Station achieved commercial operation because it previously provided transmission credits to Southern Montana during commercial operation of the Highwood Station.

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<sup>20</sup> *Id.* at 11 (citing Order No 2003-C, FERC Stats. & Regs. ¶ 31,190 at P 14).

<sup>21</sup> *Id.* at 14.

<sup>22</sup> *Id.* (citing Northwestern Notice at 10 ("As a practical matter, this case is no different than a case where Network Upgrades are placed in service but the generator never achieves commercial operation in the first place"))).

<sup>23</sup> *Id.* 14-15 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 619).

27. The Joint Protestants disagree with NorthWestern's position that allowing Southern Montana to receive repayment "would improperly shift all risk of cost recovery to the Transmission Provider and its customers."<sup>24</sup> The Joint Protestants contend that, when the Highwood Station was built and placed into commercial operation, Southern Montana put its own capital at risk, distinguishing it from an on-paper-only generator that Joint Protestants claim the Commission worried about in Order No. 2003.<sup>25</sup> The Joint Protestants state that the Commission previously found that achieving commercial operation eliminates the concern that the costs will be improperly borne by the transmission provider and the ratepayers. The Joint Protestants note that, in assessing the appropriate balance between the interconnection customer's risks and incentives, the Commission opined that "Interconnection Customers should receive a refund of the costs of Network Upgrades only if the Generating Facility has achieved commercial operation."<sup>26</sup>

28. The Joint Protestants also disagree with NorthWestern's assertion that the Network Upgrades provide no value. In executing the LGIA, NorthWestern agreed that these facilities are Network Upgrades, which by definition means that the facilities benefit NorthWestern's transmission system. The Joint Protestants assert that the Commission has previously found that "upgrades at or beyond the point where a customer connects to the grid," benefit all users of that grid.<sup>27</sup> Therefore, the Joint Protestants argue that it is unjust and unreasonable for NorthWestern to withhold refund of the amounts advanced for system Network Upgrades, given their benefit to the transmission system and to other systems.

29. The Joint Protestants also contend that NorthWestern's characterization of the Network Upgrades is misleading because it fails to account for the approximately \$2 million Great Falls Autotransformer installed at NorthWestern's Great Falls 230 kV Switchyard. The Joint Protestants contend that this grid expansion alone represents nearly \$1 million of grid investment paid for by Southern Montana that provides additional system capacity and reliability. The Joint Protestants state that the costs of this Network Upgrade were shared with another customer on a 50 percent basis and that the

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<sup>24</sup> *Id.* 15 (citing NorthWestern Notice at 4).

<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.* at 15 (citing Order No. 2003, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 731).

<sup>27</sup> *Id.* at 18 (citing *Nevada Power Company*, 113 FERC 61,007, at P 19 (2005)).

costs would not have been shared if it did not benefit someone other than Southern Montana.

30. The Joint Protestants argue that NorthWestern's *post hoc* effort to reclassify these facilities and deny them their agreed-upon treatment as Network Upgrades raises issues of material fact. Therefore, the Joint Protestants request that, if the Commission cannot resolve these issues on the record before it, it should set the matter for hearing and settlement judge procedures.

**B. NorthWestern's Answer**

31. NorthWestern disagrees with the Joint Protestants' interpretation that Order No. 2003-C requires a transmission provider to fully refund unused transmission credits to a generator that initially achieves commercial operation, even if the LGIA is terminated. NorthWestern asserts that the relevant language in Order No. 2003-C is clear that a generator that achieves but then ceases commercial operation is entitled to be reimbursed for unused credits only "as long as the Interconnection Agreement between the Interconnection Customer and the Transmission Provider remains in full force and effect," and that an interconnection agreement that is terminated is no longer "in full force and effect."<sup>28</sup> NorthWestern argues that the "as long as" clause provides an additional limitation on a transmission provider's obligation to repay unused transmission credits that the Commission consistently recognized throughout the Order No. 2003 proceeding.

32. NorthWestern contends that the Joint Protestants fail to differentiate between a generator that "ceases Commercial Operation," and a generator that "*permanently* ceases Commercial Operation." With respect to the former, NorthWestern agrees that "ceasing Commercial Operation" does not extinguish a transmission provider's obligation to refund unreimbursed transmission credits, because both the plant and the facilities that physically interconnect the generator to the transmission system remain in place, and it is therefore possible for the generator to resume commercial operation. However, NorthWestern argues, the Highwood Station falls into the latter category as it has permanently ceased Commercial Operation, was dismantled, was sold in pieces, and will never resume Commercial Operation.<sup>29</sup> Under this circumstance, NorthWestern claims that LGIA Article 2.3.1 provides it with the right to unilaterally terminate the agreement. NorthWestern notes that Order No. 2003, Order No. 2003-A, and Order No. 2003-C all

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<sup>28</sup> NorthWestern Answer at 5.

<sup>29</sup> *Id.* at 7.

hold that interconnection customers no longer have the right to reimbursement for unused transmission credits when they no longer have a plant or an LGIA.<sup>30</sup>

33. NorthWestern contends that there is no logical way to interpret an agreement as being “in full force and effect” after it is terminated. NorthWestern argues that the Joint Protestants’ interpretation would mean that the LGIA is always in full force and effect with respect to the obligation to refund unused transmission credits, and, therefore, that the “as long as” clause is meaningless because it would never apply to prevent reimbursement of unused transmission credits. NorthWestern further argues that this interpretation contravenes Commission precedent disfavoring interpretations that would render words to be mere useless surplusage.<sup>31</sup>

34. NorthWestern also disagrees with the Joint Protestants’ interpretation of Article 2.6 of the LGIA, and contends that there is nothing in any of the Order No. 2003 series of orders that suggests that Article 2.6 was intended to apply to the Commission’s transmission crediting mechanism for Network Upgrades. NorthWestern also notes that Article 11.4.3 states that nothing in the LGIA shall be construed as relinquishing or foreclosing any rights, or transmission credits, under “any other agreement or tariff.”<sup>32</sup> NorthWestern contends that this provision preserves the customer’s transmission-related rights under other agreements or tariffs, and that the Joint Protestants cannot rely on this provision because they do not allege that they have the right to receive credits unrelated to the Highwood Station under another agreement or tariff. NorthWestern requests that the Commission deny the Joint Protestants’ requested relief of immediate cash refunds or transmission credits for transmission service unrelated to the Highland Station. NorthWestern contends that the Joint Protestants are not entitled to any relief here because neither the LGIA nor Order No. 2003 obligates NorthWestern to refund unused transmission credits after the generator permanently ceases commercial operation and the LGIA is terminated.

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<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.* at 8-9 (citing *Aka v. Washington Hosp. Cent.*, 156 F.3d 1284, 1302 (D.C. Cir. 1998); *Williston Basin Interstate Pipeline Co.*, 115 FERC ¶ 61,081, at P 14 (2006)).

<sup>32</sup> *Id.* at 11 (citing LGIA Article 11.4.3).

35. Finally, NorthWestern requests that the Commission not set this matter for hearing. NorthWestern states that there are no issues of material fact here that justify a hearing, and that, given the parties' opposing views, there is no realistic possibility of a settlement.<sup>33</sup>

### **C. Joint Protestants' Answer**

36. The Joint Protestants state that they seek to clarify several inaccuracies in NorthWestern's answer. First, the Joint Protestants disagree with NorthWestern's position that LGIA Article 2.6 does not apply to transmission credits because it does not specifically reference the LGIA section in which such transmission credits are provided for. The Joint Protestants reiterate that this provision expressly provides that "[t]his LGIA shall continue in effect after termination to the extent necessary to provide for final billings and payments," which includes the credits at issue here.

37. Second, the Joint Protestants argue that nothing in the record suggests that the siting decision made by Southern Montana was inefficient and that it therefore should be denied refunds. Third, the Joint Protestants reiterate that the Highwood Station achieved commercial operation and they are therefore eligible for credits, as evidenced by NorthWestern's prior provision of credits. The Joint Protestants argue that, in establishing the bright-line Commercial Operation test, the Commission has held that any generator that commences commercial sales is eligible for credits. Finally, the Joint Protestants disagree with NorthWestern's position that the "as long as" language from Order No. 2003-C is not dicta. To the contrary, the Joint Protestants argue that this language responded to a request for relief that never raised any issue about whether an LGIA would remain in "full force or effect." Therefore, the Joint Protestants assert that, because nobody argued that it was significant whether the LGIA remained in "full force and effect," the Commission had no reason to give particular thought to the meaning and import of those words.<sup>34</sup>

## **IV. Discussion**

### **A. Procedural Matters**

38. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motion to intervene serves to make the Joint Protestants parties to this proceeding. Rule 213(a)(2) of the Commission's

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<sup>33</sup> *Id.* at 14.

<sup>34</sup> Southern Montana Answer at 3.

Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by NorthWestern and the Joint Protestants because they provided information that has assisted us in our decision-making process.

**B. Substantive Matters**

**1. Termination**

39. Based upon a review of the filing, the Commission finds that NorthWestern's notice of termination conforms with the controlling terms in the LGIA and the Commission's regulations, and we accept the notice of termination, effective March 22, 2016, as requested by NorthWestern.

40. Article 2.3.1 of the LGIA provides that the "LGIA may be terminated: by [Southern Montana], after giving [NorthWestern] ninety (90) Calendar Days advance written notice, or by [NorthWestern] notifying [the Commission] after the Generating Facility permanently ceases Commercial Operation."<sup>35</sup> NorthWestern relies on two separate grounds to support its notice of termination. NorthWestern states that Article 2.3.1 of the LGIA authorizes Southern Montana to terminate the LGIA after giving NorthWestern (as Transmission Provider) 90 calendar days advance written notice, which NorthWestern avers Southern Montana did via its December 23 Letter. NorthWestern also states that Article 2.3.1 gives NorthWestern the unilateral right to terminate the LGIA by notifying the Commission after the Generating Facility permanently ceases Commercial Operation.

41. While Southern Montana provided notice of the termination of the LGIA to NorthWestern on December 23, 2015 in the December 23 Letter,<sup>36</sup> the Joint Protestants have, in subsequent pleadings, equivocated on this request.<sup>37</sup> Therefore, we will grant the termination of the LGIA on the second ground, i.e., NorthWestern's notice to the Commission that the Highwood Station had permanently ceased commercial operation.

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<sup>35</sup> LGIA Article 2.3.1.

<sup>36</sup> See Southern Montana December 23, 2015 Letter at 2 (appended to Northwestern Notice, at Attachment B) ("I am providing this letter as notice under the LGIA of the election of Southern [Montana]...of the termination of the LGIA consistent with its right to so terminate the LGIA under Paragraph 2.3.1 of the LGIA").

<sup>37</sup> See, e.g., Protest at 1 ("If necessary to effectuate this relief, we further request rejection of the Termination Request").

We note that the notice specifically stated the following: “Because of the sale and recent completion of the removal of the Highwood Plant, no further power will be generated from the facility, thus, it is appropriate to now terminate the LGIA.”<sup>38</sup> In its protest, Southern Montana explains the situation further: “The Highwood Station ceased Commercial Operation. Facilities and equipment on Southern Montana’s side of the Switchyard were dismantled and sold at the direction of the secured noteholders of Southern Montana under the plan of reorganization in Southern Montana’s bankruptcy case.”<sup>39</sup> Therefore, it is clear that the Highwood Station has permanently ceased Commercial Operation.<sup>40</sup>

42. We also find that, consistent with Article 2.3.3 of the LGIA, NorthWestern has abided by “all Applicable Rules and Regulations applicable to such termination.” Specifically, NorthWestern has met the requirement of section 35.15 of the Commission’s regulations that public utilities make a filing with the Commission to cancel rate schedules or agreements that are required to be filed with the Commission.<sup>41</sup> Therefore, we find that accepting the notice of termination is just and reasonable. We note that the Joint Protestants’ assertion that Southern Montana would revoke its December 23 Letter is irrelevant. We are granting NorthWestern’s requested effective termination date of March 22, 2016 based on the fact that this is 60 days after NorthWestern’s filing seeking termination, and independent of the fact that this is 90 days after the December 23 Letter.

## 2. Reimbursement

43. We find that NorthWestern has no obligation to pay Southern Montana the Network Upgrade costs that remain. We agree with NorthWestern’s interpretation of Order No. 2003-C. There, the Commission expressly addressed a request for clarification that the Transmission Provider or Affected System Operator has no further obligation to reimburse the Interconnection Customer for its upfront payment if the Generating Facility

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<sup>38</sup> December 23 Letter at 2 (appended to NorthWestern Notice, at Attachment B).

<sup>39</sup> Protest at 6.

<sup>40</sup> LGIA Article 2.3.1.

<sup>41</sup> The subject LGIA conforms with the Commission-approved standard form of interconnection agreement and is thus considered to be on file with the Commission.

ceases Commercial Operation before the Interconnection Customer has been completely reimbursed.<sup>42</sup>

44. The Commission clarified:

[T]he Affected System Operator, like the Transmission Provider, must reimburse the Interconnection Customer for its upfront payment even if the Generating Facility ceases Commercial Operation before the Interconnection Customer is completely reimbursed as long as the Interconnection Agreement between the Interconnection Customer and the Transmission Provider remains in full force and effect.<sup>43</sup>

Thus, the Commission made clear that the reimbursement obligation lies only “as long as the Interconnection Agreement...remains in full force and effect.”

45. As this order terminates the LGIA between NorthWestern and Southern Montana, the LGIA can no longer be said to be “in full force and effect.” The exception is thus met, and NorthWestern, the Transmission Provider, need not reimburse Southern Montana, the Interconnection Customer, for its upfront payment for the Network Upgrades.

46. The Joint Protestants argue that termination could occur at any point if requested unilaterally by the Transmission Provider. We disagree. On the contrary, as NorthWestern points out in its Answer, Article 2.3.1 of the LGIA gives the transmission provider the unilateral right to terminate the interconnection agreement only when a generator “*permanently ceases Commercial Operation.*”<sup>44</sup> By contrast, merely ceasing Commercial Operation, such as when a plant is mothballed or shutdown or suspended, is different than the situation before us, where the physical plant has been dismantled and sold.<sup>45</sup>

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<sup>42</sup> Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 at P 11.

<sup>43</sup> *Id.* P 14.

<sup>44</sup> NorthWestern Answer at 7 (NorthWestern’s emphasis).

<sup>45</sup> Thus, the Joint Protestants’ request that the Commission permit Southern Montana to withdraw its December 23 Letter notice is irrelevant to our determination to grant NorthWestern’s notice of termination on the grounds that the generator has permanently ceased Commercial Operation.

47. The Joint Protestants argue that the true test for eligibility for reimbursement via credits is whether the generator has commenced generating electricity for sale, and that Southern Montana clearly meets this standard. In support, they cite paragraph 619 of Order No. 2003-A.<sup>46</sup> However, the Commission expressly noted in that paragraph that, “once it achieves Commercial Operation, a generating Facility is deemed to ‘continue to operate’ *if the Interconnection Agreement between the Interconnection Customer and the Transmission Provider remains in full force and effect.*”<sup>47</sup> That is not the case here.

48. We find the Joint Protestants’ other arguments equally unpersuasive. The Joint Protestants point to LGIA Article 2.6 as preserving a right to network upgrade credits after termination of the LGIA. However, NorthWestern points out that that provision extends the term of the LGIA for specifically listed reasons. We agree with NorthWestern on this point. Article 2.6 states, in full, as follows:

Survival. This LGIA shall continue in effect after termination to the extent necessary to provide for final billings and payments and for costs incurred hereunder, including billings and payments pursuant to this LGIA; to permit the determination and enforcement of liability and indemnification obligations arising from acts or events that occurred while this LGIA was in effect; and to permit each Party to have access to the lands of the other Party pursuant to this LGIA or other applicable agreements, to disconnect, remove or salvage its own facilities and equipment.

49. Nothing in Article 2.6 indicates an intent to impact the right to reimbursement for network upgrades, and Article 2.6 on its own makes no reference to “network upgrade credits,” “credits,” or “reimbursements.” The Joint Protestants argue that Southern Montana is entitled to credits because, per Article 12 of the LGIA, “payment” obligations include “credits”—a term that is not qualified in anyway in Article 12. However, our interpretation of Article 2.6 is that “billings and payments” are limited to simple billing payments, and that nothing in the Order No. 2003 series of orders suggests that Article 2.6 was intended to apply to the Commission’s transmission crediting mechanism, which is covered by Article 11.4.1.

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<sup>46</sup> Protest at 14-15.

<sup>47</sup> Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 619 (emphasis added).

50. The Joint Protestants also argue that Article 11.4.3 states that no provision of the LGIA shall be construed as relinquishing Southern Montana's right to transmission credits. Further, they state that Article 11.4.3 also provides Southern Montana the right to obtain cash reimbursements or transmission credits for transmission service that is not associated with the Highwood Station. The Joint Protestants argue that, taken together, these terms require repayment to Southern Montana and Beartooth.

51. We disagree. Like Article 2.6, Article 11.4.3 does not explicitly provide a right to transmission credit reimbursement after termination of the LGIA, and reading such a meaning into these provisions would conflict with the explicit rule governing reimbursement of transmission credits set out in Order No. 2003-C. Any other reading of the article conflicts with Order No. 2003 and its progeny. Moreover, because the Highwood Station no longer exists, Southern Montana is unable to take transmission service for which it can obtain transmission credits. Neither are the Joint Protestants entitled to reimbursement through transmission credits for purchased power by Southern Montana and Beartooth in lieu of power from the Highwood Station. As we explained in *InterGen Services, Inc.*, in order to promote efficient and cost effective siting decisions, limiting the use of transmission credits to transmission service taken from the facility that generated the credits is just and reasonable.<sup>48</sup>

52. The Joint Protestants next argue that the phrase "as long as the Interconnection Agreement between the Interconnection Customer and the Transmission Provider remains in full force and effect"<sup>49</sup> is merely a "commonplace articulation of the filed rate doctrine,"<sup>50</sup> and that the Commission was simply recognizing that, "under the filed rate doctrine, a refund could not occur except under an effective filed rate."<sup>51</sup>

53. We disagree with this interpretation of the phrase. As the Commission explained in *InterGen*:

The purpose of the up front payment for network upgrades is to provide a source of funds for the network upgrades and an incentive for interconnection customers to make efficient siting decisions. The purpose of transmission credits is to

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<sup>48</sup> 107 FERC ¶ 61,143, at P 19 (2004) (*InterGen*).

<sup>49</sup> Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 at P 14.

<sup>50</sup> Protest at 11.

<sup>51</sup> *Id.* at 12.

reimburse the generator for the up front payment. We note that the up front payment is not a rate for service, and is not the means for a transmission provider to recover its costs. Transmission providers recover the costs for network upgrades through their right to charge for transmission service at the higher of an embedded cost or incremental rate.<sup>[52]</sup>

54. Finally, the Joint Protestants state that, because the reimbursement amount concerns facilities that have already been deemed Network Upgrades, by their very nature they benefit the entire transmission system. Specifically, the Joint Protestants point to a \$2 million Great Falls Autotransformer installed at NorthWestern's Great Falls 230 kV Switchyard, of which Southern Montana paid nearly \$1 million (having split the cost with another network customer on a 50 percent basis).<sup>53</sup>

55. While we agree that the Commission's policy unequivocally recognizes the broader system-wide benefits of Network Upgrades, the Commission's recognition of those broader benefits is balanced by a need to incentivize efficient investment and not unfairly burden native load. We believe the exception outlined in Order No. 2003-C reflects that balance.<sup>54</sup> A generator's upfront payment for Network Upgrades is not a loan that requires repayment in each case, but is rather "a charge with an opportunity for refund" that "serves as a mechanism to encourage the [generator] to make efficient siting decisions."<sup>55</sup>

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<sup>52</sup> *InterGen*, 107 FERC ¶ 61,143 at P 16; *see also ExxonMobil Corp. v. Entergy Servs., Inc.*, 119 FERC ¶ 61,261, at P 17 (2007) (*ExxonMobil*).

<sup>53</sup> Protest at 19.

<sup>54</sup> Moreover, the example of the Great Falls Autotransformer is less helpful than it might be because half of its cost was paid for by another network customer, and its benefit to other customers was thus already recognized under that arrangement.

<sup>55</sup> *ExxonMobil*, 119 FERC ¶ 61,261 at PP 16-17.

The Commission orders:

The notice of termination is hereby accepted for filing, effective March 22, 2016, as requested, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.