

149 FERC ¶ 61,054
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc.

Docket No. ER14-2685-000

ORDER ON FACILITIES CONSTRUCTION AGREEMENT

(Issued October 20, 2014)

1. On August 21, 2014, Midcontinent Independent System Operator, Inc. (MISO) filed, under section 205 of the Federal Power Act (FPA),¹ public and nonpublic versions of an executed Facilities Construction Agreement (Agreement) between Michigan Electric Transmission Company, LLC (Michigan Electric), New Covert Generating Company, LLC (New Covert) (together, Parties), and MISO (August 21 Filing).² In this order, we accept MISO's August 21 Filing, subject to the outcome of the proceeding in Docket No. ER12-309, and we give notice, pursuant to section 388.112(d) of the Commission's regulations,³ that the Commission is considering the release of certain information contained in the filing for which MISO claims privileged status and that MISO has 30 days from the date of this order to file written comments to show cause why the information should not be made public, as explained below.

I. Background

2. The Agreement states that New Covert intends to interconnect its existing generating facility, in Van Buren County, Michigan, to the transmission system of ITC Interconnection LLC (ITC Interconnection) and to the PJM Interconnection, L.L.C.-controlled transmission system. MISO states that the Agreement conforms, with

¹ 16 U.S.C. § 824d (2012).

² The nonpublic version of the Agreement contains information that MISO asserts is Critical Energy Infrastructure Information (CEII), as well as certain cost information that it believes is privileged.

³ 18 C.F.R. § 388.112(d) (2014).

exceptions,⁴ to the *pro forma* Facilities Construction Agreement and contains revisions that the Commission conditionally accepted in Docket No. ER12-309.⁵ MISO requests that the Commission accept the Agreement subject to any subsequent revisions accepted by the Commission in Docket No. ER12-309.⁶

3. Exhibits A2, A3, A4, and A12 of the Agreement contain diagrams of the proposed network upgrades. These exhibits are designated as CEII, pursuant to section 388.113(c)(1) of the Commission's regulations.⁷ MISO states that the Parties assert that Exhibits A2, A3, A4, and A12 qualify as CEII because the diagrams are system maps that provide specific, detailed design information about existing critical transmission system infrastructure.⁸

4. Appendix A and Exhibits A5, A6, and A9 of the nonpublic version of the Agreement also contain dollar amounts of cost estimates for each task of the work and scheduled payments (Cost Information), which are withheld and labeled as "privileged" in the public version of the Agreement. MISO states that the Parties assert that the Cost Information is exempt from mandatory disclosure under the Freedom of Information Act (FOIA) Exemption No. 4⁹ because the Cost Information:

is confidential, financial information directly relating to [New Covert]'s construction costs which, if disclosed, could cause substantial harm to the

⁴ MISO states that the exceptions are reflected in the definitions of "Commercial Operation," "Commercial Operation Date," and "Interconnection Agreement" in Article 1 of the Agreement. August 21 Filing, Transmittal at 2.

⁵ *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233, *order on reh'g and compliance filing*, 139 FERC ¶ 61,253 (2012), *order conditionally accepting compliance filing*, 145 FERC ¶ 61,260 (2013) (GIP Orders). In these orders, the Commission conditionally accepted a series of revisions to Attachment X, Generator Interconnection Procedures (Attachment X), of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff. On February 3, 2014, in Docket No. ER12-309-006, MISO filed additional revisions to Attachment X in compliance with the GIP Orders. These revisions are pending before the Commission.

⁶ August 21 Filing, Transmittal at 2.

⁷ 18 C.F.R. § 388.113(c)(1) (2014).

⁸ August 21 Filing, Transmittal at 2.

⁹ 5 U.S.C. § 552 (2012).

company's competitive position. [New Covert] is currently in the midst of a number of complex negotiations relating to the work under the [Agreement]. In addition, [New Covert] has submitted, and is in the process of submitting, responses to Requests for Proposals and other solicitations, which have sought, and are anticipated to seek, recovery of the costs under the [Agreement]. As a result, disclosure of the cost information contained in Appendix A, Exhibits A5, A6, and A9 will result in substantial harm to [New Covert] as it would allow [New Covert]'s competitors to derive information regarding [New Covert]'s offers, and put [New Covert] at a disadvantage with respect to its negotiations with potential counterparties.¹⁰

MISO contends that the Commission has recognized the confidentiality of such information in previous MISO filings.¹¹ MISO also maintains that the Commission has recognized the competitive harm that could result from the release of parties' cost information.¹²

5. MISO asks the Commission to grant waiver of the Commission's 60-day prior notice requirement, as required by section 35.3(a) of the Commission's regulations,¹³ and to make the Agreement effective on August 22, 2014.

II. Notice and Responsive Filing

6. Notice of MISO's August 21 Filing was published in the *Federal Register*, 79 Fed. Reg. 51,329 (2014), with interventions and protests due on or before September 11, 2014. Michigan Electric filed a motion to intervene.

¹⁰ August 21 Filing, Transmittal at 3.

¹¹ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER10-1098-000 (June 24, 2010) (delegated letter order); *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER10-839-000 (Apr. 12, 2010) (delegated letter order)).

¹² *Id.* (citing, e.g., *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244, at PP 39, 49 (2012)).

¹³ 18 C.F.R. § 35.3(a) (2014).

III. Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), Michigan Electric's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Commission Determination

8. We find the August 21 Filing to be just and reasonable and has not been shown to be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we accept the Agreement for filing, to become effective on August 22, 2014, as requested, subject to the outcome of the proceeding in Docket No. ER12-309.

9. However, we give notice, pursuant to 18 C.F.R. § 388.112(d), that the Commission is considering the release of the Cost Information in Appendix A and Exhibits A5, A6 and A9, and that MISO has 30 days from the date of this order to respond with a more detailed written explanation than that provided with the filing to articulate more completely why the Cost Information therein should not be made public.

10. MISO contends that the Cost Information is exempt from mandatory disclosure under FOIA Exemption No. 4. FOIA Exemption No. 4 protects from public disclosure trade secrets and commercial or financial information that is privileged or confidential.¹⁴ A person requesting that material be treated as privileged information "must include in its filing a justification for such treatment,"¹⁵ and the request must be supported with specificity rather than vague and speculative assertions of harm.¹⁶ MISO states that, according to the Parties, disclosure of the Cost Information will result in substantial harm to New Covert because currently New Covert is in negotiations relating to work under the Agreement and is responding to proposals regarding the recovery of costs under the Agreement. MISO states that the Parties assert that disclosure would allow New Covert's competitors to derive information regarding New Covert's offers, and put New Covert at a disadvantage with respect to its negotiations with potential counterparties. However, MISO does not explain either how the Cost Information could be used to derive accurate or sufficiently approximate information regarding New Covert's offers, including what

¹⁴ 5 U.S.C. § 552(b)(4) (2012); *see also* 18 C.F.R. § 388.107(d) (2014).

¹⁵ 18 C.F.R. § 388.112(b)(1) (2014).

¹⁶ *See, e.g., Algonquin Gas Transmission, LLC*, 130 FERC ¶ 61,011, at P 48 (2010).

information regarding offers can be derived, or how competitors' knowledge of that information can cause substantial harm to New Covert. MISO also does not explain how New Covert could be disadvantaged in responding to proposals regarding the recovery of costs, or negotiations relating to work, under the Agreement.

The Commission orders:

(A) MISO's August 21 Filing is hereby accepted, effective August 22, 2014, subject to the outcome of Docket No. ER12-309, as discussed in the body of this order.

(B) MISO is hereby given notice that the Commission is considering the release of the Cost Information that MISO seeks to protect from disclosure, and that MISO has 30 days from the date of this order to file written comments to show cause why the information should not be made public, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.