

151 FERC ¶ 61,264
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

E.ON Climate & Renewables North America, LLC

Docket Nos. EL11-30-002
ER12-451-001

v.

Midwest Independent Transmission
System Operator, Inc.

ORDER DENYING REHEARING

(Issued June 29, 2015)

1. On February 15, 2013, EDP Renewables North America LLC (EDP Renewables)¹ filed a request for rehearing of the Commission's January 17, 2013 order in this proceeding,² which in turn denied rehearing of the Commission's initial order.³ In this order, we deny EDP Renewables' request for rehearing.

¹ EDP Renewables is the successor in interest to Horizon Wind Energy LLC, a member of the complainant Midwest Generation Development Group in Docket No. EL11-30-000.

² *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,048 (2013) (E.ON Rehearing Order).

³ *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076 (2011) (E.ON Initial Order).

I. Background

2. On March 22, 2011, the Midwest Generation Development Group (Development Group)⁴ filed a complaint (Complaint) in Docket No. EL11-30-000 alleging that one of two options provided in Midwest Independent Transmission System Operator, Inc.'s (MISO)⁵ Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) for the reimbursement of costs associated with generator interconnection network upgrades (Option 1)⁶ is unjust, unreasonable, and unduly discriminatory and should be removed from the Tariff.

3. On October 20, 2011, the Commission granted the Complaint, ordering the removal of Option 1 from MISO's Tariff, finding that, among other things, this option increased the costs directly assigned to the interconnection customer with no corresponding increase in service compared to other funding options.⁷ The Commission found that it was unjust and unreasonable to require an interconnection customer to provide up-front funding for network upgrades and then permit the transmission owner to repay the amount and charge the interconnection customer for the transmission owner's capital costs and income tax allowance.⁸ The Commission also found that the fact that

⁴ The Development Group is a coalition comprised of E.ON Climate & Renewables North America, LLC, Clipper Windpower Development Co., Inc.,

Horizon Wind Energy LLC, Iberdrola Renewables, Inc., Invenergy Wind Development LLC, and Invenergy Thermal Development LLC.

⁵ Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

⁶ Option 1 provided that for network upgrade costs subject to participant funding: (1) the interconnection customer provides up-front funding for network upgrades; (2) the transmission owner provides a 100 percent refund of the cost of network upgrades to the interconnection customer upon completion of the network upgrades; and (3) the transmission owner assesses the interconnection customer a monthly network upgrade charge to recover the cost of the non-reimbursable (i.e., the participant-funded) portion of the network upgrade costs based on a formula contained in Attachment GG of the Tariff. If this option is elected, a service agreement establishing the facilities charge is to be filed with the Commission.

⁷ E.ON Initial Order, 137 FERC ¶ 61,076 at P 34.

⁸ *Id.* P 37.

the Tariff gives the transmission owner the sole discretion to choose between Option 1 and Option 2 creates opportunities for undue discrimination “by affording a transmission owner the discretion to increase the costs of interconnection service by assigning both increased capital costs, as well as non-capital costs ... to particular interconnecting generators, but not others.”⁹ In that same order, the Commission also established that March 22, 2011, the filing date of the Complaint, would serve as the effective date for the removal of Option 1 from the MISO Tariff.

4. On November 21, 2011, a group of MISO transmission owners filed a request for rehearing and clarification of the E.ON Initial Order, and the Organization of MISO States filed a request for rehearing.

5. The Commission denied rehearing but clarified that its decision to remove Option 1 from MISO’s Tariff will not apply to agreements effective prior to March 22, 2011, which the Commission stated was a reasonable remedy that balances the interests of the parties, the need for regulatory certainty, and ease of administration.¹⁰

II. EDP Renewables Rehearing Request

6. EDP Renewables notes that its subsidiary Rail Splitter Wind Farm, LLC (Rail Splitter) was concurrently seeking rehearing of the Commission’s order in *Rail Splitter Wind Farm, LLC v. Ameren Services Co. and Midwest Indep. Transmission Sys. Operator, Inc.*, a related decision that was issued on the same day as the E.ON Rehearing Order.¹¹

7. EDP Renewables seeks rehearing of the E.ON Rehearing Order, arguing that the Commission erred in concluding that its finding in the E.ON Initial Order will not apply to agreements effective prior to March 22, 2011.¹² EDP Renewables states that it agrees with the Commission as to its decision to affirm the E.ON Initial Order. EDP Renewables also states that it has no complaint as to the Commission’s finding that the

⁹ *Id.* P 38.

¹⁰ E.ON Rehearing Order, 142 FERC ¶ 61,048 at P 34.

¹¹ EDP Renewables Rehearing Request at n.6 (citing *Rail Splitter Wind Farm, LLC v. Ameren Services Co. and Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,047 (2013) (Rail Splitter Initial Order)). The request for rehearing was denied. *Rail Splitter Wind Farm LLC v. Ameren Services Co. and Midwest Indep. Transmission Sys. Operator, Inc.*, 146 FERC ¶ 61,017 (2014) (Rail Splitter Rehearing Order).

¹² EDP Renewables Rehearing Request at 2.

E.ON Initial Order did not automatically modify existing agreements. EDP Renewables states that it seeks rehearing solely as to the Commission's discrete clarification that the E.ON Initial Order, as affirmed in the E.ON Rehearing Order, will not apply to any agreement effective prior to March 22, 2011.

8. EDP Renewables notes that the Commission has found Option 1 under MISO's Tariff to be unjust, unreasonable, and unduly discriminatory. EDP Renewables argues that any party to a contract applying that option language has the right, pursuant to section 206 of the Federal Power Act (FPA), to seek and obtain Commission modification of the same unjust, unreasonable, and unduly discriminatory terms in that contract.¹³ Nonetheless, EDP Renewables argues, in the E.ON Rehearing Order, the Commission purports to abrogate these statutory rights for all customers to agreements effective prior to March 22, 2011, the effective date of the E.ON Initial Order.¹⁴ According to EDP Renewables, such a blanket abrogation of rights is antithetical both to the rights of parties to FERC-jurisdictional contracts and FERC's statutory obligations as clearly set forth in FPA section 206.

9. Moreover, according to EDP Renewables, the Commission's rationale for this blanket abrogation of statutory rights relies solely on the desire for regulatory certainty and administrative ease.¹⁵ EDP Renewables argues that considerations of administrative efficiency are not sufficient to override customers' statutory rights to seek refunds for contract terms that the Commission has already found to be unjust, unreasonable, and unduly discriminatory. EDP Renewables also argues that, in this regard, it is not aware of any other complaints filed in reliance on the E.ON Initial Order aside from that filed by Rail Splitter. Thus, it questions the administrative efficiencies that the Commission sought to gain by issuing the clarification. Therefore, EDP Renewables urges the Commission to reverse the clarification in the E.ON Rehearing Order as to the applicability of the E.ON Initial Order to agreements effective prior to March 22, 2011.

¹³ *Id.* at 3.

¹⁴ *Id.* at n.12. EDP Renewables notes that, in fact, in the Rail Splitter Initial Order, the Commission denied the relief sought by EDP Renewables' subsidiary, referring back to the same clarification in the E.ON Rehearing Order that is at issue here.

¹⁵ *Id.* at 4.

III. Discussion

10. We deny rehearing with respect to EDP Renewables' request that the Commission reverse the clarification in the E.ON Rehearing Order as to the applicability of the E.ON Initial Order to agreements effective prior to March 22, 2011 for the same reasons we denied rehearing in the Rail Splitter Rehearing Order, as explained below.

11. On January 16, 2014, the Commission issued the Rail Splitter Rehearing Order.¹⁶ The issue in both that case and the instant case is identical. Rail Splitter's claim that the Rail Splitter Initial Order abdicates the Commission's responsibilities under section 206 of the FPA is the same as EDP Renewables' claim that the E.ON Initial Order abdicates the Commission's responsibilities under section 206 of the FPA. In the Rail Splitter Rehearing Order, the Commission stated that Rail Splitter's claim critically fails to recognize the limited nature of the Commission's decision in the E.ON Initial Order. In the E.ON Initial Order, the Commission stated it addressed a complaint alleging that provisions of MISO's Tariff were unjust, unreasonable, and unduly discriminatory and should be removed, and notably, no previously executed agreement was at issue in that proceeding.¹⁷ In the E.ON Rehearing Order, the Commission explained as much, stating that the E.ON Initial Order "did not automatically modify any preexisting agreement" because that issue "was not before the Commission."¹⁸ The Commission further clarified that the E.ON Initial Order does not apply to agreements executed prior to March 22, 2011 – the date on which the complaint at issue was filed.¹⁹

12. In the Rail Splitter Rehearing Order, the Commission further explained that the distinction between previously executed interconnection agreements, to which the parties have agreed to be bound, and interconnection agreements that may be entered in the future, to which parties have not yet bound themselves, lies at the heart of the Commission's decision to deny relief in the Rail Splitter Initial Order. As the Commission explained, even agreements subject to the just and reasonable standard where no "public interest" presumption is applicable are not to be lightly revised because a degree of stability and predictability is crucial to businesses and markets and to attracting investment in the utility business.²⁰ Thus, the E.ON Initial Order "does not

¹⁶ Rail Splitter Rehearing Order, 146 FERC ¶ 61,017.

¹⁷ E.ON Initial Order, 137 FERC ¶ 61,076 at P 1.

¹⁸ E.ON Rehearing Order, 142 FERC ¶ 61,048 at P 34.

¹⁹ *Id.*

²⁰ Rail Splitter Initial Order, 142 FERC ¶ 61,047 at P 31.

warrant abrogation of the preexisting, executed FSA or compel...the relief requested by Rail Splitter.”²¹

13. In the Rail Splitter Rehearing Order, the Commission also noted that its decision in the Rail Splitter Initial Order is consistent with recent precedent in which the Commission has declined to modify interconnection agreements that predate revisions to the relevant tariff provisions.²² The Commission’s findings herein are consistent with this same precedent.

The Commission orders:

EDP Renewables’ request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²¹ *Id.* P 33.

²² Rail Splitter Rehearing Order, 146 FERC ¶ 61,017 at P 21 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,210 (2008) (*Prairie State*); *Midwest Indep. Transmission Sys. Operator, Inc.* 129 FERC ¶ 61,060, at P 62 (2009)) (finding that the tariff cost allocation that should apply with respect to interconnection agreements is the one that is effective and on file on the date that the agreement is executed or filed unexecuted); *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,277, at P 10 (2008) (finding that because two generator interconnection agreements had been executed after the effective date of newly revised interconnection queue rules, the interconnection agreements must be revised to conform with the new rules); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128 (2006), *order denying reh’g*, 119 FERC ¶ 61,097 (2007) (rejecting proposal to modify network upgrade cost allocation in existing interconnection agreements).