152 FERC ¶ 61,145
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc. Docket Nos. ER14-1470-001
ER14-1470-002

ORDER ON REHEARING AND COMPLIANCE

(Issued August 21, 2015)

1. On May 9, 2014, the Commission issued an order conditionally accepting an unexecuted Facilities Service Agreement (FSA) between Ameren Illinois Company (Ameren) and White Oak Energy LLC (White Oak) that established a monthly network upgrade charge based on Option 1 pricing, as discussed below.[1] On June 9, 2014, NextEra Energy Resources, LLC (NextEra), on behalf of its affiliate White Oak, submitted a request for rehearing of the May 9 Order, and Ameren submitted its filing to comply with the Commission's May 9 Order. As discussed below, we deny in part and grant in part NextEra's request for rehearing and accept Ameren's June 9, 2014 compliance filing subject to further compliance.

I. Background

2. In October 2009, the Commission accepted a proposal by MISO to revise Attachment FF of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to increase the cost responsibility of an interconnection customer to 100 percent of network upgrade costs for projects under 345 kV, i.e., 100 percent participant funding, and 90 percent participant funding for projects 345 kV and above.[2]

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[1] *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,106 (2014) (May 9 Order).

[2] *Midwest Indep. Transmission Sys. Operator, Inc*., 129 FERC ¶ 61,060, at P 8 (2009).

At that time, MISO's Tariff provided three alternatives for funding the costs of network upgrades for generator interconnections. Attachment FF described two of these alternatives (Option 1 and Option 2), which were incorporated into MISO's *pro forma* Generator Interconnection Agreement (GIA) by reference, while Article 11.3 in MISO's *pro forma* GIA contemplated a third (the self-fund option).

3. Option 1 provided that for network upgrade costs subject to participant funding: (1) the interconnection customer provided up-front funding for network upgrades; (2) the transmission owner provided a 100 percent refund of the cost of network upgrades to the interconnection customer after the completion of the network upgrades; and (3) the transmission owner assessed the interconnection customer a monthly network upgrade charge over time to recover the cost of the network upgrades. The network upgrade charge included: (1) return on rate base, including general and common plant; (2) operations and maintenance (O&M) expense; (3) depreciation expense; (4) taxes other than income taxes; and (5) income taxes calculated under Attachment GG of the tariff. Under Option 2, the transmission owner retains the interconnection customer's initial funding for the network upgrade costs that are subject to participant funding as a contribution in aid of construction, and the interconnection customer is assessed no further charges for such upgrades. Under the self-fund option, a transmission owner may finance the construction of the network upgrades itself. [3]

4. On October 20, 2011, the Commission addressed a complaint in Docket No. EL11-30-000 by ordering the removal of Option 1 from Attachment FF, 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.[4] The Commission found that the fact that the Tariff gives the

[3] The self-fund option was originally identified in Order No. 2003. *See Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 720 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at PP 618 and 658, *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).

[4] *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076, at P 34 (2011) (E.ON), *order on reh'g*, 142 FERC ¶ 61,048 (2013) (*E.ON Rehearing Order*).

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."[5] 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. On rehearing, the Commission 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.[6]

A. The White Oak-Ameren Interconnection Agreements

5. On August 28, 2007, Ameren and White Oak executed a large generator interconnection agreement for White Oak's wind generation project near Carlock, Illinois (2007 LGIA). It was subsequently amended on March 19, 2009 (2009 Amended LGIA) and September 27, 2011 (2011 Amended LGIA) (together with the 2007 LGIA and 2009 Amended LGIA, White Oak LGIAs) to reflect the suspension and removal of another project from the MISO interconnection queue. The amended agreements did not change the original network upgrades identified in the 2007 LGIA. As of December 2009, White Oak had fully funded the required stand-alone network upgrades. In February 2011, Ameren completed construction of the required stand-alone network upgrades and the White Oak project entered commercial operation on June 20, 2011.

6. Under Section 11.4.1 of each of the White Oak LGIAs, the costs of network upgrades are to be allocated consistent with the terms of Attachment FF of the MISO Tariff. As relevant here, at the time the 2007 LGIA and the 2009 Amended LGIA became effective, section III.A.d of Attachment FF of the Tariff permitted the transmission owner the ability to elect to recover the costs of network upgrades subject to participant funding pursuant to Option 1.

B. Ameren's Filing and Responsive Pleadings

7. On March 12, 2014, Ameren filed an unexecuted FSA between White Oak and Ameren. According to Ameren, the FSA was filed unexecuted because the parties did

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[5] *E.ON*, 137 FERC ¶ 61,076 at P 38.

[6] *E.ON Rehearing Order*, 142 FERC ¶ 61,048 at P 34.

not agree on whether the FSA is the proper method for White Oak to fund its required network upgrades to the Ameren transmission system.[7]

8. In its filing, Ameren stated that, on September 1, 2011, it communicated its intent to White Oak to refund the network upgrade costs and to establish a monthly Option 1-based network upgrade charge through an FSA to recover the costs of the network upgrades (estimated at approximately $2.3 million). Ameren stated that, over the ensuing months, it sent White Oak drafts of the FSA and attempted to negotiate a resolution of the matter with White Oak. Ameren stated that, while it was its hope that the line of cases in which the Commission has considered the application of Option 1 in the intervening time period would provide a clear path forward for the application of Option 1 to White Oak, no agreement could be reached with White Oak.[8]

9. Ameren argued that the Tariff in effect at the time the 2007 LGIA was executed gave White Oak notice that Ameren had the right to establish an Option 1-based network upgrade charge, as proposed in the FSA.[9] Ameren stated that the filing of the FSA marked the completion of the process of invoicing White Oak for the interconnection service to which it agreed when it executed the 2007 LGIA.[10]

10. NextEra protested that Ameren cannot implement Option 1 pricing because it did not memorialize its Option 1 election in the original or amended White Oak LGIAs.[11] NextEra distinguished the instant matter from other cases in which the Commission allowed Option 1 pricing for LGIAs executed prior to the March 22, 2011effective date established in E.ON for removal of Option 1 from the Tariff, noting that, in the LGIAs in those cases, the transmission owners explicitly elected Option 1 pricing. NextEra argued that the *E.ON Rehearing Order* stands for the proposition that a transmission owner can apply Option 1 pricing to LGIAs executed prior to March 22, 2011 only if such agreements contained an Option 1 election.[12] NextEra argued that, by failing to insert

[7] Ameren March 12, 2014 Filing at 1.

[8] *Id*. at 3.

[9] *Id*. at 4.

[10] *Id*. at 7.

[11] NextEra April 2, 2014 Protest at 9-10.

[12] *Id*. at 19.

language electing Option 1 pricing in the White Oak LGIA, as amended, Ameren affirmed its choice of Option 2.[13] NextEra maintained that Ameren's communication to White Oak in September 2011 of its intent to use Option 1 pricing carried no import because Option 2 pricing had already attached.[14] NextEra also protested the rates, terms and conditions of the FSA.[15] Among other things, NextEra contended that Ameren should not be permitted to recover its monthly charge over a 20-year term because two and 2/3 years of interconnection service and network upgrade depreciation have already transpired. Consequently, NextEra argued that any monthly network upgrade charge should be limited to the remaining 17 and 1/3-year period.[16]

11. In response, Ameren argued that, at the time White Oak agreed to take interconnection service, there was no requirement in the Tariff that Ameren make its Option 1 election at the time the LGIA was signed or memorialize that choice in the LGIA.[17] Further, Ameren argued that White Oak misrepresented the Commission's holding in the *E.ON Rehearing Order* by relying on the Commission's description of the MISO Transmission Owners' request for clarification in the background section of the order.[18] With respect to the proposed rates under the FSA, Ameren stated that it would be willing to accommodate White Oak's request to re-calculate the network upgrade charge by allocating the total costs of network upgrades over a 17 and 1/3-year period; other issues, however, remained in dispute.[19]

12. In its answer, NextEra argued that the *E.ON Rehearing Order* provided the exact clarification sought by Ameren and the other transmission owners, i.e., that Option 1 pricing could still apply to agreements executed prior to March 22, 2011 so long as the transmission owner made an affirmative Option 1 selection in an agreement effective

[13] *Id*. at 2.

[14] NextEra April 29, 2014 Answer at 5-6.

[15] NextEra April 2, 2014 Protest at 25-34.

[16] *Id*. at 27.

[17] Ameren April 17, 2014 Answer at 5.

[18] *Id*. at 10-11.

[19] *Id.* at 16.

prior to March 22, 2011.[20] NextEra continued that there is no holding in the *E.ON Rehearing Order* where the Commission said that Option 1 could be available in any agreement effective prior to March 22, 2011, as Ameren stated, if the transmission owner had not made an affirmative Option 1 selection or deferral in that agreement.[21]

C. The May 9 Order

13. In the May 9 Order, the Commission affirmed Ameren's selection of Option 1 pricing, finding that Ameren acted within its right under the Tariff in effect at the time that the 2007 LGIA was executed. The Commission reasoned that it has consistently held that the governing Tariff provisions are those in effect at the time an LGIA is executed or filed unexecuted.[22] In addition, the Commission observed that its decision in *E.ON* to remove Option 1 pricing from Attachment FF of the Tariff does not apply to agreements effective prior to March 22, 2011.[23] The Commission therefore determined that since Ameren's FSA was filed pursuant to the terms and conditions of a pre-March 22, 2011 LGIA, Option 1 pricing is permitted to recover network upgrade costs identified in the LGIA.

14. The Commission rejected NextEra's argument that Ameren's failure to memorialize its Option 1 election in the White Oak LGIAs precluded its later election of Option 1 in an unexecuted FSA. The Commission commented that the Tariff did not require memorialization of a transmission owner's network upgrade funding methodology in an LGIA. Instead, Section 11.2 of Attachment X of the Tariff, which

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[20] NextEra April 29, 2014 Answer at 2-3.

[21] *Id.* at 4-5.

[22] May 9 Order, 147 FERC ¶ 61,106 at P 63 (citing *Rail Splitter Rehearing Order*, 146 FERC ¶ 61,017 at P 21 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,210 (2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060 at P 62)).

[23] *See E.ON Rehearing Order*, 142 FERC ¶ 61,048 at P 34; *Rail Splitter Wind Farm LLC v. Ameren Services Co.*, 142 FERC ¶ 61,047, at P 33 (2013) (*Rail Splitter*); *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,050, at PP 66-70 (2013) (*Settlers Trail*); *Midcontinent Indep. Transmission Sys. Operator, Inc.*, 145 FERC ¶ 61,111, at P 40 (2013) (*Hoopeston*), *reh'g denied*, 149 FERC ¶ 61,099 (2014).

took effect when the Commission issued the MVP Order in 2010,[24] required that a Transmission Owner "*notify* the Transmission Provider and the Interconnection Customer of which Network Upgrade repayment option it has elected under Attachment FF within fifteen (15) Calendar Days after tender of the final GIA appendices . . ." (emphasis added).[25] The Commission observed that MISO's revision to its Tariff approved in the MVP Order undermined NextEra's argument that memorialization of the Option 1 election was required in any of the White Oak LGIAs.[26]

15. The Commission also rejected NextEra's assertion that the *E.ON Rehearing Order* required an affirmative Option 1 election in order for Option 1 to apply to LGIAs executed prior to the March 22, 2011. The Commission stated that its clarification in the *E.ON Rehearing Order* – that the removal of Option 1 pricing "would not apply to agreements effective prior to March 22, 2011" – was not restricted to agreements that contained an explicit Option 1 election or to agreements in which the transmission owner elected Option 1 pricing during a particular time window.[27]

16. As to the rates, terms and conditions of the FSA, the Commission held that Ameren was within its right to collect a network upgrade charge based on the full components of Attachment GG, which specifically applies to Option 1 pricing. The Commission also upheld Ameren's proposed security and default provisions to which NextEra had objected. The Commission found that these provisions were consistent with the *pro forma* LGIA and that security was required to protect Ameren's native load against the risk of bearing unpaid costs associated with White Oak's network upgrades.[28] The Commission also agreed with NextEra's request to shorten the term of the FSA to 17 and 1/3 years. However, the Commission found that Ameren had not given adequate support for its use of the full, i.e., undepreciated, costs of the network upgrades as the

[24] *Midwest Indep. Trans. Sys. Operator, Inc.*, 133 FERC ¶ 61,221 (2010) (*MVP Order*).

[25] The Commission accepted MISO's proposal to remove the abovementioned Tariff provision from Attachment X along with the removal of Option 1 from Attachment FF. *See E.ON Rehearing Order*, 142 FERC ¶ 61,048.

[26] May 9 Order, 147 FERC ¶ 61,106 at P 64.

[27] *Id.* P 69.

[28] *Id.* PP 73-74.

basis for its network upgrade charge. The formula outlined in Attachment GG of the Tariff uses the value of Project Net Plant (which is the total costs of the network upgrades minus the Accumulated Depreciation) to establish the Annual Revenue Requirement that serves as the basis for the network upgrade charge. As NextEra noted in its protest, the White Oak network upgrades have been depreciated for 2 and 2/3 years since going into service. Therefore, the Commission directed Ameren to revise its calculation of the monthly network upgrade charge to use a Project Net Plant value that reflects the Accumulated Depreciation of the network upgrades since they went into service as the basis for the network upgrade charge over a 17 and 1/3 year term.[29]

17. The Commission also directed several additional revisions on compliance. Specifically, the Commission directed that Ameren (1) revise the transmission service provision of the FSA to clarify that the purchase of transmission service is not required under the agreement; (2) revise the *force majeure* provision to include equivalent protection for both parties; (3) revise the liability provision to remove items that are beyond the scope of the FSA; (4) revise the FSA to clarify that White Oak preserves its FPA section 206 rights under the FSA; and (5) revise the dispute resolution clause in the FSA to mirror the language in the White Oak LGIA.

II. Request for Rehearing

A. NextEra's Request for Rehearing

18. NextEra asserts that the Commission erred by finding that Option 1 pricing "is within Ameren's right under the Tariff in effect at the time the 2007 LGIA was executed."[30] NextEra argues instead that the governing Tariff provisions were those in effect when the 2011 Amended LGIA was executed because the 2011 Amended LGIA superseded both the 2007 LGIA and 2009 Amended LGIA, rendering those previous contracts inoperative. Specifically, NextEra notes that Section 30.4 of each of the 2009 and 2011 Amended LGIAs provides that the restated agreements supersede the prior agreements.[31] NextEra also cites *Prairie State* for the proposition that an effective and unchanged agreement (that has not been restated anew) would not be subject to new Tariff provisions, but would instead be subject to the Tariff provisions in effect when that

[29] *Id.* P 72.

[30] NextEra Rehearing Request at 6.

[31] *Id.*

currently existing agreement was executed and became effective.[32] Accordingly, NextEra argues that the Tariff in effect when the 2011 Amended LGIA became effective is the only version of the Tariff that can legally apply in regard to whether Ameren can elect Option 1.[33]

19. NextEra argues that the Tariff in effect when the 2011 Amended LGIA became effective provided, in part, that for Option 1 pricing, the generator interconnection agreement "shall include a provision governing the charge collection, and distribution of . . . revenues between the Transmission Owner(s) and the Interconnection Customer."[34]

20. NextEra contends, therefore, that an Option 1 election requires, at minimum, a "provision" governing the monthly Option 1 charge in the LGIA, whether that is the charge itself or a provision addressing Ameren's intention regarding Option 1.[35] Because the Option 2 election contains no comparable 'shall include' requirement, NextEra contends that Option 2 applies as a default if the transmission owner fails to affirmatively elect Option 1.[36] NextEra adds that, because there is no term or condition in any White Oak LGIA that discusses or even mentions Option 1 pricing, the Commission erred in its finding that the FSA was filed pursuant to the terms and conditions of a pre-March 22, 2011 LGIA.

21. NextEra further argues that the Commission erred in failing to address the filed rate doctrine, which prohibits a public utility from charging rates other than those on file with the Commission.[37] According to NextEra, the Tariff, which is the filed rate, provided that the "Generator Interconnection Agreement shall include a provision governing the charge, collection, and distribution" of the revenues associated with the

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[32] *Id.* at 9-10 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,210 (2008) (*Prairie State*)).

[33] *Id.* at 7.

[34] *Id.* at 10-11.

[35] *Id.* at 10.

[36] *Id.* at 12.

[37] *Id.* at 23.

monthly network upgrade charge.[38] Since the 2011 Amended LGIA did not contain this provision, NextEra argues that Ameren had no basis under the filed rate to assess a monthly network upgrade charge.[39]

22. Also, according to NextEra, the cases in which the Commission has allowed Option 1 pricing to apply are distinguishable on their facts. For instance, NextEra notes that *Rail Splitter*[40] involved an FPA section 206 challenge to an existing FSA in which the customer initially agreed to the Option 1 pricing, whereas White Oak did not agree to the Option 1 pricing. In addition, NextEra contends that the *Settlers Trail*[41] and *Hoopeston*[42] proceedings are distinguishable because Option 1 was listed as an express term or condition in a pre-March 22, 2011 LGIA, whereas no such term was listed in the White Oak LGIAs.[43] According to NextEra, in the case of Rail Splitter, Ameren's apparent failure to elect Option 1 pricing in the Rail Splitter LGIA but subsequent use of Option 1 pricing in the FSA for that project does not support the Commission's conclusion in the present case. First, says NextEra, the Rail Splitter LGIA – executed before the FSA was filed with, and accepted by, the Commission in 2010 – is not part of the record and is not publicly available to confirm the Commission's conclusion. Second, NextEra argues that Rail Splitter's agreement to and execution of the FSA tendered by Ameren does not overcome the express Tariff language requiring the transmission owner to affirmatively address Option 1 in the LGIA.[44]

23. NextEra further notes the Commission's finding that the Tariff provision regarding the 15-day notice requirement was not applicable to the 2007 LGIA and 2009 Amended LGIA. In contrast, NextEra asserts that this provision was part of the MISO Tariff when

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[38] *Id.* at 10.

[39] *Id.* at 24.

[40] *Rail Splitter*, 142 FERC ¶ 61,047; *Rail Splitter Wind Farm LLC v. Ameren Services Co.*, 146 FERC ¶ 61,017 (2014) (*Rail Splitter Rehearing Order*).

[41] *Settlers Trail*, 143 FERC ¶ 61,050.

[42] *Hoopeston*, 145 FERC ¶ 61,111.

[43] NextEra Rehearing Request at 8-9.

[44] *Id.* at 13.

the 2011 Amended LGIA was executed. NextEra argues that the Commission's consideration of this provision is inconsistent with its finding that the governing Tariff provisions are those in effect when the 2007 LGIA was executed. NextEra continues that even if the 15-day notice requirement was satisfied, that does not overcome Ameren's action of *not* addressing Option 1 in the 2011 Amended LGIA.[45] NextEra also argues that any notice that might have been satisfied when Ameren tendered a draft FSA on September 1, 2011, became a nullity when White Oak disagreed with Ameren's right and Ameren then let the matter drop.[46]

24. NextEra maintains that the May 9 Order is inconsistent with the *E.ON Rehearing Order*. NextEra argues that in the *E.ON Rehearing Order*, the Commission granted a requested clarification by the MISO Transmission Owners that Option 1 pricing could continue to apply in three specific instances: (1) "any agreement between a Transmission Owner and an Interconnection Customer in which the parties agreed to the use of Option 1 that was filed with, accepted or approved by the Commission prior to March 22, 2011; (2) "any agreements that became effective prior to March 22, 2011 where the decision to elect Option 1 or Option 2 was deferred to a later date in accordance with the Tariff"; and (3) "a GIA, Facilities Construction Agreement or other agreement in which Option 1 was selected that became effective prior to March 22, 2011 is amended, that amendment does not affect the selection of Option 1."[47] NextEra asserts that none of those instances are present here because Ameren never selected Option 1 pricing and because Option 1 pricing was not a term or condition present in any agreement executed before March 22, 2011.

25. NextEra notes that the MISO Transmission Owners did not ask the Commission to clarify that Option 1 pricing could be selected at any time so long as there is some executed or effective agreement pre-dating March 22, 2011. Had the MISO Transmission Owners made such a request, customers would have responded to protect

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[45] *Id.* at 15.

[46] *Id.*

[47] *Id.* at 18 (citing NextEra Answer at 3 (quoting Request for Clarification and Rehearing of the Midwest ISO Transmission Owners, Docket No. EL11-30-001, Nov. 21, 2011 at 3)).

their rights. Therefore, according to NextEra, the Commission's interpretation of the *E.ON Rehearing Order* impedes customers' due process.[48]

26. NextEra is concerned that the Commission's May 9 Order provides that any transmission owner in MISO might be able to select Option 1 pricing at any time (1, 2, 5 or even 10 years after commercial operation of the project) so long as there was an LGIA in effect before March 22, 2011.[49] NextEra asserts that a multitude of LGIAs were executed by MISO transmission owners and transmission customers between 2006 and March 22, 2011, when Option 1 pricing was part of the MISO Tariff and that only three FSAs (other than for White Oak) relating to those pre-2011 LGIAs have been filed with the Commission. NextEra continues that, for the vast majority of generation projects throughout MISO, projects have conducted business and sold power at wholesale based on an interconnection service cost structure that does not include the Option 1 pricing scheme. NextEra states that the May 9 Order threatens to unwind this certainty and provide surprise costs to an interconnection customer where none was expected and memorialized in an agreement effective prior to March 22, 2011.[50]

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[48] *Id.* at 19-20.

[49] *Id.* at 21.

[50] *Id.* at 22-23.

27. Alternatively, NextEra argues that the Commission erred in accepting certain of the rates, terms and conditions in the FSA. NextEra requests that the FSA rate be limited to a return of and on amounts Ameren invested to fund the network upgrades, in accordance with the Commission's decision in *Hoopeston*. NextEra observes that, in the May 9 Order, the Commission distinguished the Hoopeston and White Oak agreements because *Hoopeston* involved the self-funding of network upgrades and the Tariff did not specifically provide that the rate would be based on Attachment GG, whereas the use of Option 1 in the White Oak LGIA does allow for the collection of a rate based on the full components Attachment GG. NextEra argues, however, that the Commission's distinction is unavailing because Ameren was not within its right to charge Option 1 pricing under any of the White Oak LGIAs. NextEra states that because no LGIA referenced Option 1 (and thus indirectly Attachment GG), it is just and reasonable for the Commission to limit any Ameren rate to a return of and on the amounts Ameren provides to fund the network upgrades, consistent with the Commission's decision in *Hoopeston*.[51]

28. NextEra further argues that the Commission erred by allowing Ameren to recover O&M expenses on network upgrades.[52] NextEra argues that, under the Commission's precedents, a transmission owner may not directly assess O&M costs on network upgrades because the benefits of network upgrades accrue to all users of the system, and not just the interconnecting customer. NextEra adds that Section 10.5 of all three White Oak LGIAs allows for the recovery of O&M expenses on the transmission owner's interconnection facilities, but not for the network upgrades.[53]

29. NextEra also argues that the Commission's rationale for accepting the FSA security provisions is unsupported. NextEra asserts that it is unduly discriminatory to subject White Oak to a security provision that similarly-situated customers have not been required to bear.[54] NextEra also argues that the security provision in the FSA goes

[51] *Id.* at 25-26.

[52] *Id.* at 27 (citing *PJM Interconnection L.L.C.*, 102 FERC ¶ 61,161 (2003) (ruling that PJM could not recover O&M costs with respect to network upgrades from the generation interconnection customer) (*PJM Interconnection*); *Duke Energy Corp.*, 95 FERC ¶ 61,279 (2001) (directing transmission provider to recover O&M costs associated with network upgrade costs in transmission rates) (*Duke Energy*)).

[53] *Id.* at 27.

[54] *Id.* at 29-30.

beyond the scope of the White Oak LGIA. NextEra believes that the Commission failed to explain why the security provision is necessary to protect Ameren's native load from the network upgrade costs.[55] NextEra also asserts that the Commission failed to address whether the security provision goes beyond Section 11.5 in the White Oak LGIA by including the "full freight of Attachment GG, covering O&M, C&G [common and general expenses], a rate of return, etc."[56] Finally, NextEra asserts that the security provision is ambiguous with respect to the period of time Ameren proposes to hold the security, and the process by which Ameren can draw on the security.[57]

30. Lastly, NextEra argues that the Commission erred in finding that the default provision in the FSA is necessary to protect Ameren against the risk of the project's termination. NextEra explains that any risk to Ameren in the event of default is collateralized because Ameren owns the assets and the network upgrades. NextEra also notes that, after the project is terminated, White Oak should not continue to fund and subsidize another market participant's use of the capacity from the network upgrades. At most, NextEra argues that White Oak should be limited in its financial responsibility to the $2.079 million that Ameren refunded and should not be liable for other future costs such as O&M and C&G.[58]

B. <u>Commission Determination</u>

31. The Commission has held that the removal of Option 1 pricing from MISO's Tariff does not preclude the use of Option 1 to recover costs of network upgrades that are the subject of agreements effective prior to March 22, 2011.[59] Before the Commission on rehearing is an FSA that implements Option 1 pricing for network upgrades that were originally identified in the 2007 LGIA, which was effective as of August 28, 2007, and were likewise identified in the 2009 Amended LGIA, which was effective as of

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[55] *Id.* at 30.

[56] *Id.*

[57] *Id.* at 31, n.77.

[58] *Id.* at 31-32.

[59] *E.ON Rehearing Order*, 142 FERC ¶ 61,048 at P 34. The Commission stated that this is a reasonable remedy that balances the interests of the parties, the need for regulatory certainty, and ease of administration.

March 19, 2009. While both the 2007 LGIA and the 2009 Amended LGIA were silent as to the application of Option 1, they became effective when MISO's Tariff permitted the use of Option 1 pricing and did not require an affirmative election of Option 1. We clarify in this order that it is MISO's Tariff as in effect at the time of the execution of the 2009 Amended LGIA – not the Tariff as in effect at the time of the execution of the 2011 Amended GIA – that controls in determining whether Option 1 pricing may be applied to network upgrades that were identified in the 2009 Amended GIA, an agreement in effect prior to March 22, 2011.

32. We specifically reject NextEra's argument that the Tariff in effect when the 2011 Amended LGIA was signed governs the interconnection service and funding of network upgrades. First, NextEra is incorrect that, pursuant to section 30.4 of the LGIAs, the 2011 Amended LGIA completely superseded the prior agreements. In *Hoopeston*, the Commission stated that section 30.4 "should be interpreted in light of a GIA's effective date."[60] The Commission also determined that the Option 1 reimbursement mechanism would continue to apply to original network upgrades identified in the interconnection customer's January 2011 GIA (i.e., before the March 22, 2011 effective date established in *E.ON* for the removal of Option 1 from the Tariff) notwithstanding the parties' superseding amended agreement in May 2011, after the refund effective date in *E.ON*. It is only the incremental upgrades identified in the May 2011 agreement that were ineligible for Option 1.[61] This is because the Tariff as it existed in January 2011 dictated the relevant funding mechanism for the original network upgrades in *Hoopeston*, not the Tariff as it existed in May 2011. As applied here, the Tariff in effect as of the 2009 LGIA, which is the last effective LGIA before the March 22, 2011 refund effective date in *E.ON*, is the controlling Tariff regarding the availability of Option 1. Under that Tariff, Ameren had the right to elect Option 1.

33. Moreover, the applicable Tariff provisions concerning the use of Option 1 in effect when the 2009 Amended LGIA became effective did not contain the Attachment FF language cited by NextEra, which provides that "the Generator Interconnection Agreement shall include a provision governing the charge, collection, and distribution of . . . revenues between the Transmission Owner(s) and the Interconnection Customer." This Tariff language did not take effect until July 10, 2009, four months after the 2009

[60] *Hoopeston*, 145 FERC ¶ 61,111 at P 40.

[61] *Id*.

Amended LGIA became effective.[62] NextEra cites to no other then-effective provisions in the Tariff that required Ameren to memorialize its Option 1 election in any of the White Oak LGIAs; and we can find none. Therefore, we affirm the finding in the May 9 Order that the memorialization of Option 1 in the White Oak LGIAs was not a prerequisite for Ameren's subsequent Option 1 election, and we find that Ameren followed the governing Tariff provisions in effect when the 2009 Amended LGIA became effective.[63] Accordingly, NextEra is incorrect in its assertion that Ameren's actions were inconsistent with the filed rate doctrine.

34. We also reject NextEra's argument that the May 9 Order departed from the Commission's determination in the *E.ON Rehearing Order*. In the *E.ON Rehearing Order*, the Commission clarified that the decision in E.ON ordering MISO to remove Option 1 from the Tariff "will not apply to agreements effective prior to March 22, 2011."[64] By relying on MISO Transmission Owners' request for clarification in that proceeding, NextEra misinterprets this holding. On rehearing, NextEra reiterates the same argument it made in its protest, namely, that the Commission's clarification applied only where a transmission owner selected Option 1 in a pre-March 22, 2011 agreement. However, the Commission made no such qualification in its determination. As we held in the May 9 Order, NextEra's interpretation of the *E.ON Rehearing Order* erroneously relies on the Commission's description of the MISO Transmission Owners' request for clarification, which is not imputed into the Commission's holding.

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[62] *See Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER09-1431-000, proposed tariff sheet 3463 (filed July 9, 2009); *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060 (2009).

[63] In the May 9 Order, the Commission commented that the parties in *Rail Splitter* executed an FSA implementing Option 1 pricing even though no affirmative election of Option 1 pricing was included in the underlying LGIA. On rehearing, NextEra argued that the Rail Splitter LGIA is not part of the record and that the facts were distinguishable in any event. We need not address these arguments because the parties' actions in *Rail Splitter* merely served as an example and are not dispositive of our conclusion that the tariff provisions in effect at the time of the White Oak LGIAs did not require an affirmative Option 1 election.

[64] *E.ON Rehearing Order*, 142 FERC ¶ 61,048 at P 34. *See also Rail Splitter Rehearing Order*, 146 FERC ¶ 61,017.

35. Finally, we disagree that the determination in the May 9 Order will establish a broad policy that will allow transmission owners to surprise interconnection customers with interconnection costs that were never contemplated or expected. Notably, a transmission owner's ability to elect Option 1 is limited in several respects and remains limited by the finding in the May 9 Order. First, a transmission owner can no longer elect Option 1 for any additional network upgrades identified in an interconnection agreement effective after March 22, 2011. Therefore, interconnection customers to such agreements do not risk surprise costs associated with an Option 1 election. Second, parties to LGIAs that were effective between July 15, 2010 and March 22, 2011 are protected from unexpected costs because the notice requirement in the Tariff required the transmission owner to timely elect the use of Option 1 within 15 days of tendering of the final LGIA appendices.[65] Additionally, parties to LGIAs that were effective before March 22, 2011 but after the effectiveness of the Tariff language requiring generator interconnection agreements to include a provision governing the charge, collection, and distribution of revenues for Option 1 are protected from surprise costs because those LGIAs were required to include such language. Finally, although the 2009 Amended LGIA became effective prior to the 15-day notice requirement and the provision requiring charge information noted above, that agreement was governed by the then-effective Tariff that contained no time restriction on a transmission owner's Option 1 election and White Oak cannot claim to be subject to unexpected costs pursuant to a transmission owner's Option 1 election.

36. We deny in part and grant in part rehearing with respect to the Commission's conditional acceptance of the rates, terms and conditions of the FSA. We reject NextEra's argument on rehearing that the FSA should be limited to a return of and on amounts Ameren invested to fund the network upgrades. NextEra's argument rests on the premise that Ameren was not entitled to elect Option 1, and we have rejected that premise as discussed above. Because Option 1 allows for the collection of a rate based on the full components of Attachment GG, we uphold the determination that Ameren is entitled to recover a rate based on the formula in Attachment GG. The Commission's decision in *Hoopeston* remains distinguishable because that case involved the self-funding of network upgrades.

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[65] *See* MISO and the MISO Transmission Owners' Tariff Filing, Docket No. ER10-1791-000, Transmittal Letter at 33 and proposed tariff sheet 3093, July 15, 2010; *MVP Order*, 133 FERC ¶ 61,221 (2010).

37. Similarly we disagree with NextEra that Ameren's recovery of O&M and other similar expenses included in Attachment GG is improper or inconsistent with Commission precedent and that the Commission failed to adequately address NextEra's prior arguments. As the Commission stated in the May 9 Order, "Option 1 pricing specifically allows for the recovery of network upgrade costs, including operation and maintenance costs and allocated overhead costs, based on the formula contained in Attachment GG of the MISO Tariff."[66] The Commission stated in E.ON that the removal of Option 1 was effective March 22, 2011.[67] Because the application of Option 1 pricing is available for Ameren in the instant proceeding as explained herein, Ameren may, consistent with the holding in *E.ON*, recover its O&M and other allocated overhead costs. In this regard, the PJM precedents cited by NextEra are distinguishable. In *PJM Interconnection*, the Commission's determination that PJM could not recover O&M costs with respect to network upgrades from a generation interconnection customer was based upon its interpretation of the existing PJM Tariff.[68] In *Duke Energy*, the Commission was addressing the default interconnection pricing, not participant funding.[69] Participant funding has, however, been approved in MISO.[70]

38. Finally, we uphold our acceptance of the default provision in the FSA. In the event of default, Ameren risks the forfeiture of payments provided for in the FSA, to which Ameren is entitled under Option 1. This is true regardless of whether Ameren owns the assets and network upgrades. Therefore, we reject NextEra's argument that the default risk is collateralized. To limit the recovery to the initial capital costs of the network upgrades, as NextEra requests, would be the equivalent of an Option 2 election. Because Ameren was within its right to elect Option 1 over Option 2, it is also entitled to protection against the project's termination.

39. On rehearing, NextEra argues that the Commission erred by accepting the security provision. Upon reconsideration, we agree that White Oak should not be required to post

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[66] May 9 Order, 147 FERC ¶ 61,106 at P 70.

[67] *E.ON*, 137 FERC ¶ 61,076 at P 43.

[68] *See PJM Interconnection*, 104 FERC ¶ 61,154, at PP 17-19 (finding that the PJM Tariff did not allow for the direct assignment of O&M costs for network upgrades).

[69] *See Duke Energy*, 95 FERC ¶ 61,279 at 61,980.

[70] *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060 (2009).

security under the FSA. Neither the MISO Tariff nor the White Oak LGIA requires or even contemplates the posting of security under an FSA implementing Option 1 pricing. Under Option 1, the interconnection customer posts security and provides the funds up-front subject to the milestones in Appendix B of the LGIA. As the payment milestones in Appendix B of the LGIA are met through cash payments made to Ameren by White Oak the security requirement is reduced by a corresponding amount. According to the milestones, upon completion of the network upgrades White Oak should have made all of its cash payments that were owed to Ameren, which would have reduced White Oak's security requirement under Article 11.5 of the LGIA down to zero dollars. Thus, the security clause in Article 11.5 of the LGIA governing payments owed for construction costs has been satisfied. Since White Oak satisfied all of its requirements to post security under MISO's then current Tariff, it should not be required to post new security under the FSA, which includes facility charge payment terms implementing Option 1 pricing under the LGIA and the Tariff. As we have found herein, while such payment terms appropriately include a default provision in order to *effectuate* the Option 1 election, there is no justification for the payment terms of the FSA to include new security inasmuch as the security requirement that exists in the Tariff has already been satisfied. Regarding the Commission's prior finding, i.e., that security was required to protect Ameren's native load against the risk of bearing unpaid costs associated with White Oak's network upgrades, we find herein that the interconnection customer has satisfied the Tariff's requirement to provide security. Whether or not the default provision addresses that risk to native load is an issue that is not before us. Accordingly, we direct Ameren to submit a compliance filing removing the security provision from the FSA, along with all associated references to security in the FSA.

III. <u>Compliance Filing</u>

40. On June 9, 2014, Ameren submitted a filing to comply with the Commission's directives in the May 9 Order. Notice of Ameren's June 9 filing was published in the *Federal Register,* 79 Fed. Reg. 34,521 (2014) with protests and interventions due on or before June 30, 2014. NextEra filed a timely protest on June 28, 2014. On July 14, 2014, Ameren filed an answer to NextEra's protest.

41. Rule 213 of the Commission's Rules of Practice and Procedure[71] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept

[71] 18 C.F.R. § 385.213(a)(2) (2014).

Ameren's answer because it has provided information that has assisted us in our decision-making process.

A. Ameren's June 9 Filing

42. In its June 9 Filing, Ameren states that it revised its calculation of the network upgrade charge to use a net plant value that reflects the accumulated depreciation of the network upgrades over a 17 and 1/3 year term. According to Ameren, this recalculation results in a reduction of the network upgrade cost basis from $2,399,128 to $2,079,244 and lowers the resulting monthly charge under the FSA from $34,567 to $31,015.[72]

43. Regarding compliance requirements directed by the Commission on non-rate terms and conditions, Ameren states that in the FSA, it has (1) revised the "Transmission Service" section to clarify that the FSA does not require the purchase of transmission service; (2) revised the "Force Majeure" provision to include equivalent protection for both parties; (3) deleted the "Liability" provision as beyond the scope of the FSA; (4) added a new section called "Rights Under the Federal Power Act" to mirror language from the White Oak LGIA regarding the preservation of section 205 and 206 rights; and (5) revised the "Disputes" section to mirror the language in the White Oak LGIA.[73]

B. NextEra's Protest

44. NextEra argues that Ameren should be required to make two additional revisions to address the specific items NextEra raised. NextEra states that in the May 9 Order the Commission required Ameren to "revise the FSA to clarify that White Oak preserves its FPA section 206 rights under the FSA."[74] In its June 9 Filing, NextEra observes that Ameren proposed the following language to address this requirement:

> Rights under the Federal Power Act: Nothing in this Service Agreement shall limit the rights of the Parties or of the FERC under Sections 205 of

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[72] Ameren June 9 Filing, Transmittal at 1-2.

[73] *Id.*, Transmittal at 2-3.

[74] NextEra Protest at 3 (citing May 9 Order, 147 FERC ¶ 61,106 at P 75).

> 206 of the Federal Power Act and FERC's rules and regulations thereunder.[75]

According to NextEra, however, it had argued in its initial protest that the provision in the FSA stating that it "may not be amended, modified, or waived other than by a written document signed by all the Parties" was not just and reasonable, and that "White Oak should have the same FPA section 206 right to seek to amend or modify this FSA as it has under the 2011 Restated LGIA…"[76] NextEra asserts that Ameren's proposed revisions do not properly address these specific issues, and it requests two additional revisions.

45. First, NextEra requests that Ameren's proposed language be revised as follows:

> Rights under the Federal Power Act: Nothing in this Service Agreement shall limit the rights of Customer ~~the Parties~~ or of the FERC under Section~~s 205 of~~ 206 of the Federal Power Act and FERC's rules and regulations thereunder.

NextEra explains that it never requested for Ameren to have section 206 rights, Ameren did not request such rights, and NextEra did not address section 205 rights.[77]

46. Second, NextEra requests that the following language currently in the FSA be revised as follows:

> Entire Agreement. This Service Agreement represents the entire agreement between Owner and Customer with reference to payment terms for the Facilities provided by Owner for Customer under the LGIA. This Service Agreement may ~~not~~ be amended, modified, or waived ~~other than~~ by a written document signed by all Parties.

NextEra explains that this revision is necessary to give full effect to the preservation of White Oak's section 206 rights required in the May 9 Order – without this revision,

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[75] *Id.* (citing NextEra June 9 Filing, Attachments A and B, Revised FSA).

[76] *Id.* (citing NextEra Initial Protest at 34).

[77] *Id.* at 4.

White Oak could not seek to revise the FSA under section 206 if any amendment could occur only if Ameren and White Oak agreed.

C. Ameren's Answer

47. On the issue of section 206 rights, Ameren states that the FSA contained in the June 9 Filing contained exactly what White Oak asked for: a provision that "comport[s] with Sections 30.9 and 30.11 of the 2011 Amended LGIA which (i) provides that it may be revised by mutual agreement of the parties and (ii) reserves FPA Section 206 rights for Ameren and White Oak."[78] Ameren states that its new proposed provision in the FSA is taken verbatim from Section 30.11 of the White Oak LGIA, just as White Oak requested. Ameren is concerned that, if required to remove the reference to its FPA section 205 rights, it would face a higher burden to change the FSA relative to White Oak. Ameren does not think the "Entire Agreement" section of the FSA requires further revision because the language in the "Rights Under the Federal Power Act" section sufficiently preserves White Oak's section 206 rights.

D. Commission Determination

48. We will conditionally accept Ameren's compliance filing. We find that Ameren has complied with the Commission's directives in the May 9 Order to revise its calculation of the monthly network upgrade charge to use a Project Net Plant value that reflects the Accumulated Depreciation of the network upgrades. We also accept Ameren's "Rights Under the FPA" provision as consistent with the directives of the May 9 Order. The Commission directed Ameren to make certain revisions requested by NextEra to which Ameren has not objected, including NextEra's request that the FSA comport with Section 30.11 of the 2011 Amended LGIA. Because the June 9 Filing includes a provision that mirrors Section 30.11 of the 2011 Amended LGIA, we will not require any further changes to that provision.

49. However, we agree with NextEra that the "Entire Agreement" section, as written, may cause confusion regarding the full extent of White Oak's section 206 rights. Specifically, it is unclear whether the express preservation of rights under the FPA trumps the provision requiring mutual agreement on amendments and modifications. Therefore, we direct Ameren to revise the "Entire Agreement" section as requested by NextEra to read:

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[78] Ameren Answer at 2-3 (quoting NextEra Protest at 34).

> Entire Agreement. This Service Agreement represents the entire agreement between Owner and Customer with reference to payment terms for the Facilities provided by Owner for Customer under the LGIA. This Service Agreement may ~~not~~ be amended, modified, or waived ~~other than~~ by a written document signed by all Parties.

We note that this revision is consistent with language in the 2011 Amended LGIA regarding amendment or modification in light of the reservation of FPA rights in that agreement.

The Commission orders:

(A) NextEra's request for rehearing of the May 9 Order is denied in part and granted in part, as discussed in the body of this order.

(B) Ameren is hereby directed to submit a compliance filing within 30 days of the date of this order removing the FSA's security provision, along with all associated references, as discussed in the body of this order.

(C) Ameren's compliance filing is hereby conditionally accepted, subject to a further compliance filing to be submitted within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.