

153 FERC ¶ 61,160
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Interstate Power and Light Company

v.

Docket No. EL12-104-002

ITC Midwest, LLC

ORDER DENYING REHEARING

(Issued November 10, 2015)

1. On March 24, 2014, NextEra Energy Resources, LLC (NextEra) requested rehearing of the Commission's February 20, 2014 order¹ on rehearing and clarification of the Commission's July 18, 2013 order in this proceeding.² The Complaint Order addressed a complaint filed, pursuant to section 206 of the Federal Power Act (FPA),³ by Interstate Power and Light Company (IPL) against ITC Midwest, LLC (ITCM). IPL, a customer in the ITCM pricing zone of the Midcontinent Independent System Operator, Inc. (MISO), had complained that Attachment FF, Transmission Expansion Planning Protocol (Attachment FF), of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) was unjust, unreasonable, and unduly discriminatory in its reimbursement treatment of generator interconnection-related network upgrade costs in the ITCM pricing zone as applied to IPL and IPL's customers. In the Complaint Order, the Commission granted the complaint. In the Clarification Order, the Commission denied rehearing but granted, in part, clarification of the Complaint Order.

¹ *Interstate Power and Light Co. v. ITC Midwest, LLC*, 146 FERC ¶ 61,113 (2014) (Clarification Order).

² *Interstate Power and Light Co. v. ITC Midwest, LLC*, 144 FERC ¶ 61,052 (2013) (Complaint Order).

³ 16 U.S.C. § 824e (2012).

2. NextEra's rehearing request concerns provisional Generator Interconnection Agreements (provisional GIAs)⁴ in effect before the Complaint Order. Specifically, NextEra seeks rehearing of the clarification, in the Clarification Order, of the reimbursement treatment to be afforded to network upgrades that are included in amendments to provisional GIAs where such amendments are executed, or filed unexecuted, after the date of the Complaint Order. For the reasons discussed below, we deny rehearing.

I. Background

3. Prior to the Complaint Order, eligible interconnection customers in the ITCM pricing zone could be reimbursed up to 100 percent of their interconnection-

⁴ Provisional GIAs are discussed in the MISO Tariff at Attachment X, Generator Interconnection Procedures (Attachment X), section 11.5, Special Considerations (Section 11.5). Pertinent provisions of Section 11.5 state:

Upon the request of Interconnection Customer, and prior to completion of requisite Network Upgrades or Stand Alone Network Upgrades, Transmission Provider may provide a provisional [GIA] for limited operation at the discretion of Transmission Provider based upon the results of available studies. . . . Where available studies indicate that such facilities that are required for the interconnection of a new . . . generator are not currently in place, Transmission Provider will perform an Interconnection Facilities Study in order to confirm the facilities that are required for provisional interconnection service and to determine the details (*e.g.* configuration) of such facilities. . . . The maximum permissible output of the Generating Facility in the provisional [GIA] will be updated on a quarterly basis. . . . Interconnection Customer assumes all risks and liabilities with respect to changes, which may impact the [GIA] including, but not limited to, change in output limits and future Network Upgrade cost responsibilities.

The section was added to MISO's Generator Interconnection Procedures in 2008, *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183 (2008), *order on reh'g*, 127 FERC ¶ 61,294 (2009) (Queue Reform Order). The original term "temporary GIA" was later replaced with "provisional GIA." *See Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,301 (2009).

related network upgrade costs (ITCM Policy).⁵ However, under the reimbursement policy for generator interconnection-related network upgrades generally used elsewhere in MISO (MISO Policy), the interconnection customer is repaid 10 percent of the cost of network upgrades above 345 kV and is fully responsible for the cost of network upgrades 345 kV and below.⁶ IPL, which describes itself as the largest customer in the ITCM pricing zone, complained about the disparity between these two reimbursement policies.

4. In the Complaint Order, the Commission granted IPL's complaint. It found that the ITCM Policy resulted in an improper subsidy and was therefore unjust, unreasonable, and unduly discriminatory or preferential.⁷ The Commission directed MISO to revise Attachment FF such that interconnection customers in the ITCM pricing zone may receive up to 10 percent reimbursement for the cost of their interconnection-related network upgrades, in conformance with the generator interconnection cost recovery provisions applicable to most other MISO pricing zones, i.e., the MISO Policy.⁸ The Commission held that, consistent with precedent, the reimbursement policy to be applied to interconnection customers will be the policy in effect on the date that a GIA is executed or filed with the Commission, if unexecuted.⁹ Regarding amendments to GIAs for additional network upgrades, the Commission stated that such amendments are more appropriately addressed on a case-by-case basis to give consideration to the situation giving rise to the amendments.¹⁰

⁵ Attachment FF, section III.A.2.d.4, sets forth the ITCM Policy. Reimbursement eligibility is described in the Complaint Order, 144 FERC ¶ 61,052 at P 39.

⁶ Attachment FF, section III.A.2.d.1, describes the MISO Policy.

⁷ Complaint Order, 144 FERC ¶ 61,052 at P 33.

⁸ *Id.* P 42.

⁹ *Id.* P 43.

¹⁰ *Id.* P 44.

5. ITCM sought rehearing of the Complaint Order, arguing that the Commission had insufficiently justified this change in reimbursement policy for the ITCM pricing zone.¹¹ If the Commission did not grant rehearing, ITCM alternatively sought clarifications regarding two classes of its interconnection customers: First, ITCM requested that its interconnection customers that connected under provisional GIAs prior to the Complaint Order will be treated under the previous 100 percent reimbursement policy when their studies are completed and network upgrades determined. Second, ITCM requested that all its interconnection customers that had reached the MISO generator interconnection queue process M2 Milestone¹² by July 18, 2013, will remain under the previous 100 percent reimbursement policy.¹³

6. IPL sought clarification of the reimbursement policy to be applied to existing GIAs (without distinguishing between provisional and non-provisional GIAs) that are amended *after* July 18, 2013. IPL referenced the Complaint Order's holding that amendments to GIAs that add additional network upgrades are appropriately addressed on a case-by-case basis to give consideration to the situation giving rise to the amendments.¹⁴ IPL requested clarification that amendments to existing GIAs that result in additional network upgrades should be treated the same as new interconnection requests or new GIAs and, accordingly, that the additional network upgrades are reimbursed according to the MISO Policy.¹⁵

7. In the Clarification Order, the Commission denied ITCM's rehearing request but granted its clarification request, in part. The Commission found, regarding the impact of the Complaint Order on provisional GIAs, that the appropriate reimbursement policy is the one in effect on the date a GIA is executed or filed unexecuted with the Commission. Accordingly, it held, reimbursement for network upgrades identified in a provisional GIA that was executed or filed unexecuted with the Commission prior to July 18, 2013, will be governed by the ITCM Policy. However, reimbursement for any upgrades that are subsequently (i.e., after July 18, 2013) identified and incorporated into an executed or

¹¹ ITCM, Aug. 16, 2013 Rehearing and, Alternatively, Clarification Requests at 1-3 (ITCM Rehearing/Clarification).

¹² Attachment X, section 8.2, "Eligibility for the Definitive Planning Phase," describes the M2 Milestone.

¹³ ITCM Rehearing/Clarification at 28.

¹⁴ Complaint Order, 144 FERC ¶ 61,052 at P 44.

¹⁵ IPL, Aug. 19, 2013, Clarification Request at 3, 5.

filed-unexecuted provisional GIA will be governed by the MISO Policy.¹⁶ The Commission denied ITCM's clarification request that all ITCM's interconnection customers that had reached the M2 Milestone¹⁷ by July 18, 2013, will remain under the ITCM Policy.¹⁸

8. The Commission also granted in part IPL's requested clarification. The Commission first referred to its clarification concerning provisional GIAs, made in response to ITCM, that network upgrades not incorporated into a provisional GIA prior to July 18, 2013 will be governed by the MISO Policy in effect in the ITCM pricing zone after July 18, 2013. It then affirmed the holding, in the Complaint Order, that amendments to non-provisional GIAs are more appropriately addressed on a case-by-case basis to give consideration to the situation giving rise to the amendments.¹⁹

II. Rehearing Request

9. NextEra seeks rehearing of the Commission's clarification that network upgrades that are included in amendments to provisional GIAs, where such amendments are executed or filed unexecuted after July 18, 2013, will be subject to the MISO Policy.

10. NextEra prefaces its arguments to the Commission by describing the situation that causes it to seek rehearing of the Clarification Order. NextEra states that it has two generating projects (NextEra Projects) that commenced commercial operation under provisional GIAs: Project No. G735, for a 200-MW project, executed on December 19, 2008, amended without capacity increase or facility modification on December 11, 2009, and Project No. J091, for a 66-MW project, executed on December 11, 2009.²⁰ NextEra states that both projects' provisional GIAs did not identify any network upgrades but stated that network upgrades will be determined upon completion of applicable interconnection studies. NextEra continues that these projects have not increased their capacity nor taken any other action that might cause delay in identifying network upgrades. NextEra claims that the fault lies with MISO for the failure to identify network

¹⁶ Clarification Order, 146 FERC ¶ 61,113 at P 26 (citation omitted).

¹⁷ *See supra* P 5 & n.12.

¹⁸ Clarification Order, 146 FERC ¶ 61,113 at P 27.

¹⁹ *Id.* P 28 (citation omitted).

²⁰ Rehearing Request at 8-9.

upgrades and incorporate them into the NextEra Projects' provisional GIAs before July 18, 2013.²¹

11. NextEra notes that MISO's delays in processing the interconnection requests were due, in part, to revising the interconnection procedures to a "first ready, first served" approach.²² NextEra states that additional delays were caused by withdrawal of some higher-queued generators in an earlier study group. This caused MISO to suspend studies for the projects in the lower-queued study groups, which included the NextEra Projects.²³

12. NextEra states that although MISO commenced the Definitive Planning Phase System Impact Studies in August 2012, and completed these studies in March 2013, MISO failed to issue the required Facilities Study and to update the NextEra Projects' provisional GIAs prior to the Complaint Order.²⁴ NextEra states that it repeatedly but unavailingly asked MISO to produce the interconnection studies results and to amend the NextEra Projects' provisional GIAs.²⁵

13. NextEra recognizes that, in Community Wind II, the Commission took an approach contrary to NextEra's request here.²⁶ Specifically, the Commission stated that the mere fact of having a temporary (i.e., provisional) GIA does not grandfather any particular cost allocation methodology, that the Commission's general policy is that the tariff that should apply is the one that is effective and on file on the date that the interconnection agreement is executed or filed unexecuted. NextEra also states that the Commission concluded in Community Wind II that the rules in effect when the GIA was updated, not originally executed, should apply.²⁷

²¹ *Id.* at 9-10.

²² The revisions were adopted in the Queue Reform Order. *See supra* n.4.

²³ Rehearing Request at 10-12.

²⁴ *Id.* at 12-13.

²⁵ *Id.* at 13.

²⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,019 (2009), *order on reh'g and compliance*, 131 FERC ¶ 61,165, *order on reh'g*, 133 FERC ¶ 61,011 (2010) (Community Wind II). This proceeding, under Attachment FF of MISO's Tariff, addressed the disputed cost allocation for a particular network upgrade, the construction of a new transmission line.

²⁷ Rehearing Request at 17-18 (citing Community Wind II, 131 FERC ¶ 61,165 (*continued* ...))

14. However, NextEra criticizes the Commission's analysis in Community Wind II as ignoring that a provisional GIA is fully as binding on the interconnection customer as is the eventual amended GIA. NextEra states that the terms and conditions in the body of the agreement are the same for both, and that the interconnection customer in both commits to the same cost responsibility. NextEra states that the difference between the two is in the appendices as the later GIA will be amended to incorporate network upgrades after MISO has completed some or all interconnection studies. NextEra contrasts the commitment of an interconnection customer having a provisional GIA with the commitment of an entity with a "permanent" GIA. It states that, typically, under a provisional GIA, the interconnection customer is required to accelerate its part in the interconnection process by constructing and operating its generating facility. By contrast, NextEra states, some of the queue processing problems over the last decade have been caused by entities that suspended their GIAs or else terminated their GIAs at the last minute, before construction funding was required, with negative effects on other interconnection customers.²⁸

15. NextEra states that the Commission's reference, in Community Wind II, to the "mere fact" that a generator has a provisional GIA may indicate the Commission's belief that requesting a provisional GIA signals a lack of commitment to the project. It offers that the Commission may be unaware of the interconnection customer's obligations under a provisional GIA, and that, therefore, Community Wind II did not fully vet the relevant issues and is not significant precedent.²⁹

16. NextEra urges the Commission to treat provisional GIAs the same as other GIAs. For NextEra, the key issue is "whether the generator has contracted for the capacity required by the network upgrades before or after the new effective date."³⁰ NextEra argues that because a generator with a provisional GIA has committed to pay for the network upgrades, the same as an interconnection customer with any other GIA, reimbursement rules, when they change, should give the generator with a provisional GIA and the interconnection customer the same grandfathering protections. NextEra states that the Commission's decision in the Clarification Order was not based on substantial evidence because the Commission failed to consider any evidence to support

at P 32).

²⁸ *Id.* at 18.

²⁹ *Id.* at 18-19.

³⁰ *Id.* at 19.

its distinction between generators with provisional GIAs and generators with other GIAs.³¹

17. NextEra objects that the Commission is punishing the NextEra Projects because of MISO's failure to complete the projects' interconnection studies in a timely manner, when other projects with provisional GIAs executed or filed unexecuted at later dates are eligible for reimbursement.³² NextEra states that reasonably-timed processing of interconnection requests by MISO would have already incorporated the needed network upgrades in the NextEra Projects' GIAs. NextEra recognizes that due to delays in administering the interconnection queue, because of the Queue Reform Order's changes in MISO's Generator Interconnection Procedures, compounded by problems in processing prior-queued projects in the area of NextEra's projects, MISO did not complete its studies and update the NextEra provisional GIAs.³³ However, NextEra objects that when the Commission decided, in the Clarification Order, to apply the MISO Policy to all provisional GIAs whose network upgrades had not been incorporated as of July 18, 2013, it took no account of why MISO had not amended provisional GIAs to state the network upgrades.³⁴

18. NextEra compares the treatment of its projects to five other projects, whose interconnection requests were submitted in the same 2007-2009 time frame as the NextEra Projects and whose provisional GIAs were executed after those of the NextEra Projects. NextEra states that MISO has already updated those five projects' provisional GIAs with at least some identified network upgrades. NextEra objects that those five projects, all of which are later-queued than the NextEra Projects, may qualify, under the Clarification Order, for the ITCM Policy.³⁵

19. NextEra objects that the Commission has not explained why it is just and reasonable for those projects to be grandfathered under the ITCM Policy but not the NextEra Projects. The different treatment in identifying network upgrades and incorporating upgrades into GIAs, according to NextEra, is due to MISO not updating the NextEra Project provisional GIAs with interconnection study results, a distinction that NextEra considers to be arbitrary and to lack valid policy purposes. NextEra adds that

³¹ *Id.*

³² *Id.* at 2, 20-22.

³³ *Id.* at 20.

³⁴ *Id.*

³⁵ *Id.* at 20-22.

the Clarification Order's holding will not promote more efficient siting for projects that are already sited and operating, like the NextEra Projects, and that the holding makes a retroactive rule that punishes the generator for the Transmission Provider's failure to complete its obligations under the GIA and to comply diligently with its tariff obligations.³⁶

20. NextEra states that it reasonably relied on the continued existence of the ITCM Policy and on MISO completing interconnection studies and identifying network upgrades in a timely manner when it executed the provisional GIAs for the NextEra Projects, constructed the projects, and negotiated the price and terms of the projects' power sales contracts. NextEra states that it did not anticipate that the Commission, in a rehearing proceeding, would retroactively apply the MISO Policy to projects that have waited for years for MISO to complete interconnection studies.³⁷ NextEra claims that the Clarification Order's ruling is inexplicable in light of the Commission's policy of not allowing punitive retroactive effects, and its recognition that stability and predictability are crucial to attracting investment in the utility business.³⁸

21. NextEra recognizes that its provisional GIAs contain the following generic notification of risk provision:

The Interconnection Customer assumes all risks and liabilities with respect to changes, which may impact the [GIA] including, but not limited to, change in output limits and responsibilities for future Network Upgrade cost responsibilities that have not yet been identified on the direct connect Transmission System as well as all affected Transmission, Distribution or Generation System(s), including non-Transmission Provider Systems.[³⁹]

³⁶ *Id.* at 22-23.

³⁷ *Id.* at 23-24.

³⁸ *Id.* at 24 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128, at P 26 (2006), *reh'g denied*, 119 FERC ¶ 61,097 (2007)). Those orders rejected MISO's proposed tariff revisions to Attachment FF to change the cost allocation of network upgrades in existing GIAs; the orders did not discuss temporary (i.e., provisional) GIAs.

³⁹ *Id.* at 25. This *pro forma* language is found in Appendix H of MISO's *pro forma* GIA that was conditionally accepted for filing in *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233, *order on reh'g*, 139 FERC ¶ 61,253 (2012), (*continued ...*)

22. NextEra contends that this text does not mean that all regulatory change will inevitably be thrust upon a provisional GIA without recourse to the Commission determining what is just and reasonable in the circumstances. Rather, NextEra urges, the Commission is obliged to guard against unjust and unreasonable regulatory changes that subject market participants to punitive consequences. NextEra continues that it is not just and reasonable to subject a small set of generators to retroactive policy changes that they could not guard against, but are due to the Transmission Provider's lengthy delays in performing its obligations. NextEra states that its projects have assumed the risk of output limits and lost energy production due to these limits, and also the risk of not getting reimbursement due to not securing qualifying power sales contracts. It is not just and reasonable, according to NextEra, to say this generic assumption of risk provision automatically encompass discriminatory, unexpected, and financially costly retroactive application of revised market rules.⁴⁰

23. As requested relief for holders of provisional GIAs, NextEra offers three alternatives. NextEra's preferred alternative is for the Commission to hold that provisional GIAs in effect before July 18, 2013 are subject to the ITCM Policy for network upgrades identified after July 18, 2013 if such network upgrades are required under the capacity contracted by the generator in the provisional GIA before July 18, 2013, including if the network upgrades are identified and the GIA is amended after July 18, 2013 because of delayed completion of interconnection studies. NextEra's second alternative, for provisional GIAs in effect before July 18, 2013, is reimbursement under the ITCM Policy for network upgrades that are identified in interconnection studies (and as amended in later studies) completed before July 18, 2013, even if MISO has not yet updated the GIAs to incorporate network upgrades. NextEra's last alternative is that the Commission provide for case-by-case review of provisional GIAs in effect before July 18, 2013 whose network upgrades have yet to be incorporated in their GIAs to give consideration to the situation giving rise to the need for network upgrades in each provisional GIA.⁴¹

III. Discussion

24. We deny NextEra's request for rehearing. We affirm the determination in the Clarification Order that upgrades identified in a provisional GIA that was executed or filed unexecuted with the Commission prior to July 18, 2013 will be governed by the

order on clarification, 150 FERC ¶ 61,035 (2015).

⁴⁰ *Id.* at 24-25 (citing *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d. 831 (D.C. Cir. 2006)).

⁴¹ *Id.* at 25-26.

ITCM Policy. We further affirm that any upgrades that are subsequently identified and incorporated into an amendment to such a provisional GIA, but which were not included in the provisional GIA that was executed or filed unexecuted with the Commission prior to July 18, 2013, will be governed by the MISO Policy in effect in the ITCM pricing zone after July 18, 2013.⁴² As noted in the Clarification Order, this determination is consistent with the Commission's policy that the appropriate reimbursement policy is the one in effect on the date a GIA is executed or is filed unexecuted with the Commission.⁴³

25. Furthermore, NextEra acknowledges that its provisional GIAs contain the following generic notification of risk provision:

The Interconnection Customer assumes all risks and liabilities with respect to changes, which may impact the [GIA] including, but not limited to, change in output limits and responsibilities for future Network Upgrade cost responsibilities that have not yet been identified on the direct connect Transmission System as well as all affected Transmission, Distribution or Generation System(s), including non-Transmission Provider Systems.^[44]

We find that the fact that the Commission may require MISO to revise its Tariff to change its interconnection customer network upgrade cost responsibility reimbursement policy during the time it takes MISO to complete a given interconnection study and to amend a provisional GIA to include network upgrades is a risk that NextEra assumed when it entered into the provisional GIAs for the NextEra Projects.

26. NextEra also argues that it is being punished because of MISO's failure to complete its interconnection studies in a timely manner, when other projects with provisional GIAs executed or filed unexecuted at later dates are eligible for reimbursement under the ITCM Policy. As NextEra acknowledges, MISO's queue procedures have been revised to follow a "first ready, first served" approach, but there is no guarantee that a particular interconnection request will be completed first simply because it proceeded to a provisional GIA before another request. However, MISO's

⁴² See Clarification Order, 146 FERC ¶ 61,113 at P 26.

⁴³ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 62 (2009); *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106, at P 70 (2006)). See also *West Deptford Energy, LLC v. FERC*, 766 F.3d. 10, 19-20 (D.C. Cir. 2014).

⁴⁴ Rehearing Request at 25.

queue procedures do not alter the Commission's clearly established policy that bases the applicable cost allocation method on when a GIA is executed or filed unexecuted with the Commission.

27. Last, in *Community Wind II*, the Commission made clear that merely having a provisional GIA does not grandfather any particular cost allocation methodology and that the tariff that should apply is the one that is effective and on file on the date that the interconnection agreement is executed or filed unexecuted, and that the rules in effect when the GIA is updated, not originally executed, should apply.⁴⁵ This precedent, specific to provisional GIAs, is consistent with the Commission's long-standing policy towards cost allocations in GIAs as being governed by the tariff in effect on the date of the particular GIA's execution or filing unexecuted with the Commission, as noted above.

The Commission orders:

NextEra's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁵ *Community Wind II*, 131 FERC ¶ 61,165 at P 32. *See supra* P 13.