

154 FERC ¶ 61,072
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc.

Docket Nos. ER14-1470-003
ER14-1470-004

ORDER ON REHEARING AND COMPLIANCE

(Issued February 2, 2016)

1. On August 21, 2015,¹ the Commission granted in part, and denied in part, a request for rehearing of the Commission's May 9, 2014 order,² which conditionally accepted an unexecuted Facilities Service Agreement (FSA) between Ameren Illinois Company (Ameren) and White Oak Energy LLC (White Oak). In the August 21 Order, the Commission also directed Ameren to remove from the FSA the requirement that White Oak post financial security for its payment obligations and to remove any associated references to security in the FSA. For the reasons discussed below, we deny Ameren's request for rehearing of the August 21 Order, grant its request for clarification and accept its compliance filing.

I. Background

2. On October 20, 2011, the Commission addressed a complaint in Docket No. EL11-30-000 by ordering the removal of Option 1³ from the cost recovery

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,145 (2015) (August 21 Order).

² *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,106 (2014) (May 9 Order).

³ 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

(continued ...)

mechanisms for interconnection-related network upgrades in the Midcontinent Independent Transmission System Operator, Inc.'s (MISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).⁴ 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 directing MISO to remove Option 1 from its Tariff will not apply to large generator interconnection agreements (LGIAs) effective prior to March 22, 2011, even if the right to select Option 1 was deferred at the time the underlying LGIA was executed.⁵

3. On August 28, 2007, Ameren and White Oak executed a large generator interconnection agreement (2007 LGIA) for White Oak's wind generation project, which was subsequently amended on March 19, 2009 and September 27, 2011 (together with the 2007 LGIA, White Oak LGIAs). The amended agreements did not change the original network upgrades identified in the 2007 LGIA.

4. On March 12, 2014, Ameren filed an unexecuted FSA between White Oak and Ameren implementing Option 1 pricing as the cost recovery mechanism for network upgrade costs identified in the White Oak LGIAs. The FSA was filed unexecuted because White Oak had objected to the Option 1-based network upgrade charge. White Oak's parent, NextEra Energy Resources, LLC (NextEra), also protested the rates, terms and conditions of the FSA, including the provision requiring White Oak to post financial security.⁶

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.

⁴ *E.ON Climate & Renewables North America, LLC v. Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,076 (2011), *order on reh'g*, 142 FERC ¶ 61,048 (2013) (*E.ON Rehearing Order*).

⁵ *E.ON Rehearing Order*, 142 FERC ¶ 61,048 at PP 14, 34.

⁶ NextEra filed pleadings in this proceeding on behalf of its subsidiary, White Oak.

A. The May 9 Order

5. In the May 9 Order, the Commission conditionally accepted the FSA and rejected NextEra's argument that Ameren's failure to memorialize its Option 1 election in the underlying White Oak LGIAs precluded its later election of Option 1 through the FSA. The Commission, among other things, also upheld Ameren's proposed security and default provisions in the FSA 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.⁷

B. The August 21 Order

6. In the August 21 Order, the Commission affirmed its determination to accept the FSA but granted NextEra's request for rehearing in part by finding that White Oak should not be required to post security under the FSA. Accordingly, the Commission directed Ameren to remove the FSA's security provision, along with all associated references in the FSA to security. On September 21, 2015, Ameren filed a request for rehearing and clarification of the August 21 Order. Also, on September 21, 2015, Ameren submitted a compliance filing in response to the directive in the August 21 Order.

II. Notice of Filing and Responsive Pleading

7. Notice of Ameren's September 21, 2015 compliance filing was published in the *Federal Register*, 80 Fed. Reg. 58,243 (2015) with interventions or protests due on or before October 13, 2015. On October 6, 2015, NextEra filed an answer to both Ameren's request for rehearing and clarification and Ameren's compliance filing (October 6 Answer).

III. Discussion

A. Procedural Matters

8. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2015), prohibits an answer to a request for rehearing. Therefore we reject the October 6 Answer to the extent that it is a prohibited answer to a request for rehearing but accept the portion of NextEra's October 6 Answer that responds to Ameren's compliance filing.

⁷ May 9 Order, 147 FERC ¶ 61,106 at PP 73-74.

B. Substantive Matters**1. Request for Rehearing and Clarification****a. Argument on Rehearing**

9. Ameren argues that the Commission erred in the August 21 Order by requiring the removal of the security provision from the FSA. According to Ameren, the Commission's reasoning that "[n]either the MISO Tariff nor the White Oak LGIA requires or even contemplates the posting of security under an FSA implementing Option 1 pricing" does not support the reversal of its prior determination in the May 9 Order that White Oak should be required to post security under the FSA.⁸ Ameren states that because there is no *pro forma* version of the FSA, none of the specific terms in the FSA are directly required by, or contemplated in, the MISO Tariff.⁹ Rather, Ameren argues that the FSA is a separate, standalone rate schedule that should be judged by its content, and not on whether the MISO Tariff requires or contemplates any particular aspect of it.

10. Ameren asserts that, while security is not expressly required by the MISO Tariff to be included in an FSA, the concept of financial security as a just and reasonable component of a tariff or rate schedule is in fact contemplated by the MISO Tariff. For example, Ameren notes that financial security is required for generator interconnections under the *pro forma* LGIA and is also required under section 7.14 of the MISO Tariff for transmission service when payments are missed. Ameren adds that the Commission has long recognized the importance of financial security in the transmission service and interconnection context as essential to protecting the transmission owner from risks associated with generating projects.¹⁰

11. According to Ameren, financial security under the FSA serves a different role than financial security under the *pro forma* LGIA. Ameren states that the security provision of the FSA is designed to secure the payment stream under the FSA after construction is complete – a function entirely separate from security required under the GIA, which

⁸ Ameren Rehearing Request at 4 (citing August 21 Order, 152 FERC ¶ 61,145 at P 39).

⁹ *Id.*

¹⁰ *Id.* at 5 (citing *Hydrogen Energy Cal. LLC*, 135 FERC ¶ 61,068, at P 31 (2011); *Ariz. Pub. Serv. Co.*, 143 FERC ¶ 61,280, at P 23 (2013); *Coso Energy Developers*, 134 FERC ¶ 61,088, at P 19 (2011); *Standardization of Generator Interconnection Agreements and Procedures*, 109 FERC ¶ 61,287, at P 95 (2004)).

provides security during construction, but not after construction is complete. Ameren continues that, because the *pro forma* LGIA requires interconnection customers to provide security during construction, it would be inconsistent to then not permit transmission owners to require security under the FSA to ensure payment for those same facilities, because to do so would fail to mitigate the risk of the interconnection customer deciding to stop paying for the facilities built to interconnect its project. Ameren adds that financial security allows Ameren and its transmission customers to avoid the risks of contract litigation against an entity that may not have funds to meet its payment obligations.

12. Ameren is also concerned that implementing the Commission's directive to remove the security provision and all associated references to financial security in the Default section of the FSA, which the Commission accepted in both the May 9 Order and the August 21 Order, would mean that the failure to make payments under the FSA is no longer an event of default, even though non-payment would still be a breach of contract.¹¹ Accordingly, Ameren requests clarification that the Commission did not intend to re-write the Default provision of the FSA, and that Ameren is permitted to modify the Default provision on compliance to preserve, even in the absence of financial security, the original intent of the Default provision.¹² If the Commission does not grant clarification on this point, Ameren seeks rehearing.

b. Commission Determination

13. We deny rehearing. While it is true that there is no *pro forma* version of the FSA, the FSA does not exist in a vacuum, since it sets forth the terms of recovering network upgrade costs identified in the underlying *pro forma* LGIA, as contemplated by the MISO Tariff. Specifically, under the MISO Tariff in effect at the time that Option 1 pricing was available, Attachment FF provided that a transmission owner could recover a fixed network upgrade charge based on a formula contained in Attachment GG of the MISO Tariff. This charge is reflected in the FSA. Permitting a transmission owner to require the posting of security affects rates by increasing costs to interconnection customers, and the requirement to post security, like the network upgrade charge, must therefore be referenced in the Tariff or other agreement even if no *pro forma* version of the FSA exists. As the Commission held in the August 21 Order, the MISO Tariff does not require or even contemplate the posting of security under an FSA implementing Option 1 pricing.

¹¹ *Id.* at 7.

¹² *Id.* at 8.

14. As to Ameren's argument that it is inconsistent to require security in an LGIA but not permit transmission owners to require security in an FSA, we disagree. The requirement to provide security during construction does not necessitate further security in an FSA. To the contrary, as the Commission held in the August 21 order, since White Oak already satisfied the security requirement that existed in MISO's then current Tariff, no further security is required. Security under the *pro forma* LGIA protects against nonpayment of the cost of capital during construction whereas security under the FSA would protect against nonpayment of the cost of capital as well as the non-capital and financing costs during the term of the FSA. Since the interconnection customer under the terms of a *pro forma* LGIA already satisfied the Tariff's requirement to post security on the cost of capital of the network upgrades, through completing all of its milestone payments to the transmission owner, it does not stand to reason that the interconnection customer should then be required to repost security on that same cost of capital at a later date, under an FSA. Furthermore, it is unreasonable to impute a security requirement in an FSA from the security requirement in a *pro forma* LGIA since the FSA security covers a different and longer time period than that contemplated in the LGIA.

15. We will, however, grant Ameren's request for clarification. The directive in the August 21 Order to "remove all references to security in the FSA" relates to the Default provision only insofar as that provision defined the failure to provide and maintain security as a triggering event of default. The Commission did not intend by that directive to materially modify the Default provision, which it accepted and upheld in the May 9 Order and August 21 Orders.

2. Compliance Filing

a. Ameren's Submittal

16. In response to the August 21 Order, Ameren submitted revisions to its FSA. First, Ameren revised the "Entire Agreement" section in the FSA as directed by paragraph 39 of August 21 Order. Second, Ameren removed the "Security" provision of the FSA but emphasized that it was not waiving its arguments on rehearing. With respect to the Commission's directive to remove "all associated references to security," Ameren revised the Default provision to eliminate as a triggering event of default the failure "to provide and maintain security." However, consistent with its request for clarification of the August 21 Order, Ameren includes language in the Default provision to specify that non-payment would constitute an event of default.

b. NextEra's Answer

17. NextEra states that it does not oppose Ameren's clarification request and Ameren's proposed revision to the Default provision in the FSA.¹³

c. Commission Determination

18. As discussed in our clarification above, we agree that the directive in the August 21 Order with respect to security was not intended to materially alter the Default provision of the FSA. Accordingly, we accept Ameren's language adding non-payment as a triggering event of default as consistent with the original intent of the Default provision as a conforming edit in its compliance filing. We also accept Ameren's revision to the "Entire Agreement" section of the FSA as consistent with the directive in the August 21 Order.

The Commission orders:

(A) Ameren's request for rehearing is denied and its request for clarification is granted, as discussed in the body of this order.

(B) Ameren's compliance filing is hereby accepted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹³ October 6 Answer at 6.