

155 FERC ¶ 61,040
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 No. ER16-974-000

ORDER ACCEPTING GENERATOR INTERCONNECTION AGREEMENT
SUBJECT TO CONDITION

(Issued April 19, 2016)

1. On February 19, 2016, Midcontinent Independent System Operator, Inc. (MISO) filed, pursuant to section 205 of the Federal Power Act (FPA)¹ and section 35.12 of the Commission's regulations,² an unexecuted, provisional Generator Interconnection Agreement (Provisional GIA) among MISO, Ford County Wind Farm, LLC as the interconnection customer (Ford County), and Ameren Services Company (Ameren Services) as agent for Ameren Illinois Company d/b/a Ameren Illinois (Ameren) as the transmission owner, regarding Project No. J375 in MISO's interconnection queue.³ The Commission accepts the Provisional GIA subject to condition, as discussed below.

I. Filing

2. MISO states that two issues led to the Provisional GIA being filed unexecuted.⁴ First, MISO states that Ford County did not consent to Ameren's election to provide the initial funding for the network upgrades associated with the Provisional GIA, and so that election is not provided for in the Provisional GIA. MISO notes that the requirement that the interconnection customer consent to the transmission owner's election to provide the

¹ 16 U.S.C. § 824d (2012).

² 18 C.F.R. § 35.12 (2015).

³ MISO Generator Interconnection Agreement Filing, Transmittal Letter at 1 (Filing).

⁴ *Id.* at 2.

initial funding for network upgrades was added to Article 11.3 of the *pro forma* GIA as a result of recent Commission orders in Docket No. EL15-68-000.⁵ MISO explains that, because the Initial Funding Rehearing Order is subject to judicial review, Ameren proposed the following language in section 10.2 (Transmission Owner Election to Fund the Capital for the Network Upgrades and Interconnection Customer Response) of Appendix A to the Provisional GIA:

This GIA may be subject to further administrative and/or judicial proceedings related to the FERC Order under FERC Docket No. EL15-68-000 and proceedings related to the Transmission Owners' election to provide initial funding for Network Upgrades. The Parties acknowledge that any subsequent Commission order or court order on judicial review may be applicable to, and require modification of, this GIA.

MISO states that Ford County protests the inclusion of this language.

Second, MISO states that Ford County wants to preserve its right to dispute the final allocation of network upgrade costs that will be assigned to Ford County, as MISO has not yet made a final determination regarding the network upgrades that will be required for MISO to provide interconnection service to Ford County's generating facility.⁶ The Provisional GIA provides for the construction of an estimated \$1,348,500 of transmission owner interconnection facilities and an estimated \$1,086,000 of transmission owner network upgrades.⁷ However, as the interconnection request has not yet been fully studied, Ford County requested MISO to offer a provisional GIA pursuant to MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff). The Provisional GIA initially provides for zero MW conditional energy resource interconnection service that will convert to 124 MW of energy resource interconnection service upon completion of all facilities to be identified in the interconnection studies.⁸

⁵ *Id.* (citing *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,220, at PP 47, 53; *order on reh'g*, 153 FERC ¶ 61,352 (2015) (Initial Funding Rehearing Order)).

⁶ *Id.*

⁷ *Id.*, Tab A (Provisional GIA), Appendix A, §§ 2-3.

⁸ *Id.* §§ 1 and 3; Transmittal Letter at 2. *See also* MISO FERC Electric Tariff, Attachment X, Generator Interconnection Procedures, § 11.5 (Special Considerations) (47.0.0) (addressing how MISO may provide a provisional GIA).

3. MISO states that the body of the Provisional GIA conforms to its *pro forma* GIA and contains pending language filed with the Commission in Docket No. ER16-696-000 on January 8, 2016, in compliance with the Commission's orders in Docket No. EL15-68, *et al.*⁹ Accordingly, MISO asks that the Commission accept the Provisional GIA subject to the outcome of Docket No. ER16-696, *et al.* MISO also asks the Commission to waive its 60-day notice requirement as required by section 35.3(a) of the Commission's regulations, 18 C.F.R. § 35.3(a) (2015), and make the Provisional GIA effective as of February 20, 2016.¹⁰ MISO asserts that the parties have indicated their intention for and support of this effective date, and notes that that the February 20, 2016 date will provide certainty to the parties as to the status of the agreement.

II. Notice and Responsive Pleadings

4. Notice of MISO's filing was published in the *Federal Register*, 81 Fed. Reg. 9847 (2016), with interventions and protests due on or before March 11, 2016.

5. Ameren Services filed a timely motion to intervene. Ford County filed a timely motion to intervene and protest. Ameren filed a timely motion to intervene, comments, and answer to Ford County's protest.¹¹ MISO filed an answer to Ford County's protest.

6. On April 1, 2016, Ford County submitted a motion to file a second protest out of time or, in the alternative, a complaint.

A. Protests and Answers

1. Section 10.2 of Appendix A

7. Ford County states that the language proposed by Ameren in section 10.2 of Appendix A to the Provisional GIA is unnecessary.¹² Ford County states that the Commission has determined that MISO transmission owners may only elect to provide the initial funding for network upgrades when that election is mutually agreed upon by the interconnection customer and transmission owner.¹³ Ford County states that, under

⁹ Filing, Transmittal Letter at 1.

¹⁰ *Id.* at 3.

¹¹ Ameren Services filed to intervene on behalf of Ameren, and Ameren filed a separate intervention along with the protest and answer.

¹² Ford County Protest at 5.

¹³ *Id.* at 6 (citing Initial Funding Rehearing Order, 153 FERC ¶ 61,352 at P 65).

section 313(c) of the FPA, 16 U.S.C. § 8251(c) (2012), neither the filing of an application for rehearing nor the commencement of judicial review operates as a stay of the challenged order, unless the Commission or the court specifically so orders. Ford County states that the Commission has not stayed the effectiveness of the revision to Article 11.3 of the *pro forma* GIA ordered in Docket No. EL16-58, *et al.*, nor has it authorized MISO to include disclaimer provisions stating that the language remains subject to further review.¹⁴ Thus, Ford County states that the Tariff language is in full force and effect, and that Ameren is attempting to undermine the effect of Commission-approved Tariff language by suggesting that such language may change upon further review and that such change may necessitate a change to the Provisional GIA.¹⁵ Ford County states that the Commission has the authority and obligation to comply with jurisdictional court orders on review, as well as with its own further orders, without the need to so state in the Provisional GIA.¹⁶ Ford County also notes that, under Article 30.11 of the Provisional GIA, in the event of a court or Commission order that the transmission owner believes should affect the Provisional GIA, the transmission owner has the right to request such modification in a filing with the Commission.¹⁷

8. Ford County further argues that Appendix A to the Provisional GIA is not the appropriate place for provisions regarding the reservation of legal rights or acknowledgments of legal consequences of judicial review; rather, Appendix A is meant to identify the equipment and facilities required for interconnection.¹⁸ Ford County states that the Commission has previously rejected an attempt by a transmission owner to deviate from the *pro forma* GIA by including non-conforming provisions in the attachments to the GIA.¹⁹ Ford County argues that, if Ameren were to include its proposed paragraph as a non-conforming provision to the body of the Provisional GIA, Ameren would have the high burden to show that this non-conforming language is a necessary change due to a specific reliability concern, novel legal issue, or other unique factor.²⁰ Moreover, Ford County argues that inclusion of Ameren's language is likely to

¹⁴ The parties have referred to "sections" of the GIA, but in fact the sections in the GIA are termed "Articles," which term will be used herein.

¹⁵ Ford County Protest at 6-7.

¹⁶ *Id.* at 9.

¹⁷ *Id.* n.20.

¹⁸ *Id.* at 7.

¹⁹ *Id.* (citing *S. California Edison Co.*, 141 FERC ¶ 61,100, at P 27 (2012)).

²⁰ *Id.* at 8.

confuse third parties, such as financial institutions, when they review the Provisional GIA as part of the interconnection customer's efforts to obtain financing for its energy project.

9. In its answer, Ameren states that the Provisional GIA is the first GIA it has entered into since the Commission found in Docket No. EL15-68, *et al.* that a MISO transmission owner must obtain the consent of the interconnection customer before it can elect to provide the initial funding for network upgrades.²¹ Ameren notes that it has requested rehearing of that order and that a petition for review has been filed in the United States Court of Appeals for the District of Columbia Circuit; thus, Ameren contends that its proposed language in section 10.2 of Appendix A to the Provisional GIA adds clarity by putting parties on notice that any subsequent grant of rehearing, or action by a reviewing court, may require modifications to the agreement.²² Ameren disputes Ford County's argument that the language is unnecessary, and argues that any confusion borne by potential financiers to Ford County's project is a result of the recent change in Commission precedent, including the fact that such change is subject to rehearing and judicial review.

10. Ameren disagrees with Ford County that Article 30.11 of the *pro forma* GIA is sufficient to preserve the rights of parties to unilaterally seek modification of the Provisional GIA.²³ According to Ameren, Article 30.11 allows parties to make prospective changes to the Provisional GIA, but does not address circumstances where the modifications to an interconnection agreement derive from administrative and judicial processes that began prior to the execution date of the agreement. Further, Ameren asserts that, if the contested language simply preserved the same rights as those found in Article 30.11, Ford County would lack a reasonable objection to it.

2. Network Upgrade Costs

11. Ford County notes that it is participating in the MISO Definitive Planning Process to determine the network upgrades required for MISO to provide interconnection service to its generating facility, and that this process is not yet complete.²⁴ Ford County states that it requested the Provisional GIA to allow for construction of the interconnection facilities in a timely manner. Ford County notes that, because a specific transmission line upgrade was not listed in the feasibility study and is affecting the costs and timelines for

²¹ Ameren Answer at 4.

²² *Id.* at 5.

²³ *Id.* at 6.

²⁴ Ford County Protest at 9.

its generating facility, Ford County reserves the right to challenge the allocation of network upgrades that will be assigned to it.²⁵

12. MISO states in its answer that its position is that, according to MISO's Tariff, Ford County will ultimately be responsible for upgrades that would not be needed but for its interconnection.²⁶ MISO explains that it has not yet run all needed studies to fully determine the scope of upgrades required for Ford County to interconnect. MISO states that Ford County had the option to wait for all studies to be complete, whereupon all upgrade risks relating to the Ford County interconnection would have been known, but that Ford County instead elected to proceed with a provisional GIA that allows customers to move forward in their interconnection process while bearing the risk of being ultimately responsible for as yet unknown network upgrades. MISO states that it has indicated to Ford County that, in the absence of any upgrades, there is no available capacity for the proposed point of interconnection, and therefore Ford County has been granted zero MW of conditional energy resource interconnection rights under the Provisional GIA. MISO states that after all studies are complete, and required upgrades are known, the parties will determine Ford County's ultimate responsibility for upgrades.

13. Ameren states that it takes no position on the substance of the network upgrade issue, but asks that the Commission dismiss it as premature.²⁷ Ameren states that Ford County is protesting the potential cost of network upgrades that are currently unknown and not included in the Provisional GIA.²⁸ Ameren argues that Ford County should wait until its network upgrade liability is determined by the system impact study and facilities study and incorporated in an amended agreement before it raises any issues regarding network upgrade cost assignment.

14. In its late-filed second protest, Ford County states that on March 28, 2016, MISO released a draft system impact study report concluding that Ford County will be responsible for approximately \$43.4 million in network upgrade costs and an additional \$6.883 million in network upgrades on the transmission system operated by PJM Interconnection, LLC.²⁹ Based on this new information, Ford County protests the requirement under Article 11.5 of the Provisional GIA for Ford County to make an

²⁵ *Id.* at 10-11.

²⁶ MISO Answer at 3.

²⁷ Ameren Answer at 6.

²⁸ *Id.* at 7.

²⁹ Ford County Second Protest at 2.

initial payment of 20 percent of the total costs of network upgrades within 30 days of a Commission order accepting the Provisional GIA (Initial Payment). Ford County disputes these network upgrade costs and argues that they are not caused solely by the interconnection of Ford County's project.³⁰ Accordingly, Ford County submits that it would be unjust and unreasonable for MISO to require Ford County to make its Initial Payment while the amount of network upgrades properly allocable to Ford County remains in dispute.³¹

15. Ford County submits that good cause exists to grant its motion to file a protest out of time because Ford County's concerns relating to the Initial Payment are directly related to the issues raised in its initial protest, but are based on information that only became available on March 28, 2016.³² Moreover, Ford County states that resolution of these issues in the same docket as the Commission's evaluation of the Provisional GIA will promote administrative efficiency and regulatory certainty with respect to implementation of the Provisional GIA. If, however, the Commission denies Ford County's motion to protest out-of-time, then pursuant to sections 206 and 306 of the FPA and Rule 206 of the Commission's Rules of Practice and Procedure, Ford County submits its protest of the Initial Payment requirements as a complaint. Ford County contends that, pursuant to sections 206 and 306 of the FPA, Article 11.5 of the Provisional GIA as applied in these circumstances is unjust and unreasonable because it would require Ford County to submit an Initial Payment before all network upgrade costs are established and in fact are in dispute.³³

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,³⁴ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

³⁰ *Id.* at 2-5.

³¹ *Id.* at 2-3.

³² *Id.* at 3.

³³ *Id.* at 3, 7-8.

³⁴ 18 C.F.R. § 385.214 (2015).

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept MISO's and Ameren's answers because they have provided information that assisted us in our decision-making process.

18. Although Ford County characterized its April 1 filing as a motion to file a protest out of time or, in the alternative, a complaint, we will not treat it as a complaint because the Commission discourages the combination of complaints with other types of filings, including protests.³⁵ The Commission has long held that a complaint should not be submitted as part of a motion to protest or intervene in an ongoing proceeding – such a filing does not allow interested parties sufficient notice of the complaint because it is not formally docketed and noticed.³⁶ Accordingly, we consider Ford County's motion to be a late-filed protest, and we accept it.

B. Substantive Matters

1. Section 10.2 of Appendix A

19. We accept the Provisional GIA, effective February 20, 2016, subject to condition, as discussed below.³⁷ Our acceptance is subject to MISO submitting a compliance filing within 30 days of the date of this order that removes Ameren's proposed contested language in section 10.2 of Appendix A, for the reasons discussed below.

We reject Ameren's proposed language in section 10.2 of Appendix A that attempts to preserve Ameren's rights to request modification of that appendix, should the Initial

³⁵ See *MidAmerican Energy Co. and Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,250, at P 71 (2011); *Entergy Servs., Inc.*, 104 FERC ¶ 61,084, at P 13 (2003).

³⁶ *Golden Spread Elec. Coop., Inc., et al. v. Southwestern Pub. Serv. Co.*, 115 FERC ¶ 61,136, at P 4 (2006) (citing *Louisiana Power & Light Co.*, 50 FERC ¶ 61,040, at 61,062-63 (1990) (stating that complaints must be titled as such and cannot be included as part of a protest or motion to intervene)); *Yankee Atomic Elec. Co.*, 60 FERC ¶ 61,316, at 62,096-97 n.19 (1992) (explaining the importance of filing a complaint separately from a motion for clarification); *Entergy Servs., Inc.*, 52 FERC ¶ 61,317, at 62,270 (1990) (stating that complaints must be filed separately from motions to intervene and protests).

³⁷ The Commission can revise a proposal filed under section 205 of the FPA as long as the filing utility accepts the change. See *City of Winnfield v. FERC*, 744 F.2d 871, 875-77 (D.C. Cir. 1984). The filing utility is free to indicate that it is unwilling to accede to the Commission's conditions by withdrawing its filing.

Funding Rehearing Order be modified as a result of the appeals process to give a transmission owner the right to initially fund network upgrades without the interconnection customer's consent.³⁸ The express purpose of Appendix A is to describe the facilities and upgrades that will be involved in connecting the generation project to MISO's system. What is contained in Appendix A with respect to facilities listed and cost responsibility for those facilities must reflect the state of the law as of the date the agreement becomes effective. It is not appropriate to insert into Appendix A language, such as that sought by Ameren, that functions as a reservation of rights to modify the Provisional GIA in the event that the Commission's determination in Docket No. EL15-68, *et al.* is overturned. We further find that the proposed contested language is unnecessary, as any amendments to Article 11.3 of the *pro forma* GIA will be determined, if necessary, on remand in Docket No. EL15-68, *et al.*³⁹ In addition, under Article 30.11 of the Provisional GIA, MISO has the right to make a unilateral filing to modify the Provisional GIA under section 205 of the FPA, while the transmission owner and the interconnection customer have the right to make a unilateral filing to modify the Provisional GIA pursuant to section 206 of the FPA. We find that Ameren has sufficient rights under Article 30.11 of the Provisional GIA to make its arguments for changes to Appendix A depending upon the result of the appeals process.⁴⁰

20. We also find Ameren's proposed contested language to be misleading, as it insinuates that the Commission's orders in Docket No. EL15-68, *et al.* are not final until

³⁸ We do not agree with Ford County's argument that Ameren's proposed language is a deviation from the *pro forma* GIA and that Ameren bears a high burden to explain that the change is a necessary change that is consistent with or superior to the *pro forma* agreement. Generally, changes to the appendices of a *pro forma* GIA are not considered non-conforming if they do not amend the terms and conditions of the *pro forma* GIA, but merely provide case-specific details regarding the interconnection. *See, e.g., Sw. Power Pool, Inc.*, 134 FERC ¶ 61,224, at P 9 (2011); *Sw. Power Pool, Inc.*, 132 FERC ¶ 61,062, at P 16 (2010); *Sw. Power Pool, Inc.*, 133 FERC ¶ 61,040, at P 14 (2010).

³⁹ *See Virginia Elec. and Power Co.*, 131 FERC ¶ 61,171, at P 18 (2010) (rejecting as unnecessary proposed tariff sheets reserving the utility's rights with respect to the allocation of facilities costs at issue in a separate complaint, finding that the effective date for a change in the allocation of costs, if required, would be determined in the separate proceeding).

⁴⁰ It is the Commission's responsibility to determine whether the proposed modifications are just and reasonable under Article 30.11. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,050, at P 51 n.57 (2013).

the administrative appeals of that order are exhausted. The Commission has already affirmed its determination on rehearing that MISO transmission owners may only elect to provide the initial funding for network upgrades when that election is mutually agreed upon by the interconnection customer.⁴¹ In addition, section 313(c) of the FPA⁴² expressly provides that the filing of a request for rehearing or a petition for judicial review does not operate as a stay of the order of which rehearing or judicial review is sought.

2. Network Upgrade Costs

21. With respect to Ford County's request to reserve its rights to challenge the future allocation of network upgrades that may be assigned to it after studies are completed, we find that such reservation is unnecessary. MISO, as the transmission provider, has not yet completed all needed studies to determine Ford County's final cost allocation for required network upgrades. In order to include those upgrades as part of Ford County's interconnection agreement, we assume that MISO will tender a revised or superseding interconnection agreement when the studies are complete. Ford County may challenge

the terms of that revised or superseding agreement when it is filed with the Commission.⁴³

22. We find no merit to the argument in Ford County's late-filed second protest that Article 11.5 of the Provisional GIA, which requires Ford County to submit an Initial Payment to MISO within 30 days of the Commission's acceptance of the Provisional GIA, is unjust and unreasonable. Ford County argues that Article 11.5 is unjust and unreasonable because the amount and allocation of the network upgrades remains in dispute. However, Ford County does not dispute the amount and allocation of the network upgrades that are memorialized in the Provisional GIA that is now before the Commission; instead, Ford County is disputing future potential network upgrade costs based on a draft system impact study report and a draft affected systems study not listed in the Provisional GIA. The Initial Payment clause in Article 11.5 of the Provisional GIA is concerned only with the network upgrades listed within the appendices to the

⁴¹ Initial Funding Rehearing Order, 153 FERC ¶ 61,352 at P 65.

⁴² 16 U.S.C. § 8251(c) (2012).

⁴³ A provisional GIA is designed to permit an interconnection customer to use available transmission capacity before the completion of all required network upgrades, and by making the business decision to enter into a provisional GIA, the interconnection customer takes on the risk of as yet unknown network upgrades that may be necessary after the studies are complete. See Appendix H of the Provisional GIA.

Provisional GIA. If MISO finds that network upgrades are warranted in the future, MISO will amend the Provisional GIA accordingly, and Ford County has the right to protest those amended network upgrade costs and any Initial Payment pertaining to those costs.

3. Other Matters

23. The Provisional GIA contains language that MISO proposed to add to Article 11.3 of its *pro forma* GIA, as filed in Docket No. ER16-696-000 in compliance with the Commission's orders in Docket No. EL15-68, *et al.*⁴⁴ As that language is pending Commission review, we accept the filing herein subject to the condition that, should the Commission in Docket No. ER16-696 require changes to MISO's proposed language, MISO must re-file the Provisional GIA to reflect such changes within 30 days of the Commission's order in that proceeding.

24. We grant MISO's request for waiver of the 60-day notice requirement to permit an effective date of February 20, 2016, as requested, for good cause shown.⁴⁵

The Commission orders:

(A) The Provisional GIA is hereby accepted, subject to condition and subject to the outcome of Docket No. ER16-696, to become effective February 20, 2016, as discussed in the body of this order.

(B) MISO is hereby directed to submit a compliance filing, 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.

⁴⁴ See Initial Funding Rehearing Order, 153 FERC ¶ 61,352 at P 65.

⁴⁵ *Central Hudson Gas & Elec. Corp., et al.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992), and *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993).