

155 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Otter Tail Power Company

Docket No. ER15-2671-001

Midcontinent Independent System Operator, Inc.
Otter Tail Power Company

Docket No. ER16-948-000

(Not Consolidated)

ORDER ON REHEARING AND COMPLIANCE

(Issued May 2, 2016)

1. By letter order issued November 17, 2015 in Docket No. ER15-2671-000,¹ the Commission accepted, subject to condition, an executed Facilities Service Agreement (Spiritwood FSA) between Otter Tail Power Company (Otter Tail) and Great River Energy (Great River), which Otter Tail filed on September 18, 2015. In the November 17 Order, the Commission directed Otter Tail, *inter alia*, to remove the Spiritwood FSA's security provision and to make corresponding revisions to the Spiritwood FSA's reimbursement and default provisions. On December 17, 2015, Otter Tail filed a request for rehearing of the November 17 Order and, on February 16, 2016, Midcontinent Independent System Operator, Inc. (MISO), on behalf of Otter Tail, submitted a revised version of the Spiritwood FSA, under protest, as part of a compliance filing in Docket No. ER16-948-000.² For the reasons discussed below, we deny Otter Tail's request for rehearing of the November 17 Order and accept the February 16, 2016 compliance filing.

¹ *Otter Tail Power Co.*, 153 FERC ¶ 61,173 (2015) (November 17 Order).

² As directed in the November 17 Order, the revised Spiritwood FSA was filed by MISO, on behalf of Otter Tail, under MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).

I. Background

2. In 2007, Great River submitted two requests to MISO for interconnection of its Spiritwood generation facility, located in Stutsman County, North Dakota, to Otter Tail's system. The first request, designated as MISO Queue No. G645 (G645 Project) was for 50 MW. The second request, designated as MISO Queue No. G788 (G788 Project), was to increase the net output of the Spiritwood generation facility by 49 MW for a total of 99 MW.

3. On June 4, 2008, MISO, Otter Tail, and Great River (collectively, the Parties) entered into a conforming Large Generator Interconnection Agreement (GIA) for the G645 Project, which was designated as Original Service Agreement No. 1972 and reported in MISO's electric quarterly report (Original GIA). The Parties explained in the Original GIA that MISO had not yet completed the necessary interconnection studies for the G788 Project, and that the generating facility was being restricted to 50 MW until the appropriate interconnection studies were completed for the entire 99 MW project. The Original GIA, therefore, addressed the construction of interconnection facilities associated with the G645 Project only.

4. The Original GIA required, among other things, Otter Tail to install network upgrades to its Spiritwood substation. Consistent with MISO's Tariff, Great River was directly assigned cost responsibility for the network upgrades. The cost of the network upgrades was approximately \$1,420,217, as reflected in the Original GIA. Great River provided the up-front funding for the network upgrades between 2008 and 2009, and Otter Tail completed the work on or about June 21, 2009. However, as a result of several delays, the Spiritwood generation facility did not enter into commercial operation until November 1, 2014.

5. Under the terms of the Original GIA, and the MISO Tariff, as in effect at that time, Great River was required to fund the costs of the network upgrades, and Otter Tail was required to reimburse Great River pursuant to one of several options. Otter Tail elected Option 1 under Attachment FF of the MISO Tariff, which allowed Otter Tail to reimburse Great River 100 percent of the funding for the network upgrades that Great River provided, and then recover that amount, subject to a 50 percent-50 percent sharing of those costs, through a monthly charge established in a service agreement to be filed with the Commission (i.e., the Spiritwood FSA). Further, Otter Tail's election of Option 1 under Attachment FF of the MISO Tariff applies only to the network upgrades associated with the G645 Project.

6. On September 18, 2015, Otter Tail filed in Docket No. ER15-2671-000 under Otter Tail Power's Control Area Services and Operations Tariff (Otter Tail Tariff) the executed Spiritwood FSA, between itself and Great River, establishing a monthly network upgrade charge based on Option 1 pricing under Attachment FF of the MISO Tariff. The Spiritwood FSA provides that Otter Tail will receive a total revenue

requirement of \$2,041,874 over the Spiritwood FSA's 15-year term, which amounts to a monthly revenue requirement for the network upgrade charge of \$11,344. Under the Spiritwood FSA, Otter Tail is required to reimburse Great River for the amounts Great River advanced for the network upgrades, plus interest, within 10 days of receiving security in a form acceptable to Otter Tail.³

7. In the November 17 Order, the Commission found that the Spiritwood FSA's security provision is inconsistent with the MISO Tariff and Commission precedent. Specifically, the Commission noted that, in a recent order,⁴ the Commission had granted in part the rehearing request of NextEra Energy Resources, LLC, which argued, *inter alia*, that the Commission erred in accepting a security provision in the White Oak Facilities Service Agreement (White Oak FSA) between Ameren Illinois Company (Ameren) and White Oak Energy LLC (White Oak), an affiliate of NextEra Energy Resources, LLC. In the White Oak Rehearing Order, the Commission explained that, "Neither the MISO Tariff nor the White Oak [GIA] requires or even contemplates the posting of security under an FSA implementing Option 1 pricing."⁵ The Commission reasoned that, under Option 1, the interconnection customer provides up-front funding of network upgrades, and that, upon completion of the network upgrades, assuming that White Oak had made all of the required milestone payments, the security requirement under Article 11.5 of the GIA is reduced to zero.⁶ Accordingly, the Commission found that the security clause in Article 11.5 of the White Oak GIA governing payments owed for Ameren's construction costs had been satisfied.⁷ The Commission explained that because White Oak satisfied all of its requirements to post security under MISO's then-current Tariff, White Oak should not be required to post new security under the White Oak FSA.⁸ Thus, the Commission required Ameren, on compliance, to remove the security provision, along with all associated references, from the White Oak FSA.

³ The Spiritwood FSA's security provision states that the irrevocable letter of credit is to be in the amount of \$2,041,874 from a bank of a credit rating of at least AA- and terms reasonably acceptable to Otter Tail.

⁴ November 17 Order, 153 FERC ¶ 61,173 at P 12 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,145, at P 31 (2015) (White Oak Rehearing Order)).

⁵ White Oak Rehearing Order, 152 FERC ¶ 61,145 at P 39.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

8. Applying this rationale to the instant proceeding, the Commission in the November 17 Order determined that Great River had satisfied the security requirement of the Original GIA and MISO's then-current Tariff by providing up-front funding to Otter Tail for the network upgrades, and thus Great River should not be obligated to post security again.⁹ Therefore, in the November 17 Order, the Commission accepted the Spiritwood FSA, subject to condition, and directed Otter Tail to remove the security provision of the Spiritwood FSA, along with all associated references, including those in the Spiritwood FSA's reimbursement and default provisions.¹⁰ In addition, as the removal of the security language from the Spiritwood FSA's reimbursement provision may affect the timing of when Great River will be reimbursed funds by Otter Tail,¹¹ the Commission further directed Otter Tail to include a reimbursement mechanism that is not triggered by the receipt of a letter of credit from Great River and is acceptable to Great River. As previously noted, the Commission also determined that the Spiritwood FSA should be filed under the MISO Tariff rather than under the Otter Tail Tariff.¹²

II. Notice of Filing and Responsive Pleading

9. Notice of the February 16, 2016 compliance filing in Docket No. ER16-948-000 was published in the *Federal Register*, 81 Fed. Reg. 8952 (2016), with interventions and protests due on or before March 8, 2016. On January 27, 2016, Great River filed in Docket Nos. ER15-2671-000 and ER15-2671-001 a motion to intervene out-of-time and an answer to Otter Tail's request for rehearing. On February 24, 2016, Great River filed a timely motion to intervene in Docket No. ER16-948-000.

⁹ November 17 Order, 153 FERC ¶ 61,173 at P 13.

¹⁰ *Id.*

¹¹ The Spiritwood FSA's reimbursement provision provides that, "Within ten (10) days of *receipt of the letter of credit further described in "Security" below*, [Otter Tail] shall reimburse, and [Great River] shall accept, funds in the amount of \$1,457,372, with such amount including all funds paid by [Great River] to [Otter Tail] for the Facilities and interest accumulated on that amount per the terms of the G645 GIA, as amended." Otter Tail Filing, Attachment A at 2 (emphasis added).

¹² November 17 Order, 153 FERC ¶ 61,173 at P 14 (citing *Union Elec. Co.*, 151 FERC ¶ 61,168, at P 9 (2015)). Otter Tail states that it does not seek rehearing on this issue. Otter Tail Rehearing Request at 4 n.13.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), Great River's timely, unopposed motion to intervene in ER16-948-000 serves to make it a party to that proceeding. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Great River has not met this higher burden of justifying its late intervention in ER15-2671-000 and ER15-2671-001.¹³

11. 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. Accordingly, we will reject Great River's answer as an impermissible answer to Otter Tail's request for rehearing.

B. Substantive Matters

1. Request for Rehearing

a. Argument on Rehearing

12. Otter Tail argues that the Commission erred by relying on the White Oak Rehearing Order and the MISO Tariff as a basis for ordering the removal of the security provision from the Spiritwood FSA. Otter Tail asserts that the Commission should grant rehearing and accept the Spiritwood FSA as filed on September 18, 2015, without modification.

13. Otter Tail advances several reasons why the Commission's reliance on the White Oak Rehearing Order was misplaced. First, Otter Tail argues that the facts and circumstances related to the White Oak proceeding differ in material ways from the instant proceeding.¹⁴ Otter Tail notes that the White Oak FSA was filed unexecuted and was protested by the interconnection customer because, among other things, the

¹³ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹⁴ Otter Tail Rehearing Request at 6.

interconnection customer objected to the White Oak FSA's security provision.¹⁵ Otter Tail explains that, in contrast, the Spiritwood FSA was executed, and Great River did not protest the filing of the Spiritwood FSA in the instant proceeding. Otter Tail argues that the Commission should not disturb the bargain struck in the executed Spiritwood FSA by ordering removal of its security provision.¹⁶

14. Second, Otter Tail argues that reliance on the White Oak Rehearing Order is misplaced because it is not a final order.¹⁷ Otter Tail notes that the parties to the White Oak FSA have sought rehearing of the White Oak Rehearing Order, and contends that the Commission could grant rehearing, returning to its initial correct view of the White Oak FSA's security provision. Otter Tail argues that the reasoning of the White Oak Rehearing Order was erroneous and that the Commission's application of this reasoning to the Spiritwood FSA is premature and flawed.¹⁸

15. Further, Otter Tail argues that the Commission erred when it found that the Spiritwood FSA's security provision is inconsistent with the MISO Tariff. Otter Tail claims that the security provisions in the Original GIA and the Spiritwood FSA do not serve the same purpose.¹⁹ Otter Tail argues that the provision in the Original GIA secures milestone payments during construction while the provision in the Spiritwood FSA secures payment obligations related to the monthly charge for the term of the Spiritwood FSA.²⁰ Otter Tail asserts that under both a GIA and an FSA, the transmission owner is at risk of not recovering the costs of the network upgrades: the transmission owner has either not collected payments for all the costs, in the case of the GIA, or has

¹⁵ *Id.* at 6 (citing White Oak Rehearing Order, 152 FERC ¶ 61,145 at P 16).

¹⁶ *Id.* at 6-7 (citing *Entergy Servs., Inc.*, Opinion No. 485, 116 FERC ¶ 61,296, at PP 53, 65 (2006) (affirming the presiding judge's decision not to disturb an agreement found to have been freely negotiated and entered into), *order on reh'g & clarification*, Opinion No. 485-A, 119 FERC ¶ 61,019 (2007); *N. Border Pipeline Co.*, 90 FERC ¶ 61,263, at 61,877 n.45 (2000); *Idaho Power Co.*, Opinion No. 601, 46 FPC 384 (1971)).

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 9.

returned all of the network upgrade up-front funds to the interconnection customer, in the case of the FSA.²¹

16. Otter Tail also asserts that the Commission did not provide a reasoned basis for reversing itself on the security provision in the White Oak Rehearing Order.²² Otter Tail argues that the Commission did not provide an explanation addressing the risk that the transmission owner faces of the interconnection customer failing to make payments under an FSA, nor did the Commission support its decision not to protect native load customers through the use of a security provision. Additionally, Otter Tail argues that the Commission appeared to suggest that protection for native load should be provided in a default provision, but failed to provide any analysis.²³

17. Otter Tail further claims that the Spiritwood FSA comports with the MISO Tariff in effect at the time the parties entered into the Original GIA.²⁴ Otter Tail avers that the Commission's reasoning in the White Oak Rehearing Order that neither the MISO Tariff nor the White Oak GIA requires or even contemplates the posting of security under an FSA implementing Option 1 pricing "overlooks what *is* required by the MISO Tariff and whether an FSA satisfies those requirements."²⁵ Otter Tail asserts that an FSA is not a *pro forma* agreement under the MISO Tariff and therefore does not have a prescribed form and terms, allowing the terms of an FSA to be altered, so long as they satisfy the Option 1 requirements.²⁶ Additionally, Otter Tail notes that the Commission has accepted FSAs that include additional commercial terms that are not specifically addressed by the Option 1 requirements of MISO's Tariff, including provisions governing effective date and term, default, assignment, and force majeure.²⁷

²¹ *Id.*

²² *Id.* (citation omitted).

²³ *Id.* at 10.

²⁴ *Id.* at 11.

²⁵ *Id.* (emphasis in original).

²⁶ *Id.* at 11-12.

²⁷ *Id.* at 12 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,023 (2015); *Midwest Indep. Transmission Sys. Operator, Inc.*, Letter Order, Docket No. ER13-506-000 (Jan. 30, 2013); *Otter Tail Power Co.*, Letter Order, Docket

b. Commission Determination

18. We deny rehearing. We disagree with Otter Tail's argument that the Commission erred in the November 17 Order in relying on the White Oak Rehearing Order as a basis for ordering removal of the Spiritwood FSA's security provision. We find irrelevant to our determination in this proceeding that, in contrast to the White Oak FSA, the Spiritwood FSA at issue in this proceeding was executed and unprotested. Notwithstanding the parties' agreement, the Commission has the statutory authority to reject rates of a service agreement that it determines to be unjust and unreasonable or unduly discriminatory.

19. We also disagree with Otter Tail's argument that, because the Spiritwood FSA is not a *pro forma* agreement under the MISO Tariff, and therefore does not have a prescribed form and terms, the security provision comports with the MISO Tariff. The Commission addressed a similar argument in its order on rehearing of the White Oak Rehearing Order, stating that:

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* [GIA], 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 [White Oak Rehearing Order], the MISO Tariff does not require or even contemplate the posting of security under an FSA implementing Option 1 pricing.²⁸

20. We also disagree with Otter Tail's argument that, because the security provision in the Spiritwood GIA does not serve the same purpose as the security provision in the

No. ER11-2821-000 (Mar. 31, 2011); *Ameren Servs. Co.*, Letter Order, Docket No. ER10-677-000 (Mar. 5, 2010)).

²⁸ *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,072, at P 13 (2016) (Second White Oak Rehearing Order).

Spiritwood FSA, the security provision is consistent with the MISO Tariff. As the Commission stated in the Second White Oak Rehearing Order:

Security under the *pro forma* [GIA] 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* [GIA] 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.²⁹

Further, as the Commission explained in the Second White Oak Rehearing Order, because the FSA security covers a different and longer time period than that contemplated in the *pro forma* GIA, it would be unreasonable to impute a security requirement in an FSA on the basis of the security requirement in the GIA.³⁰

21. Finally, we reject as moot Otter Tail's argument that the Commission erred in relying on the White Oak Rehearing Order since the parties to the White Oak FSA had sought rehearing of the White Oak Rehearing Order. After Otter Tail's rehearing request in the instant proceeding, the Commission issued the Second White Oak Rehearing Order.³¹ In the Second White Oak Rehearing Order the Commission denied Ameren's rehearing request challenging the Commission's directive in the White Oak Rehearing Order that Ameren remove the security provision, along with all associated references, from the White Oak FSA.³²

²⁹ *Id.* P 14.

³⁰ *Id.*

³¹ 154 FERC ¶ 61,072.

³² The Commission in the Second White Oak Rehearing Order did, however, grant Ameren's request for clarification, explaining that the Commission did not intend by that directive to materially modify the White Oak FSA's default provision, which the Commission had previously accepted and upheld. *Id.* P 15.

2. Compliance Filing

a. Otter Tail's Submittal

22. In response to the Commission's determination in the November 17 Order, MISO, on behalf of Otter Tail, submitted revisions to the Spiritwood FSA (Revised Spiritwood FSA).³³ Otter Tail explains that the Revised Spiritwood FSA removes the security provision and includes a reimbursement mechanism that is not triggered by receipt of a letter of credit from Great River. Otter Tail asserts that it is authorized to state that Great River finds the Revised Spiritwood FSA acceptable and has, therefore, executed it.³⁴ Otter Tail maintains that, as of September 15, 2015, Great River has been reimbursed the amounts provided under the GIA and, as of February 16, 2016, Otter Tail has initiated the release of Great River's letter of credit in connection with the Revised Spiritwood FSA.³⁵

b. Commission Determination

23. We accept Otter Tail's compliance filing. We find that Otter Tail has complied with the Commission's directives in the November 17 Order to remove the security provision of the Spiritwood FSA, along with all associated references, including those in the Spiritwood FSA's reimbursement and default provisions. We note, however, that although Otter Tail deleted the previous reimbursement mechanism that was triggered by the receipt of a letter of credit from Great River in compliance with the November 17 Order, Otter Tail did not propose a new reimbursement mechanism in the Revised Spiritwood FSA. Nevertheless, we find that Otter Tail's statement in its transmittal letter that it has already reimbursed Great River is sufficient to satisfy the Commission's concern that Great River would be properly reimbursed the amounts provided for under the GIA. Finally, we note that, as directed in the November 17 Order, Otter Tail has appropriately filed the Revised Spiritwood FSA under the MISO Tariff rather than under the Otter Tail Tariff.

³³ MISO states that as the administrator of the MISO Tariff, MISO joins in the compliance filing but takes no position on the substance of the filing. Compliance Filing at 1 n.2. Otter Tail states that it does not agree with the findings in the November 17 Order concerning the Spiritwood FSA and, therefore, has made the compliance filing under protest and subject to Otter Tail's request for rehearing of the November 17 Order. *Id.* at 2.

³⁴ *Id.*

³⁵ *Id.* at 3.

The Commission orders:

(A) Otter Tail's request for rehearing is denied, as discussed in the body of this order.

(B) Otter Tail'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.