

137 FERC ¶ 61,223
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Midwest Independent Transmission System
Operator, Inc.

ER12-101-000

ORDER CONDITIONALLY ACCEPTING FACILITIES
CONSTRUCTION AGREEMENT

(Issued December 16, 2011)

1. On October 17, 2011, as supplemented on October 20, 2011, Midwest Independent Transmission System Operator, Inc. (MISO) filed, pursuant to section 205 of the Federal Power Act (FPA),¹ an unexecuted nonconforming Facilities Construction Agreement (Agreement) among MISO, Bishop Hill Energy LLC (Bishop Hill), and Ameren Services Company (Ameren). The Commission conditionally accepts the proposed Agreement, subject to compliance filing, to become effective October 18, 2011, as requested.

I. Background

2. On July 7, 2011, Bishop Hill entered into a generator interconnection service agreement with PJM Interconnection, LLC (PJM) and Commonwealth Edison Company (ComEd).² The generator interconnection service agreement is intended to facilitate the interconnection of 200 MW of wind generation, owned by Bishop Hill, to the PJM transmission system.

3. PJM's study of Bishop Hill's interconnection request identified certain upgrades that might be required on the Ameren system within MISO. As a result, MISO directed Ameren to conduct a facilities study to determine the cost of network upgrades required on Ameren's system within MISO to accommodate Bishop Hill's interconnection request

¹ 16 U.S.C. § 824d (2006).

² See *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,084 (2011) (accepting the generator interconnection service agreement among Bishop Hill, PJM and ComEd).

in PJM. The study concluded that Ameren would need to replace a 138 kV circuit breaker, two disconnect switches, and a bus conductor at the East Kewanee Substation, with an estimated cost of \$582,900.

4. MISO prepared the Agreement in this proceeding, which is based on MISO's *pro forma* Facilities Construction Agreement but with certain deviations.³ Ameren objected to MISO's proposal to delete from the Agreement certain crediting provisions that are included in the *pro forma* Facilities Construction Agreement. Accordingly, Ameren requested that MISO file the Agreement with the Commission as unexecuted.

II. Unexecuted Facilities Construction Agreement

5. MISO filed the proposed Agreement on October 17, 2011 and supplemented its filing on October 20, 2011.⁴ MISO explains that the proposed Agreement includes several deviations from the *pro forma* Facilities Construction Agreement. MISO states that the Commission accepts nonconforming *pro forma* agreements if the requested deviations are necessary due to reliability concerns, novel legal issues, or other unique factors. MISO believes that Bishop Hill's location outside the MISO footprint presents unique legal and factual circumstances that justify the proposed deviations.⁵ MISO also contends that the proposed deviations are consistent with deviations in a similar nonconforming agreement that was previously accepted by the Commission.⁶ Under the Agreement, Bishop Hill must pay Ameren upfront for all costs (including taxes and financing costs) associated with seeking and obtaining all necessary approvals and of designing, engineering, constructing, and testing the Network Upgrades and System Protection Facilities that Ameren will construct to accommodate Bishop Hill's request for

³ The *pro forma* Facilities Construction Agreement is included in MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff). See MISO FERC Electric Tariff, Fifth Revised Volume No. 1, Attachment X at Appendix 8.

⁴ MISO's October 20, 2011 Filing included a public version of the Agreement and requested that the Commission mark the Agreement submitted in its October 17, 2011 Filing as non-public.

⁵ MISO has designated the Agreement as Original Service Agreement No. 2397 under its Tariff.

⁶ MISO October 17, 2011 Filing at 3, citing *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER10-1349-000 (Jul. 19, 2010) (delegated letter order).

interconnection to the PJM system.⁷ MISO requests that the Commission grant an October 18, 2011 effective date for the Agreement.

III. Notice of Filing and Responsive Pleadings

6. Notice of MISO's filing was published in the *Federal Register*, 76 Fed. Reg. 66,285 (2011), with interventions and protests due on or before November 7, 2011. The Illinois Commerce Commission filed a notice of intervention and Bishop Hill filed a timely motion to intervene. Ameren filed a timely motion to intervene and protest. On November 16, 2011, Bishop Hill filed an answer to Ameren's protest. On December 1, 2011, Ameren filed an answer to Bishop Hill's answer.

7. Ameren protests MISO's deletion from the Agreement of the reference to Attachment FF of the MISO Tariff, which relates to Interconnection Credits, and argues that MISO has not justified this deviation from the *pro forma* Facilities Construction Agreement. By deleting the references to Attachment FF, Ameren argues that it will be unable to elect a certain cost recovery mechanism, also known as Option 1.⁸ However, Ameren also acknowledges that the Commission recently found Option 1 to be unjust, unreasonable, and unduly discriminatory.⁹ Ameren asserts that it wants to preserve this option in the event that the Commission grants rehearing or the order is overturned on appeal. Ameren also notes that in *E.ON*, the Commission invited MISO to file a proposal under section 205 to address any concerns related to the elimination of Option 1 and, to the extent MISO makes such a proposal to make available other cost recovery options

⁷ Agreement at § 3.2.1.

⁸ Pursuant to Attachment FF of the MISO Tariff, the Interconnection Customer must pay upfront 100 percent of the costs of Network Upgrades required for its generator interconnection. A Transmission Owner electing Option 1 was entitled to refund to the Interconnection Customer the entire cost of the Network Upgrades and then charge the Interconnection Customer for the participant-funded portion of the costs through a monthly Network Upgrade Charge over time, based on the formula contained in Attachment GG of the Tariff. Under Option 2, the Transmission Owner does not refund any of the participant-funded portion of the costs and the Interconnection Customer is not responsible for any further payments.

⁹ See *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076 (2011) (*E.ON*) (requiring MISO to remove Option 1 from its Tariff, holding Option 1 is unjust, unreasonable, and unduly discriminatory). Ameren, among other parties, has requested rehearing in that proceeding.

under Attachment FF, Ameren wishes to reserve its right to elect such options under the Agreement.

8. In further support of its argument, Ameren notes that neither MISO's Tariff nor the Joint Operating Agreement between MISO and PJM support the premise that Ameren should be compensated differently based on the location of the interconnection customer. Ameren also contends that the similar nonconforming Facilities Construction Agreement that MISO cites to support its proposal is not determinative in the instant proceeding because the agreement MISO cites was fully executed, was uncontested, and was accepted in a delegated letter order.

9. In its answer, Bishop Hill agrees with MISO that the provisions governing Interconnection Credits should not be included in the proposed Agreement because Bishop Hill is seeking to interconnect outside the MISO footprint. Further, Bishop Hill argues that the Commission has already determined that Option 1 is unjust and unreasonable and as a result is no longer included in MISO's Tariff. Therefore, Bishop Hill believes that MISO's proposed modifications "do not deviate from the current requirements of the MISO tariff and related *pro forma* agreements"¹⁰ Bishop Hill also asserts that Ameren cannot stay the Commission's order in *E.ON*, and that Ameren's effort to preserve its right to elect a cost recovery mechanism that MISO may file in the future is entirely speculative at this point. In its answer, Ameren clarifies that it does not seek to challenge or stay implementation of the Commission's determination in *E.ON*. Further, Ameren reiterates its argument that neither MISO's Tariff nor the Joint Operating Agreement between MISO and PJM justify removal of the *pro forma* Interconnection Crediting provisions.

IV. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers submitted by Bishop Hill and Ameren because they have provided information that assisted us in our decision-making process.

¹⁰ Bishop Hill Answer at 3.

B. Substantive Matters

12. For the reasons set forth below, we conditionally accept the proposed Agreement, subject to compliance, effective October 18, 2011, as requested.

13. The Commission recognized in Order No. 2003 that standardized interconnection procedures and the corresponding *pro forma* agreements reduce opportunities for undue discrimination, expedite the development of new generation, promote system reliability, and ensure just and reasonable rates.¹¹ However, the Commission has also explained that “there would be a small number of extraordinary interconnections where reliability concerns, novel legal issues or other unique factors would call for the filing of a non-conforming agreement.”¹² Under such circumstances, the filing party must not only identify how those portions of the nonconforming agreement differ from the *pro forma* agreement, but it must also “explain why the unique circumstances of the interconnection require” a nonconforming agreement.¹³

14. We find that MISO has met its burden to demonstrate that most of the proposed deviations in the Agreement are necessary under the circumstances in this case. MISO explains that it must change the definitions of “Commercial Operation” and “Interconnection Agreement” in the Agreement to reference the “Interconnection Service Agreement” with PJM instead of a “Generator Interconnection Agreement” with MISO. MISO also explains that it must change the definition of “Network Upgrades” to state that the generating facility is on a transmission system outside the Midwest ISO footprint. Finally, MISO states that it must change section 15 and the signature blocks in the Agreement to show agreement-specific details of the parties, such as addresses for notice and DUNS number. Without these proposed modifications, the terms of the *pro forma* Facilities Construction Agreement would inaccurately describe the relationship between the various parties involved.

¹¹ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 11 (2003), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *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).

¹² *PJM Interconnection, LLC*, 111 FERC ¶ 61,163, at P 10 (2005) (citing Order No. 2003).

¹³ *Id.*

15. However, we find that MISO has not carried its burden to demonstrate that the deletion of the provisions governing Interconnection Credits are necessary due to reliability concerns, novel legal issues, or other unique factors. MISO merely states that the crediting language should be removed because the underlying interconnection occurs outside the MISO transmission system. However, MISO has not demonstrated how the location of the underlying interconnection requires a cost recovery mechanism other than that which is provided in the *pro forma* Facilities Construction Agreement.¹⁴ Therefore, we will conditionally accept the Agreement, subject to MISO filing a revised nonconforming Facilities Construction Agreement that retains the Interconnection Credit provisions contained in the *pro forma* Facilities Construction Agreement.¹⁵

The Commission orders:

(A) MISO's proposed Agreement is hereby conditionally accepted, as discussed in the body of this order, to become effective October 18, 2011, as requested.

(B) MISO is hereby directed to submit a compliance filing, as discussed above, within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁴ We also reject MISO's argument that we should accept the Agreement because it is similar to another nonconforming agreement that was accepted by delegated letter authority. Actions taken by the Commission staff by delegated authority do not constitute precedent binding the Commission in future cases. *See, e.g., PJM Interconnection, LLC*, 111 FERC ¶ 61,163 at P 12 (rejecting arguments that the Commission should accept a nonconforming agreement because it resembles another agreement that was accepted by delegated letter authority); *see also E.ON*, 137 FERC ¶ 61,076 at P 41 (citing *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

¹⁵ Specifically, MISO must restore sections 3.2.2.1 – 3.2.2.4, and associated language in section 3.3.1 of the Agreement. As discussed above, these provisions refer generally to Attachment FF and do not expressly reference Option 1 and Option 2. *See supra* P 7 & n.8. As a result, the effective provisions of Attachment FF, governing Interconnection Credits, will apply to the upgrades in question irrespective of whether the Commission grants or denies rehearing of its decision in *E.ON*.