

146 FERC ¶ 61,017
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Rail Splitter Wind Farm, LLC

Docket No. EL12-11-001

v.

Ameren Services Company
and
Midwest Independent Transmission
System Operator, Inc.

ORDER GRANTING CLARIFICATION AND DENYING REHEARING

(Issued January 16, 2014)

1. In a January 17, 2013 order,¹ the Commission denied the relief requested in Rail Splitter Wind Farm, LLC's (Rail Splitter) complaint against Ameren Services Company (Ameren) and Midwest Independent Transmission System Operator, Inc. (MISO)² regarding Ameren's assessment of a monthly carrying charge against Rail Splitter pursuant to a Facilities Service Agreement (FSA). As discussed below, we grant Ameren's request for clarification and deny Rail Splitter's requests for rehearing of the January 17 Order.

¹ *Rail Splitter Wind Farm, LLC v. Ameren Servs. Co.*, 142 FERC ¶ 61,047 (2013) (January 17 Order).

² Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

I. Background

A. Rail Splitter-Ameren Interconnection Agreement

2. In July 2009, Rail Splitter, Ameren, and MISO entered into an Amended and Restated Large Generator Interconnection Agreement (LGIA), pursuant to which Ameren would construct the network upgrades necessary to accommodate the interconnection of Rail Splitter's 101 MW wind-powered electric generation facility (Facility). Under section 11.4.1 of the LGIA, the costs of the network upgrades are to be allocated consistent with the terms of Attachment FF of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).

3. At the time the LGIA was executed, section III.A.d of Attachment FF of the Tariff provided the transmission owner with a choice between two options for recovering the costs of network upgrades subject to participant funding. Under Option 1, the transmission owner repaid 100 percent of such network upgrade costs to the interconnection customer and then required the interconnection customer to pay the transmission owner a monthly charge to recover the costs of the upgrades subject to participant funding over a negotiated period of time (Monthly Charge). The Monthly Charge included: (1) return on rate base, including general and common plant; (2) operations and maintenance expense; (3) depreciation expense; (4) taxes other than income taxes; and (5) income taxes calculated under Attachment GG of the Tariff. Charges collected under Attachment GG were subtracted from the transmission owner's revenue requirement under Attachment O of the Tariff. Under Option 2, the transmission owner retained the interconnection customer's initial payments for the cost of network upgrades subject to participant funding as a contribution in aid of construction and assessed no further charges to the interconnection customer.³ Section III.A.d required only that the transmission owner's election between Option 1 and Option 2 must be made on a non-discriminatory and consistent basis.

4. Ameren completed construction of the network upgrades necessary to facilitate the interconnection of the Facility in July 2009. At that time, Rail Splitter had paid virtually all of the requisite costs, the Facility itself was nearly complete, and Ameren informed Rail Splitter that it would elect Option 1 under Attachment FF of the Tariff. Although Rail Splitter informally raised concerns with Ameren's election of Option 1, it

³ An additional mechanism existed under Article 11.3 of MISO's *pro forma* interconnection agreement, wherein the transmission owner could elect to provide the up-front funding for the capital cost of the network upgrades.

nevertheless entered into the FSA, which was filed with the Commission in January 2010 and accepted in a delegated letter order.⁴

B. January 17 Order

5. In its complaint, Rail Splitter sought to apply the Commission's decision in *E.ON Climate & Renewables North America, LLC v. Midwest Independent Transmission System Operator, Inc.*⁵ to its FSA with Ameren, arguing that the Monthly Charge required by the FSA is unjust, unreasonable, and unduly discriminatory. In response, Ameren asserted that the *Mobile-Sierra*⁶ doctrine applies to the FSA and that Rail Splitter had not shown that modifying the FSA was justified under the public interest standard.⁷

6. In the January 17 Order, the Commission denied the relief requested by Rail Splitter. As an initial matter, the Commission stated that the *Mobile-Sierra* presumption, as defined by the Supreme Court, does not apply to the FSA.⁸ However, because Rail Splitter failed to justify modification of the FSA under the ordinary just and reasonable standard of review, the Commission did not elaborate any further on this issue.

7. Proceeding to the merits of Rail Splitter's complaint, the Commission emphasized the importance of stability and regulatory certainty.⁹ The Commission observed that at the time that Ameren informed Rail Splitter of its intent to elect Option 1, Attachment FF

⁴ *Ameren Servs. Co.*, Docket No. ER10-677-000 (Mar. 5, 2010) (delegated letter order). The FSA became effective January 1, 2010.

⁵ 137 FERC ¶ 61,076, at PP 36-43 (2011) (*E.ON*), *reh'g denied*, 142 FERC ¶ 61,048, at P 34 (2013) (*E.ON Rehearing Order*). In *E.ON*, the Commission agreed with the complainant that Option 1 was unjust and unreasonable and, therefore, directed MISO to remove Option 1 from the Tariff. *Id.* P 40.

⁶ *United Gas Pipeline v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

⁷ January 17 Order, 142 FERC ¶ 61,047 at P 19.

⁸ *Id.* (citing *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S.527, 546 (2008); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *see also MidAmerican Energy Co.*, 138 FERC ¶ 61,028 (2012)).

⁹ *Id.* P 31 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128, at P 26 (2006)).

of the Tariff required the parties to execute a service agreement to memorialize the election. Noting that the Tariff also authorized MISO to file such a service agreement with the Commission unexecuted, the Commission pointed out that Rail Splitter executed the FSA without challenging the election. The Commission reasoned that Rail Splitter's obligation to pay according to Option 1 did not dissuade Rail Splitter from executing the FSA without protest or objection, and was similarly insufficient to persuade the Commission to abrogate the FSA.¹⁰

II. Rehearing Requests

A. Ameren

8. Ameren does not challenge the Commission's finding in the January 17 Order that the FSA is just and reasonable. Rather, Ameren asks the Commission to clarify that the Commission did not intend to rule summarily on the application of the *Mobile-Sierra* doctrine to the FSA. It asks the Commission to clarify that the January 17 Order merely concluded that, because Rail Splitter failed to justify modification of the FSA under the ordinary just and reasonable standard of review, the Commission need not speak to the question of whether modification of the FSA would require Rail Splitter to satisfy the public interest standard.¹¹

9. In support of its request for clarification, Ameren suggests that the Commission's determination is ambiguous.¹² According to Ameren, on the one hand, the Commission simply declared that the *Mobile-Sierra* doctrine does not govern the FSA without any further explanation. On the other hand, however, Ameren suggests that the relevant legal finding in the January 17 Order appears to be reflected in the Commission's statement: "However, since Rail Splitter fails to justify modification of the FSA under the ordinary just and reasonable standard of review, we need not opine further on this issue."¹³

10. To the extent that the Commission denies Ameren's request for clarification, Ameren seeks rehearing of the Commission's finding that the public interest presumption review does not apply to the FSA.¹⁴ First, Ameren argues that the Commission's

¹⁰ *Id.* PP 32-33.

¹¹ Ameren Request for Clarification at 5.

¹² *Id.* at 5-6.

¹³ *Id.* at 6 (quoting January 17 Order, 142 FERC ¶ 61,047 at P 30).

¹⁴ *Id.* at 6-9.

one-sentence disposition of the issue fails the test of reasoned decision-making because the Commission did not explain its determination.¹⁵

11. Second, Ameren contends that the Commission reached the wrong conclusion with respect to whether the *Mobile-Sierra* doctrine applies in this case. Ameren states that the Commission has previously interpreted the Supreme Court's decision in *Morgan Stanley* as setting the public interest standard as the default standard of review absent contractual evidence that the parties intended to subject future modifications to the ordinary just and reasonable standard of review.¹⁶ Ameren further asserts that the FSA is "an arms-length contract that did not preserve a less stringent standard of review" and that "Rail Splitter freely executed the agreement and did not oppose Ameren's filing of the agreement with the Commission."¹⁷ Thus, Ameren concludes that in order to obtain the relief sought in Rail Splitter's complaint, Rail Splitter must demonstrate that the public interest requires such a modification. In this case, Ameren argues that neither Rail Splitter nor the Commission has provided a valid basis for concluding that the public interest standard of review does not apply to the FSA.¹⁸

B. Rail Splitter

12. Rail Splitter argues first that the Commission has abrogated Rail Splitter's statutory rights under section 206 of the Federal Power Act (FPA).¹⁹ Rail Splitter asserts that section 206 requires the Commission to modify jurisdictional contracts that it finds to be unjust, unreasonable, or unduly discriminatory. Rail Splitter adds that the Commission has already determined in *E.ON* that the contractual terms at issue in the FSA are not just and reasonable. Rail Splitter, therefore, reasons that the Commission's stated interest in stability and regulatory certainty cannot support its refusal to modify the FSA.

13. Second, Rail Splitter contends that the Commission's reliance on principles of contract and regulatory stability is inconsistent with the Commission's precedent, in

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 8 (citing *Standard of Review for Modifications to Jurisdictional Agreements*, 125 FERC ¶ 61,310, at P 4 (2008)).

¹⁷ *Id.*

¹⁸ *Id.* at 8-9.

¹⁹ Rail Splitter Request for Rehearing at 6-8 (citing 16 U.S.C. § 824e (2006)).

which interconnection customers have executed interconnection agreements and later successfully challenged provisions of those agreements.²⁰ For instance, Rail Splitter points out that in *Duke Hinds, LLC v. Entergy Services, Inc.*, the Commission ordered revisions to executed interconnection agreements and noted that an interconnection customer does not waive its right to later challenge the justness and reasonableness of an interconnection agreement merely because the customer did not challenge the provision at issue when the interconnection agreement was filed.²¹ Thus, Rail Splitter recalls the Commission's prior statement that a utility that has signed such a contract has no legitimate expectation that the contract will never be revised.²²

14. In further support of its assertion that the January 17 Order is at odds with Commission precedent, Rail Splitter argues that an interconnection customer's option to ask the transmission owner to file the interconnection agreement unexecuted was not intended to override customers' statutory rights to seek modification of an executed contract.²³ Rather, according to Rail Splitter, the Commission has previously rejected the proposition that an interconnection customer may not challenge an executed agreement, and explained that such a provision would negate the customer's statutory rights under section 206 of the FPA.²⁴

15. Lastly, Rail Splitter contends that its reliance on *E.ON* was sufficient to satisfy the just and reasonable standard and the Commission's conclusion to the contrary is

²⁰ *Id.* at 8-10.

²¹ *Id.* at 8-9 (citing 117 FERC ¶ 61,210 (2006) (*Duke Hinds*)).

²² *Id.* at 9 (quoting *Duke Hinds*, 117 FERC ¶ 61,210 at P 28). Rail Splitter contends that the Commission ruled similarly in *Ontelaunee Power Operating Company, LLC v. Metropolitan Edison Company*, 119 FERC ¶ 61,181, at P 12 (2007) (rejecting arguments that res judicata and collateral estoppel bar an interconnection customer from challenging an interconnection agreement that expressly permitted the customer to challenge the agreement pursuant to section 206 of the FPA).

²³ Rail Splitter Request for Rehearing at 9.

²⁴ *Id.* (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 328 (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)).

erroneous and at odds with Commission precedent.²⁵ Rail Splitter explains that the FSA implements Ameren's election of Option 1 pricing, which is not just and reasonable pursuant to the Commission's decision in *E.ON*. Moreover, Rail Splitter contends that its reliance on *E.ON* was sufficient to satisfy the statutory just and reasonable standard, as the Commission has often relied upon its prior findings in ruling that a contract provision is not just and reasonable.²⁶ Rail Splitter posits that the Commission's conclusion in the January 17 Order ignores Rail Splitter's reliance on *E.ON* and apparently finds that it was incumbent on Rail Splitter to develop additional arguments establishing why Option 1 is unjust and unreasonable.²⁷

III. Commission Determination

16. As discussed further below, we will grant Ameren's request for clarification and deny Rail Splitter's request for rehearing.

A. Ameren

17. We grant Ameren's request for clarification. As Ameren points out, the Commission's statement in the January 17 Order that the *Mobile-Sierra* presumption does not apply to the FSA was not necessary to the Commission's denial of the relief requested by Rail Splitter. The Commission denied the relief sought in Rail Splitter's complaint because Rail Splitter had failed to justify modification of the preexisting, executed FSA, even under the just and reasonable standard where no "public interest" presumption is applicable.²⁸ As a result, we agree with Ameren that the Commission did not need to address the issue of which standard of review governed Rail Splitter's proposed modification of the FSA.

B. Rail Splitter

18. We deny rehearing with respect to the January 17 Order's denial of the relief requested by Rail Splitter's complaint.

²⁵ *Id.* at 10-12.

²⁶ *Id.* at 11 (citing *Quachita Power, LLC v. Entergy Louisiana*, 118 FERC ¶ 61,155 (2007) (*Quachita Power*); *Tenaska Ala. II Partners, L.P. v. Ala. Power Co.*, 118 FERC ¶ 61,037, at P 27 (2007) (*Tenaska*)).

²⁷ *Id.* at 11-12.

²⁸ January 17 Order, 142 FERC ¶ 61,047 at PP 30-33.

19. Rail Splitter's claim that the January 17 Order abdicates the Commission's responsibilities under section 206 of the FPA critically fails to recognize the limited nature of the Commission's decision in *E.ON*. In *E.ON*, the Commission addressed a complaint alleging that provisions of Attachment FF were unjust, unreasonable, and unduly discriminatory and should be removed from the Tariff.²⁹ Notably, no previously executed agreement was at issue in that proceeding. On rehearing, the Commission explained as much, stating that *E.ON* "did not automatically modify any preexisting agreement" because that issue "was not before the Commission."³⁰ The Commission further clarified that *E.ON* does not apply to agreements executed prior to March 22, 2011—the date on which the complaint at issue was filed.³¹

20. The distinction between previously executed interconnection agreements, to which the parties have agreed to be bound, and interconnection agreements that may be entered in the future, to which parties have not yet bound themselves, lies at the heart of the Commission's decision to deny the relief requested by Rail Splitter in the January 17 Order. As the Commission explained, even agreements subject to the just and reasonable standard where no "public interest" presumption is applicable are not to be lightly revised because a degree of stability and predictability is crucial to businesses and markets and to attracting investment in the utility business.³² Thus, "*E.ON* does not warrant abrogation of the preexisting, executed FSA or compel . . . the relief requested by Rail Splitter."³³

21. We also note that the Commission's decision in the January 17 Order is consistent with recent precedent in which the Commission has declined to modify interconnection agreements that predate revisions to the relevant tariff provisions.³⁴ For example, in

²⁹ *E.ON*, 137 FERC ¶ 61,076 at P 1.

³⁰ *E.ON* Rehearing Order, 142 FERC ¶ 61,048 at P 34.

³¹ *Id.*

³² January 17 Order, 142 FERC ¶ 61,047 at P 31.

³³ *Id.* P 33.

³⁴ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,210 (2008) (*Prairie State*); *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 62 (2009) (finding that the tariff cost allocation that should apply with respect to interconnection agreements is the one that is effective and on file on the date that the agreement is executed or filed unexecuted); *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,277, at P 10 (2008) (finding that because two generator interconnection agreements had been executed after the effective date of newly revised

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Prairie State, the Commission addressed the effect of revisions to the *pro forma* interconnection agreement under the Tariff. In that case, the parties entered into an interconnection agreement that reflected the cost allocation provisions of the then-effective Tariff.³⁵ MISO subsequently revised the pertinent Tariff provisions.³⁶ The interconnection customer, in turn, submitted a request to increase the output of its facility.³⁷ The Commission ultimately concluded that the Tariff provisions in effect at the time that the parties entered the original interconnection agreement should apply to the initial interconnection request and the new provisions should only apply to the network upgrades necessary to accommodate the interconnection customer's request to increase the facility's output.³⁸

22. Rail Splitter mischaracterizes the Commission's decision in *Duke Hinds* as undermining the Commission's reliance on principles of regulatory certainty in the January 17 Order. In response to assertions that the Commission erroneously failed to apply the *Mobile-Sierra* presumption, the Commission explained that the interconnection agreements in question reserved to the parties the right to unilaterally seek modifications of the agreements pursuant to sections 205 and 206 of the FPA.³⁹ In that context, the Commission explained that "[a] utility that has signed such a contract has no legitimate expectation that the contract *will never* be revised. . . . The fact that Duke did not challenge . . . the original [agreements when they] were filed does not mean that it waived its right, specifically preserved in the [agreements], to challenge them later."⁴⁰ The Commission's determination in *Duke Hinds* is, therefore, that the ordinary just and reasonable standard does not preclude unilateral modification of an agreement. Contrary

interconnection queue rules, the interconnection agreements must be revised to conform with the new rules); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128 (2006), *order denying reh'g*, 119 FERC ¶ 61,087 (2007) (rejecting proposal to modify network upgrade cost allocation in existing interconnection agreements).

³⁵ *Prairie State*, 125 FERC ¶ 61,210 at P 2.

³⁶ *Id.* P 3.

³⁷ *Id.* P 4.

³⁸ *Id.* PP 17-19.

³⁹ *See Duke Hinds*, 117 FERC ¶ 61,210 at PP 27-28.

⁴⁰ *Id.* P 28 (emphasis added).

to Rail Splitter's suggestion, however, *Duke Hinds* does not preclude the Commission from considering principles of regulatory certainty in evaluating the justness and reasonableness of an agreement.

23. The longstanding Commission policy at the heart of the *Duke Hinds* proceedings further distinguishes it from the instant proceeding. In the *Duke Hinds* proceedings, interconnection customers challenged interconnection agreements that violated the Commission's well-established prohibition of "and" pricing, which prices transmission service to reflect a combination of the average and the incremental cost of the expansion.⁴¹ In comparison, at the time that the FSA was executed, no Commission policy prohibited Option 1 pricing.

24. Similarly, the Commission's decision in *Quachita Power*, in which an interconnection customer challenged its existing interconnection agreement with Entergy Services, Inc., does not call the January 17 Order into question.⁴² Because the complaint and interconnection agreement at issue in *Quachita Power* involved the same interconnection agreement provisions, and the complaint at issue raised the same substantive arguments, as the Commission had addressed when evaluating modifications to existing interconnection agreements (namely, the *Duke Hinds* proceeding), the Commission ruled summarily in accordance with those prior determinations.⁴³ However, the relationship between the LGIA and *E.ON* is distinguishable in that *E.ON* addresses MISO's *pro forma* Tariff provisions, which will serve as the basis for future interconnection agreements. By contrast, specific interconnection agreements were at issue in *Quachita Power*. Indeed, Rail Splitter offers no case in which the Commission has overturned preexisting interconnection agreements on the basis of revised tariff provisions.⁴⁴

⁴¹ See *Duke Energy Hinds, LLC v. Entergy Servs., Inc.*, 102 FERC ¶ 61,068, at P 22 (2003).

⁴² *Quachita Power*, 118 FERC ¶ 61,155 (2007).

⁴³ *Id.* PP 28-29 (citing *Duke Hinds*, 117 FERC ¶ 61,210; *Pac. Gas & Elec. Co.*, 117 FERC ¶ 61,294 (2006)).

⁴⁴ In further support of the proposition that the Commission has "often relied upon its prior findings in ruling that a contract provision is unjust and unreasonable," Rail Splitter cites *Tenaska*, 118 FERC ¶ 61,037, at P 27 (2007). See Rail Splitter Request for Rehearing at 11 & n.33. Rail Splitter's reliance on *Tenaska* suffers from the same flaw as its reliance on *Quachita Power*. The case on which the Commission relied in granting

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25. Additionally, Rail Splitter mischaracterizes the January 17 Order as finding that Rail Splitter's failure to challenge the FSA prior to execution bars Rail Splitter's complaint.⁴⁵ The Commission did not hold that Rail Splitter was prohibited from challenging the FSA. Rather, Rail Splitter's challenge did not succeed because its reliance on *E.ON* alone was insufficient to counter the considerations underlying the Commission's historical hesitation to abrogate interconnection agreements following revision of the applicable tariff.

The Commission orders:

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

(B) Rail Splitter's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

the relief requested in *Tenaska* addressed an interconnection agreement—not a *pro forma* tariff. See *Tenaska*, 118 FERC ¶ 61,037 at P 27 (citing *S. Co. Servs., Inc.*, 108 FERC ¶ 61,229, at P 1 (2004)).

⁴⁵ Rail Splitter Request for Rehearing at 8-9 (citing *Ontelaunee Power Operating Company, LLC v. Metropolitan Edison Co.*, 119 FERC ¶ 61,181; *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146).