

174 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Midcontinent Independent System Operator, Inc.

Docket No. ER21-722-000

ORDER ACCEPTING UNEXECUTED FACILITIES SERVICE AGREEMENT

(Issued February 18, 2021)

1. On December 23, 2020, Midcontinent Independent System Operator, Inc. (MISO) submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),¹ an unexecuted Facilities Service Agreement (FSA) among Emmons-Logan Wind, LLC (Emmons-Logan) as interconnection customer, ITC Midwest LLC (ITC Midwest) as transmission owner, and MISO (collectively, the Parties). MISO designated the FSA as Original Service Agreement No. 3597 under its service agreements tariff. In this order, we accept the FSA for filing, effective February 22, 2021, as requested.

I. Background

2. MISO's *pro forma* Generator Interconnection Agreement (GIA) in Attachment X of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) describes the schedule for construction, the details of design, and the payment options for any network upgrades constructed for the interconnection customer by the transmission owner with which it directly interconnects. In MISO, an interconnection customer is responsible for 100% of network upgrade costs, with a possible 10% reimbursement for network upgrades that are 345 kV and above. The Tariff provides two options for funding the costs of network upgrades for generator interconnections.² Under the first option, the interconnection customer provides up-front funding for network upgrades and

¹ 16 U.S.C. § 824d.

² See *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075, at P 2 (*Pro Forma FSA Order*), *order on reh'g*, 173 FERC ¶ 61,037, at P 5 (2020).

the transmission owner refunds the reimbursable portion³ of the payment, as applicable, to the interconnection customer in the form of a credit to reduce the transmission service charges incurred by the transmission customer with no further financial obligations on the interconnection customer for the cost of network upgrades (the “Generator Up-Front Funding” option).⁴ Under the second option contained in Article 11.3 of MISO’s *pro forma* GIA, the transmission owner can unilaterally elect to provide the up-front funding for the capital cost of the network upgrades and assign the non-reimbursable portion of the costs of the network upgrades directly to the interconnection customer through a network upgrade charge that recovers a return on and of the transmission owner’s cost of capital (the “Transmission Owner Initial Funding” option). The details for repayment of the cost of network upgrades through the network upgrade charge are memorialized in MISO’s *pro forma* FSA, which the Commission accepted on April 27, 2020.⁵

3. In addition to MISO’s *pro forma* GIA, the Commission has also accepted a *pro forma* Facilities Construction Agreement (FCA) and *pro forma* Multi-Party Facilities Construction Agreement (MPFCA) for use in the MISO region.⁶ The *pro forma* FCA is an agreement for network upgrades on affected systems, i.e., network upgrades constructed for an interconnection customer by a transmission owner other than the transmission owner with which the interconnection customer directly interconnects. The *pro forma* MPFCA is used when multiple interconnection requests cause the need for construction of common network upgrades (network upgrades that are constructed by a transmission owner for more than one interconnection customer) on a directly-connected transmission system or an affected system. Pursuant to a decision from the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit)⁷ and a series of related orders, the Transmission Owner Initial Funding option was extended to FCAs and MPFCAs.⁸

³ The reimbursable portion would be 10% of the cost of network upgrades 345 kV and above and zero percent of the cost of network upgrades less than 345 kV.

⁴ MISO Tariff, Attach. FF, § III.A.2.d.

⁵ *Pro Forma* FSA Order, 171 FERC ¶ 61,075.

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,301, at P 5 (2009).

⁷ *See Ameren Servs. Co. v. FERC*, 880 F.3d 571, 585 (D.C. Cir. 2018) (*Ameren*).

⁸ *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158, at PP 28-36 (2018) (order on remand addressing the *Ameren* decision, where the Commission reversed its prior determination in the vacated orders that removed the Transmission Owner Initial Funding option from the Tariff, providing for Transmission Owner Initial Funding for GIAs, as well as FCAs and MPFCAs, prospectively, and requesting briefing on the

Specifically, Article 3.2.1 of the *pro forma* FCA and MPFCA was updated to allow for transmission owners and affected system operators to elect the Transmission Owner Initial Funding option.⁹

II. Filing

4. MISO states that the proposed FSA conforms with the *pro forma* FSA.¹⁰ The FSA states that the Parties entered into an MPFCA for the purpose of facilitating the interconnection of Emmons-Logan's facilities through the construction of necessary network upgrades to ITC Midwest's transmission system. The network upgrades were identified as a result of Emmons-Logan's interconnection request for project numbers J302 and J503 in MISO's interconnection queue. ITC Midwest elected the Transmission Owner Initial Funding option for the network upgrades, pursuant to Article 3.2.1 of the MPFCA. The proposed FSA sets forth the terms and conditions by which ITC Midwest will provide initial funding to construct the network upgrades and then recover a return on and of its costs over the term of the agreement.¹¹

5. MISO states that Emmons-Logan declined to execute the FSA and requested that the FSA be submitted unexecuted because of "continued legal uncertainty regarding" the Transmission Owner Initial Funding option and because Emmons-Logan seeks to preserve its rights by requesting that the FSA be filed unexecuted.¹² MISO also states that ITC Midwest has executed the FSA and asserts that unilateral election of Transmission Owner Initial Funding is proper.¹³ MISO requests an effective date of February 22, 2021.

treatment of certain existing agreements), *order denying reh'g*, 169 FERC ¶ 61,233, at PP 1, 125, 136-41 (2019) (addressing, among other things, Transmission Owner Initial Funding for certain existing agreements), *order on reh'g and compliance*, 172 FERC ¶ 61,248, at P 3 (2020) (Compliance Order).

⁹ See Compliance Order, 172 FERC ¶ 61,248 at PP 6, 29-30.

¹⁰ Filing, Transmittal Letter at 1.

¹¹ *Id.*, Tab A, proposed FSA, preamble.

¹² *Id.*, Transmittal Letter at 1.

¹³ *Id.* at 1-2.

III. Notice and Responsive Pleadings

6. Notice of the Filing was published in the *Federal Register*, 85 Fed. Reg. 86,915 (Dec. 31, 2020), with interventions and protests due on or before January 13, 2021. Emmons-Logan filed a timely motion to intervene and protest. ITC Midwest filed a timely motion to intervene and comments. On January 26, 2021, MISO filed an answer to the protest.

A. Emmons-Logan Protest

7. Emmons-Logan states that it opposes the unilateral right of transmission owners to choose the Transmission Owner Initial Funding option, noting that litigation of this right is still ongoing due to the pending petitions for review filed with the D.C. Circuit.¹⁴ Emmons-Logan also objects to the FSA requirement that security¹⁵ remain in place during the term of the agreement, arguing that there is no basis for security after the transmission owner has been paid for its upgrade costs.¹⁶ For these reasons, Emmons-Logan states that it refused to execute the FSA and expressly reserves the right to file with the Commission to terminate the FSA if the Commission “reverts to its initial findings” regarding Transmission Owner Initial Funding so that Emmons-Logan can be made whole. Emmons-Logan further requests that the Commission reject the FSA and require the Parties to amend it to state that the changes will be undone if the legal premise for Transmission Owner Initial Funding is later eliminated. Emmons-Logan also requests, as an alternative, that the Commission state in its order that if future Commission decisions lead to removal of the Transmission Owner Initial Funding option, then interconnection customers should be able to retroactively annul and reverse Transmission Owner Initial Funding elections and terminate FSAs.

B. ITC Midwest Comment

8. ITC Midwest states that Emmons-Logan has not provided a basis for rejecting or conditioning the FSA.¹⁷ ITC Midwest argues that the protest constitutes a collateral

¹⁴ Emmons-Logan Protest at 2-3.

¹⁵ Under Article IV (Security) of MISO’s *pro forma* FSA, the interconnection customer is required to provide the transmission owner with security in an amount equal to the initial capital cost of the network upgrades, which remains with the transmission owner throughout the term of the FSA, though it may be reduced annually on a *pro rata* basis. MISO Tariff, Attach. X, app. 14, art. IV (Security) (34.0.0).

¹⁶ Emmons-Logan Protest at 3.

¹⁷ ITC Midwest Comments at 3-4.

attack on the Commission's prior orders accepting (1) the Transmission Owner Initial Funding option and (2) the *pro forma* FSA.¹⁸

C. MISO Answer

9. MISO argues that there is no legal basis to reject the proposed FSA because the agreement reflects the Commission's directives in the orders accepting the Transmission Owner Initial Funding option and in the *Pro Forma* FSA Order.¹⁹ MISO states that a pending petition for review with a circuit court of appeal does not stay or modify Commission orders.²⁰

10. MISO opposes Emmons-Logan's proposal to memorialize its reservation of rights in the FSA.²¹ MISO contends that such amendments would be premature because any reversal or modification on rehearing or appeal is speculative. Further, MISO argues, if there is a reversal or modification at some point in the future, it will be up to the Commission to fashion appropriate remedies.

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept MISO's answer because it has provided information that assisted us in our decision-making process.

¹⁸ *Id.* at 4.

¹⁹ MISO Answer at 2-3.

²⁰ *Id.* at 3-4.

²¹ *Id.* at 4.

B. Substantive Matters

13. We accept the FSA for filing, to be effective February 22, 2021, as requested.²² We disagree with Emmons-Logan's argument that the Commission should direct the Parties to amend the FSA to include language providing that Emmons-Logan may terminate the FSA if pending Commission or judicial decisions result in the elimination of the unilateral right of the transmission owner to elect the Transmission Owner Initial Funding option. We also disagree with Emmons-Logan's alternative request that we hold at this time that we will allow interconnection customers to retroactively annul and reverse Transmission Owner Initial Funding elections should future Commission decisions lead to reversal of such unilateral elections. The FSA, which conforms with MISO's *pro forma* FSA, appropriately reflects the state of the law as of the date the agreement becomes effective. Neither a request for rehearing nor a petition for review stays the effectiveness or enforceability of a Commission order.²³ In addition, Article X.f of the FSA provides that "[n]othing in this Service Agreement shall limit the rights of the Parties or of [the Commission] under Sections 205 and 206 of the [FPA] and [the Commission's] rules and regulations thereunder." The Commission will address any request to retroactively annul and reverse Transmission Owner Initial Funding elections if and when an FPA section 205 or 206 filing making such a request is submitted.

14. Additionally, regarding Emmons-Logan's objection to the FSA requirement that security remain in place during the term of the agreement, we note that this provision, Article IV.c, is unchanged from the *pro forma* FSA. In the *Pro Forma* FSA Order, the Commission accepted this provision as just and reasonable and found that "the posting of financial security is reasonable to protect the transmission owner and transmission service customers from the risk that an interconnection customer will stop making payments under an FSA and that the portion of the undepreciated costs would be borne

²² We note that ITC Midwest uses its 2018 Attachment O data to calculate the network upgrade charge in Exhibit I. We expect that ITC Midwest will update this information in accordance with FSA Article III.d: "Any adjustment to the inputs to Owner's Attachment O Formula Rate or successor rate under the Tariff used in the Formula shown in Exhibit I of this Service Agreement shall require a recalculation of the Formula set forth in Exhibit I for the period to which such adjustment applies and require revised Payment amounts and refunds or surcharges, as necessary."

²³ 16 U.S.C. § 8251(c); 18 C.F.R. § 385.713(e) (2020).

by either the transmission owner or transmission customers, or assigned to another interconnection customer.”²⁴

The Commission orders:

The FSA is hereby accepted, effective February 22, 2021, as requested, as discussed in the body of this order.

By the Commission. Chairman Glick is concurring with a separate statement attached. Commissioner Clements is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁴ *Pro Forma* FSA Order, 171 FERC ¶ 61,075 at P 32, *order on reh'g*, 173 FERC ¶ 61,037, at PP 20-23.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.

Docket Nos. ER21-720-000
ER21-721-000
ER21-722-000

(Issued February 18, 2021)

GLICK, Chairman, *concurring*:

1. I support today's orders accepting the unexecuted Facilities Service Agreements (FSA) in the instant dockets, because they conform with MISO's *pro forma* FSA and reflect the state of the law today. However, I write separately to reiterate my concern that giving transmission owners the discretion to unilaterally choose whether to self-fund network upgrades constructed on behalf of affiliated and non-affiliated interconnection customers may be unjust and unreasonable and unduly discriminatory or preferential.¹ The Commission failed to meaningfully wrestle with these concerns in its orders allowing transmission owners the unilateral right to choose up-front funding.²

For these reasons, I respectfully concur.

Richard Glick
Chairman

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233 (2019) (Glick, Comm'r, dissenting), *order on reh'g*, 172 FERC ¶ 61,248 (2020) (Glick, Comm'r, dissenting).

² *Id.*

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.

Docket No. ER21-722-000

(Issued February 18, 2021)

CLEMENTS, Commissioner, *concurring*:

1. I concur in today's order accepting the Facilities Service Agreement MISO filed in this proceeding because it conforms to the *pro forma* version of that agreement in MISO's tariff. However, I write separately to highlight my concern that MISO's underlying rules on network upgrade funding may not be just and reasonable and may be unduly discriminatory or preferential. The Commission's August 2018¹ and December 2019² orders adopting the current interconnection rules do not adequately address the justifiable concern that those rules create an opportunity for generation-owning transmission owners to unduly discriminate between assets in which they have an ownership interest and assets in which they do not have such an interest. Because I explained this concern more fully in my concurring statement in *Midcontinent Independent System Operator, Inc.*,³ I will not repeat that explanation here, but I continue to believe MISO's interconnection rules may well merit additional scrutiny in the near future.

For these reasons, I respectfully concur.

Allison Clements
Commissioner

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158 (2018).

² *Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233 (2019).

³ *Midcontinent Indep. Sys. Operator, Inc.*, 174 FERC ¶ 61,084 (2021) (Clements, Comm'r, concurring).