

February 9, 2010

VIA ELECTRONIC DELIVERY

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Tatanka Wind Power, LLC v. Montana-Dakota Utilities Company
Docket No. EL10-___-000

Dear Secretary Bose:

Pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ and Order Nos. 2003 and 2003-A,² Tatanka Wind Power, LLC (“Tatanka”) hereby submits the enclosed complaint against Montana-Dakota Utilities Company, a division of MDU Resources Group, Inc. (“MDU”). Tatanka files this complaint due to MDU’s refusal to repay Tatanka for 100% of its costs incurred for network upgrades and MDU’s denial that it has any repayment obligation. MDU’s refusal to make such a payment to Tatanka constitutes a breach of MDU’s obligations to do so under the currently effective Amended and Restated LGIA to which it is a party and a violation of the Commission’s policies regarding generation interconnection agreements and procedures contained in Order Nos. 2003 and 2003-A. MDU’s objections as to its repayment obligations are long-standing but have been heard and rejected by the Commission in previous proceedings.

Tatanka requests that the Commission act on this complaint in a timely manner to enforce MDU’s repayment obligations set forth in the Amended and Restated LGIA and allow Tatanka to rightfully recover its significant financial costs that have already been invested in such network upgrades.

1 **PU-10-52** Filed: 2/26/2010 Pages: 31
Complaint of Tatanka Wind Power v. MDU (FERC)

Public Service Commission

¹ 18 C.F.R. § 385.206 (2009).

² *Standardization of Generator Interconnection Agreements and Procedures*, 104 FERC ¶ 61,103 (2003) (“Order No. 2003”); *Standardization of Generator Interconnection Agreements and Procedures*, 106 FERC ¶ 61,220 (2004) (“Order No. 2003-A”).



FOLEY & LARDNER LLP

Kimberly D. Bose
February 9, 2010
Page 2

If you have any questions regarding this filing, please contact the undersigned.
Thank you for your consideration in this matter.

Very truly yours,

/s/ Thomas McCann Mullooly

Thomas McCann Mullooly

Encl.

TABLE OF CONTENTS

INTRODUCTION 1

I. COMMUNICATIONS 1

II. FACTUAL BACKGROUND 2

III. UNDER BINDING PRECEDENT, MDU MUST PAY 100% OF NETWORK UPGRADE COSTS; ITS COUNTERARGUMENTS ARE UNAVAILING 6

 A. All Applicable LGIA Provisions Mandate Repayment to Tatanka for 100% of its Network Upgrade Costs..... 7

 1. Midwest ISO Pro Forma LGIA 7

 2. Original Tatanka LGIA..... 8

 3. First Revised Tatanka LGIA..... 9

 4. Amended and Restated Tatanka LGIA..... 9

 B. The Commission Has Repeatedly Dismissed MDU’s Objections to Applicable LGIA Provisions Mandating Repayment to Tatanka of 100% of its Network Upgrade Costs 10

 1. The Commission Dismissed MDU’s Objections to the Original Tatanka LGIA..... 11

 2. The Commission Dismissed MDU’s Objections to the Amended and Restated Tatanka LGIA..... 12

 C. The Commission Denied Midwest ISO’s Attempt to Apply 50/50 Repayment Provisions to the First Revised Tatanka LGIA..... 13

 D. Evolution of Commission Policy on Network Upgrade Reimbursement Does Not Override the Explicit Terms of the Amended and Restated LGIA 15

IV. HARM CAUSED BY MDU AND REQUEST FOR RELIEF..... 18

V. DISPUTE RESOLUTION 19

VI. COMMISSION JURISDICTION TO RULE ON COMPLAINT 20

VII. REQUIREMENTS FOR COMPLAINTS UNDER RULE 206(b) 21

VIII. CONCLUSION..... 23

NOTICE OF COMPLAINT 24

CERTIFICATE OF SERVICE 26

INTRODUCTION

Pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ and Order Nos. 2003 and 2003-A,² Tatanka Wind Power, LLC (“Tatanka”) hereby submits this complaint against Montana-Dakota Utilities Company, a division of MDU Resources Group, Inc. (“MDU”). Tatanka files this complaint due to MDU’s refusal to repay Tatanka for 100% of its costs incurred for network upgrades and MDU’s denial that it has any repayment obligation. MDU’s refusal to make such a payment to Tatanka constitutes a breach of MDU’s obligations to do so under the currently effective Amended and Restated LGIA (defined below) to which it is a party and a violation of the Commission’s policies regarding generation interconnection agreements and procedures contained in Order Nos. 2003 and 2003-A. MDU’s objections as to its repayment obligations are long-standing but have been heard and rejected by the Commission in previous proceedings.

As discussed below, the Commission should act on this complaint in a timely manner to enforce MDU’s repayment obligations set forth in the Amended and Restated LGIA and allow Tatanka to rightfully recover its significant financial costs that have already been invested in such network upgrades. In support of this complaint, Tatanka states as follows:

I. COMMUNICATIONS

All correspondence and communications regarding this complaint should be addressed and directed to the persons listed below. Persons noted with an asterisk (*) are

¹ 18 C.F.R. § 385.206 (2009).

² *Standardization of Generator Interconnection Agreements and Procedures*, 104 FERC ¶ 61,103 (2003) (“Order No. 2003”); *Standardization of Generator Interconnection Agreements and Procedures*, 106 FERC ¶ 61,220 (2004) (“Order No. 2003-A”).

designated for service and should be included on the official service list in the proceeding.

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II. FACTUAL BACKGROUND

Tatanka is the owner and operator of a 180 megawatt (“MW”) wind generation facility located in Dickey and McIntosh Counties, North Dakota and McPherson County, South Dakota. The Tatanka facility interconnects with the transmission grid owned by MDU via a 230 kV single-circuit transmission line. The Tatanka facility is located within the Midwest Independent System Operator Corporation (“Midwest ISO”) geographic region.

In order to connect the Tatanka facility with the transmission system, Tatanka (through its predecessor), MDU and the Midwest ISO entered into a large generator interconnection agreement (“LGIA”) that was filed with the Commission on March 2, 2005 and was based on the Midwest ISO’s *pro forma* LGIA in effect at the time. As described in more detail in Section III.A below, although the original Tatanka LGIA was revised and subsequently amended and restated, Article 11.4.1 of each of these three

applicable LGIAs contain provisions requiring 100% repayment to Tatanka for its costs incurred for network upgrades.

Pursuant to Article 5.1.3 of the Amended and Restated Tatanka LGIA, Tatanka was provided with the option to build the Transmission Owner's Interconnection Facilities and Stand Alone Network Upgrades (as defined in the Amended and Restated Tatanka LGIA). The language in Article 5.1.3 sets forth five provisions related to Tatanka's "option to build," each of which has been satisfied in this case.³

First, if the In-Service Date (October 1, 2007), Initial Synchronization Date (October 15, 2007) and Commercial Operation Date (December 1, 2007) designated by Tatanka under Article 5.1.2 and as set forth in Section 2.A. of Appendix B of the Amended and Restated Tatanka LGIA were not acceptable to MDU, then the Midwest ISO was required to have notified Tatanka within thirty Calendar Days. Tatanka received no such notice from the Midwest ISO within the applicable time frame stating that these dates were not acceptable. Thus this provision does not undermine Tatanka's "option to build."

Second, the language in Article 5.1.3 that allows the Midwest ISO, MDU and Tatanka to "agree otherwise" as to Tatanka's election of the "option to build" is not applicable in this case because the Midwest ISO, MDU and Tatanka never agreed to any

³ Section 5.1.3 reads as follows: "**Option to Build.** If the dates designated by Interconnection Customer are not acceptable to Transmission Owner to complete the Transmission Owner's Interconnection Facilities or Stand Alone Network Upgrades, the Transmission Provider shall so notify the Interconnection Customer within thirty (30) Calendar Days, and unless the Parties agree otherwise, Interconnection Customer shall have the option to assume responsibility for the design, procurement and construction of Transmission Owner's Interconnection Facilities and Stand Alone Network Upgrades by the dates originally designated by the Interconnection Customer under Article 5.1.2. The Parties must agree as to what constitutes Stand Alone Network Upgrades and identify such Stand Alone Network Upgrades in Appendix A. Except for Stand Alone Network Upgrades, Interconnection Customer shall have no right to construct Network Upgrades under this option."

arrangements other than Tatanka's election of the "option of build" as reflected in the Amended and Restated Tatanka LGIA.

Third, Tatanka not only had the "option to build" but actually selected the "option to build" under the Amended and Restated Tatanka LGIA, as evidenced in two sections of the agreement: (i) Section 3(a) of Appendix A is titled "Transmission Owner Stand Alone Network Upgrades to Be Built By Interconnection Customer Under Article 5.1.3, Option to Build" and (ii) Section 1 of Appendix B states that "Interconnection Customer selects the Option to Build as described in Article 5.1.3. Articles 5.1.1, 5.1.2 and 5.1.4 shall not apply to this LGIA."

Fourth, as required under the second sentence in Article 5.1.3, the Midwest ISO, MDU and Tatanka agreed as to what constitutes Stand Alone Network Upgrades by identifying such Stand Alone Network Upgrades in Section 3(a) of Appendix A which reads as follows:

Transmission Owner Stand Alone Network Upgrades shall include a 230 kV three-circuit breaker ring bus switching substation to be located on Transmission Owner's Ellendale-Wishek 230 kV line. From a practical standpoint, this portion of the overall required facilities shall include the equipment and facilities from the attachment point to the 230 kV ring bus for switch 5183 then continuing around the 230 kV ring bus including 3-230 kV circuit breakers, 230 kV disconnect switches (but not switch 5183), 230 kV Ellendale and Wishek line attachment deadend structures, arresters, CCVTs, protective relaying, metering and communications equipment for the 230 kV Ellendale and 230 kV Wishek lines, substation fence, ground grid, conduit, control cable, station lighting, control house and associated equipment, RTU, station power voltage transformer, AC station power distribution, DC power distribution, station battery and charger, steel structures, foundations, bus work, substation site grading, crushed rock surfacing, approach road, and all other Transmission Owner facilities used in "common".

Fifth, the last sentence in Article 5.1.3, which states that Tatanka shall have no right to construct Network Upgrades other than Stand Alone Network Upgrades under this option, is not applicable in this case because Tatanka constructed only Stand Alone Network Upgrades under its election of the “option of build” in Article 5.1.3 of the Amended and Restated Tatanka LGIA.

Having selected the “option to build” and satisfied each of the provisions applicable to such option as discussed above, Tatanka built the Stand Alone Network Upgrades identified in Section 3(a) of Appendix A of the Amended and Restated Tatanka LGIA and initially paid for the costs of building such upgrades. In order to obtain repayment for such costs under Article 11.4.1 of the Amended and Restated Tatanka LGIA, Tatanka submitted an invoice to MDU on September 30, 2008 requesting repayment of the total amount that Tatanka had incurred in connection with the building of such upgrades. On February 5, 2009, Tatanka sent an updated invoice in the amount of \$4,036,892.67 for Network Upgrades, plus interest of \$239,895.00 calculated per FERC regulation and the LGIA, for a total of \$4,276,787.67.

MDU provided notice on October 22, 2008 to Tatanka and the Midwest ISO pursuant to Section 27.1 of the Amended and Restated Tatanka LGIA that it disputed this invoice. Notwithstanding Tatanka’s efforts to resolve such dispute with MDU as further described in Section IV of this complaint below, MDU has refused to provide repayment to Tatanka for the costs incurred in building the relevant facilities.

The factual background of the complaint is further described in the attached Affidavit of Iker Chocarro, Exhibit A, including a detailed discussion of the overall costs

incurred, the Network Upgrade portion of those costs for which Tatanka seeks reimbursement, and the construction process.

III. UNDER BINDING PRECEDENT, MDU MUST PAY 100% OF NETWORK UPGRADE COSTS; ITS COUNTERARGUMENTS ARE UNAVAILING

MDU has failed to repay Tatanka for 100% of its costs incurred for network upgrades. MDU's inaction in failing to make such repayment and its refusal to acknowledge its repayment obligation violates Article 11.4.1 of the Amended and Restated Tatanka LGIA and each of the predecessor LGIAs. The Commission has approved the LGIA for the Tatanka project on several occasions during which the arguments MDU has continued to raise in discussions with Tatanka have all been considered and rejected by the Commission. In these proceedings, the Commission issued binding precedent on this issue involving these parties and these facilities in which it denied attempts by MDU and the Midwest ISO to modify the 100% repayment provisions for network upgrade costs contained in the applicable Tatanka LGIAs. Tatanka has also complied with the procedures governing its "option to build" the network upgrades at issue in this proceeding and has acted in good faith in its negotiations with MDU to resolve these issues. Each of the counterarguments MDU has raised has been rejected by the Commission.

The refusal of MDU to repay Tatanka for its costs incurred for network upgrades is patently unjust and breaches its legal obligation to do so. As described in more detail in Section IV below, such refusal significantly harms Tatanka and is contrary to the public interest.

A. All Applicable LGIA Provisions Mandate Repayment to Tatanka for 100% of its Network Upgrade Costs

The LGIA for the Tatanka facility has been amended and submitted to the Commission several times. The Amended and Restated Tatanka LGIA (and each of its predecessor LGIAs) mandates repayment to Tatanka of its costs incurred for network upgrades. On each occasion, and indeed in the Midwest ISO *pro forma* LGIA from the relevant time period, the repayment obligations as to network upgrades are clear and unambiguous. A brief overview of each of the following four LGIAs is provided here: (i) the Midwest ISO *pro forma* LGIA, (ii) the Original Tatanka LGIA, (iii) the First Revised Tatanka LGIA, and (iv) the Amended and Restated Tatanka LGIA which is currently in effect.

1. Midwest ISO Pro Forma LGIA

Under Order Nos. 2003 and 2003-A, an interconnection customer that initially funds the cost of required network upgrades is entitled to reimbursement for all its costs in doing so.⁴ In compliance with the requirements set forth in Order 2003-A,⁵ the Midwest ISO filed a revised *pro forma* LGIA with the Commission on April 26, 2004.⁶ Article 11.4.1 of the *pro forma* LGIA provides for repayment to an interconnection customer for 100% of its costs incurred for network upgrades:

“Interconnection Customer shall be entitled to a cash repayment by the Transmission Owner and the Affected System Owner that owns the Network Upgrade, equal to the total amount paid respectively to Transmission Owner and Affected System Operator, if any, for the Network Upgrades, including any tax gross-up or other tax-related payments associated with Network Upgrades, and not repaid to Interconnection Customer pursuant to Article

⁴ See Order No. 2003 at PP 694, 696; Order No. 2003-A at P 9.

⁵ Order No. 2003-A at P 43.

⁶ *Compliance Filing of Midwest ISO*, Docket No. ER04-458-001 (filed April 26, 2004).

5.17.8 or otherwise, to be paid to Interconnection Customer on a dollar-for-dollar basis for the non-usage sensitive portion of transmission charges. ... Any repayment shall include interest calculated in accordance with the methodology set forth in FERC's regulations ... from the date of any payment for Network Upgrades through the date on which the Interconnection Customer receives a repayment of such payment”⁷

The Commission approved this language in Article 11.4.1 of the Midwest ISO's *pro forma* LGIA, effective as of July 8, 2004.⁸

2. Original Tatanka LGIA

The Midwest ISO filed the original, unexecuted LGIA applicable to the Tatanka facility that was entered into among Dakota Wind Harvest, LLC (as predecessor in interest to Tatanka) as the interconnection customer, MDU as the transmission owner and the Midwest ISO as the transmission provider with the Commission on March 2, 2005 (the “Original Tatanka LGIA”).⁹ Article 11.4.1 of the Original Tatanka LGIA contained the exact same language in Article 11.4.1 as was previously included in the Midwest ISO's *pro forma* LGIA in effect at the time which provided for the repayment to Tatanka of 100% of its costs incurred for network upgrades.¹⁰ Just as it had approved this same language in Article 11.4.1 of the Midwest ISO's *pro forma* LGIA, the Commission approved this language in Article 11.4.1 of the Original Tatanka LGIA, effective as of February 28, 2005.¹¹

⁷ *Id.* (emphasis added).

⁸ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,027 at PP 48-50 (2004), *order on reh'g*, 109 FERC ¶ 61,085 at PP 55-58 (2004).

⁹ *Midwest Independent Transmission System Operator, Inc., Submission of Unexecuted Large Generator Interconnection Agreement*, Docket No. ER05-667-000 (filed March 2, 2005).

¹⁰ Article 11.4.1 of Original Tatanka LGIA.

¹¹ *Midwest Independent Transmission System Operator, Inc.*, 113 FERC ¶ 61,082 at P 27 (2005) (“FERC Order on Original Tatanka LGIA”).

3. First Revised Tatanka LGIA

To comply with certain modifications required by the Commission,¹² the Midwest ISO filed with the Commission an unexecuted copy of a revised LGIA among these same parties on November 23, 2005 (the “First Revised Tatanka LGIA”).¹³ The First Revised Tatanka LGIA retained the same language in Article 11.4.1 as was previously included in the Original Tatanka LGIA which provided for the repayment to Tatanka of 100% of its costs incurred for network upgrades.¹⁴ The Commission accepted for filing the First Revised LGIA on April 21, 2006 and deemed it effective as of February 28, 2005.¹⁵

4. Amended and Restated Tatanka LGIA

The Midwest ISO filed an amended and restated LGIA on December 21, 2007, among these same parties (the “Amended and Restated Tatanka LGIA”), Exhibit B, that contained revised appendices to reflect Tatanka’s acquisition of new wind turbines, updates to certain engineering diagrams and new language relating to the System Protection Scheme.¹⁶ The Amended and Restated Tatanka LGIA retained the same language in Article 11.4.1 as was previously included in the First Revised Tatanka LGIA which provided for the repayment to Tatanka of 100% of its costs incurred for network upgrades.¹⁷ The Commission accepted the Amended and Restated Tatanka LGIA for

¹² See FERC Order on Original Tatanka LGIA. The required revisions in the First Revised Tatanka LGIA did not relate to the repayment to an Interconnection Customer of its costs incurred for Network Upgrades, but rather pertained to metering issues which were included in revised Articles 7.1 and 7.4 of the First Revised Tatanka LGIA.

¹³ *Midwest Independent Transmission System Operator, Inc., Submission of Unexecuted Large Generator Interconnection Agreement*, Docket No. ER05-667-004 (filed November 23, 2005).

¹⁴ Article 11.4.1 of First Revised LGIA.

¹⁵ *Letter Order*, Docket No. ER05-667-004 (issued April 21, 2006).

¹⁶ *Midwest Independent Transmission System Operator, Inc., Submission of Unexecuted Amended and Restated Large Generator Interconnection Agreement*, Docket No. ER08-352-000 (filed December 21, 2007).

¹⁷ Article 11.4.1 of the Amended and Restated Tatanka LGIA.

filing on February 7, 2008 and the Amended and Restated Tatanka LGIA was deemed effective as of December 22, 2007.¹⁸ The Amended and Restated Tatanka LGIA is currently in effect as of the date of the filing of this complaint.

Through the proceedings discussed above, the Commission has issued binding precedent on the issue of reimbursement for Network Upgrades involving these parties and these facilities. In such precedents, the Commission denied attempts by MDU and the Midwest ISO to modify the 100% repayment provisions for Network Upgrade costs contained in the applicable Tatanka LGIAs. As discussed below, MDU utilized its opportunity to object to these proceedings but its objections were rejected by the Commission.

B. The Commission Has Repeatedly Dismissed MDU's Objections to Applicable LGIA Provisions Mandating Repayment to Tatanka of 100% of its Network Upgrade Costs

The Commission twice rejected MDU's objections to the 100% repayment provisions applicable to Tatanka for its network upgrade costs. MDU's objections were rejected in both the Original Tatanka LGIA proceeding and the Amended and Restated Tatanka LGIA proceeding. The Commission may not entertain any further objections by MDU to such repayment provisions because any such objections would constitute collateral attacks on the Commission's settled decisions.¹⁹

¹⁸ *Letter Order*, Docket No. ER08-352-000 (issued February 7, 2008) ("FERC Order Accepting Amended and Restated Tatanka LGIA").

¹⁹ *See, e.g., Utilicorp United Inc.*, 93 FERC ¶ 61,303, 62,046 (2000) (failure of a party to seek rehearing of a determination made by the Commission in a prior order bars that party from challenging the Commission's determination); *California Independent System Operator Corp.*, 104 FERC ¶ 61,128 at P 13 (2003) (rejecting arguments that could have been made on rehearing, but were not, as an impermissible collateral attack); *Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 834 (D.C. Cir. 2005) (cited in *AEP*, 122 FERC ¶ 61,083 at P 68 n.68 (2008) ("doctrine of res judicata precludes the relitigation of a claim or issue that was the subject of a prior cause of action between the parties").

1. The Commission Dismissed MDU's Objections to the Original Tatanka LGIA

The Commission considered and rejected MDU's objections to the 100% repayment provisions contained Article 11.4.1 of the Original Tatanka LGIA.²⁰ In its protest filed with the Commission, MDU argued that these provisions would force MDU to reimburse Tatanka for Network Upgrade costs even though MDU did not have sufficient transmission revenues from which to pay for the required reimbursement.²¹ MDU argued that as a result of this situation it would be required to recover the required reimbursement amounts from its native load customers who would receive no benefits from the interconnection of the Tatanka generation facility with MDU's transmission facilities because the power generated from the facility was being delivered outside the MDU pricing zone.²² MDU contended that it should thus not be required to provide reimbursement to Tatanka for the network upgrades.

The Commission dismissed MDU's arguments on two grounds.²³ First, the Commission ruled that the non-conforming change to the repayment provisions which were currently effective in the Original Tatanka LGIA would only be permitted in unique circumstances or for operational reasons, neither of which was present in this case.²⁴ Second, the Commission reiterated that Order No. 2003-B²⁵ required the transmission

²⁰ *Montana-Dakota Utilities, Inc., Motion to Intervene Out-of-Time, Comments and Protest*, Docket No. ER05-667-000 at Section III.B. (filed April 12, 2005).

²¹ *Id.*

²² *Id.*

²³ FERC Order on Original Tatanka LGIA at PP 27-28 (October 24, 2005).

²⁴ *Id.* at P 27.

²⁵ *Standardization of Generator Interconnection Agreements and Procedures*, 109 FERC ¶ 61,287 at P 56 (2004) ("Order 2003-B") (holding that "[i]f a Transmission Provider (or an existing Transmission Customer) believes that, for an actual interconnection, it faces circumstances where native load and other customers are not held harmless, it should make that demonstration in an actual transmission rate filing. The Transmission Provider must explain the facts of the case and the assumptions on which its calculation is based and provide evidentiary support. . . . We emphasize that the Transmission Provider bears the full

owner to prove that its native load customers would be harmed by these provisions and ruled that MDU had not “provided sufficient support for its claims that it and its native load customers are harmed by the transmission crediting provisions under the current *pro forma* interconnection agreement.”²⁶

No requests for rehearing of the Commission’s order were filed in the proceeding and the Commission’s order constituted final agency action regarding the repayment provisions in the Original Tatanka LGIA.²⁷

2. The Commission Dismissed MDU’s Objections to the Amended and Restated Tatanka LGIA

The Commission also considered and rejected MDU’s objections to the 100% repayment provisions contained Article 11.4.1 of the Amended and Restated Tatanka LGIA. After the Amended and Restated Tatanka LGIA was filed with the Commission, MDU filed a motion to intervene in which it restated its arguments in opposition to the repayment provisions for network upgrades that were contained in Article 11.4 of the Amended and Restated LGIA.²⁸ On December 21, 2007, the Commission issued an order granting MDU’s request to intervene in the proceeding but accepted the Amended and Restated LGIA for filing effective as of December 22, 2007 notwithstanding MDU’s opposition to the repayment provisions.²⁹

burden of showing that any such proposal is just and reasonable and not unduly discriminatory or preferential, and is appropriate under the circumstances”).

²⁶ FERC Order on Original Tatanka LGIA at P 28.

²⁷ *Id.*

²⁸ *Montana-Dakota Utilities Co., Motion to Intervene*, Docket No. ER08-352-000 (filed January 10, 2008).

²⁹ FERC Order Accepting Amended and Restated Tatanka LGIA.

The Commission's order constituted final agency action regarding the repayment provisions in the Amended and Restated Tatanka LGIA, and no requests for rehearing of the Commission's order were filed in the proceeding.³⁰

C. The Commission Denied Midwest ISO's Attempt to Apply 50/50 Repayment Provisions to the First Revised Tatanka LGIA

The Commission has also rejected the Midwest ISO's requests to replace the 100% repayment provisions applicable to Tatanka for its network upgrade costs contained in the First Revised Tatanka LGIA with 50/50 repayment provisions. The Midwest ISO filed a proposal with the Commission to modify Attachment FF (Transmission Expansion Planning Protocol) of its Open Access Transmission and Energy Markets Tariff that would have retroactively applied revised repayment provisions³¹ to certain pre-existing LGIAs (including the First Revised Tatanka LGIA).³² The revised repayment provisions would change the 100% repayment to interconnection customers for network upgrade costs to only 50% repayment to interconnection customers for such costs, with the transmission owners receiving repayment for the remaining 50% of such costs.³³

The Commission rejected the application of the 50/50 repayment provisions for network upgrade costs to LGIAs filed on or after February 5, 2006, including the First

³⁰ *Id.*

³¹ *Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,106 (2006), *order denying reh'g*, 117 FERC ¶ 61,241 (2006).

³² *Midwest Independent System Operator, Inc., Section 205 Filing Regarding Cost Allocation Policy Filing*, Docket No. ER06-1439-000 (filed August 31, 2006). The three criteria to identify LGIAs filed on or after February 5, 2006 that would be purportedly be subject to the 50/50 repayment provisions for Network Upgrades are as follows: (i) the LGIA was entered into after the Midwest ISO submitted its Order No. 2003-A compliance filing on April 26, 2004 in which it proposed the new 50/50 repayment provisions for Network Upgrades, (ii) the Network Upgrades under the applicable LGIA are not yet in service and not included in the Transmission Owner's recoverable rate base, and (iii) the generation facility is not yet in commercial operation. *Id.*

³³ *Id.*

Revised Tatanka LGIA, for four main reasons.³⁴ First, the Commission ruled that the Midwest ISO had failed to demonstrate that the application of such repayment provisions to applicable existing LGIAs would produce just and reasonable results.³⁵ Second, the Commission ruled that the Midwest ISO had failed to show how the application of such repayment provisions to applicable existing LGIAs would encourage efficient siting decisions since these provisions would apply to generators that had already been sited.³⁶ Third, the Commission ruled that the Midwest ISO had failed to show how the application of such repayment provisions to applicable existing LGIAs would avert improper subsidies.³⁷ Fourth, the Commission rejected the Midwest ISO's argument that generators should have known that the Midwest ISO was going to propose revised 50/50 repayment provisions for network upgrade costs that would apply to certain existing LGIAs, emphasizing that the terms of pre-existing LGIAs must be upheld in order to maintain the stability and predictability of business decisions and financial liabilities that the parties to existing LGIAs had previously negotiated.³⁸

The Commission rejected a request for rehearing of its order rejecting the Midwest ISO's proposed tariff revisions³⁹ which constituted final agency action on the Midwest ISO's proposed tariff revisions filed in these proceedings.

³⁴ *Midwest Independent Transmission System Operator, Inc.*, 117 FERC ¶ 61,128 (2006), *reh'g denied*, 119 FERC ¶ 61,097 (2007).

³⁵ *Midwest Independent Transmission System Operator, Inc.*, 117 FERC ¶ 61,128 at P 25 (2006).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at P 26.

³⁹ *Midwest Independent Transmission System Operator, Inc.*, 117 FERC ¶ 61,128 (2006), *reh'g denied*, 119 FERC ¶ 61,097 (2007).

D. Evolution of Commission Policy on Network Upgrade Reimbursement Does Not Override the Explicit Terms of the Amended and Restated LGIA

While Commission policy regarding reimbursement of Network Upgrade costs, particularly in the Midwest ISO, has evolved over time, the Commission has consistently held that the terms of an approved and effective LGIA govern repayment obligations. Later evolutions in repayment obligations that may occur in pro forma LGIAs do not alter the terms of pre-existing LGIAs.⁴⁰

Under Order Nos. 2003 and 2003-A, the Commission mandated repayment to an interconnection customer of all of its costs incurred in initially funding network upgrades. Order No. 2003 requires all public utilities subject to the Commission's jurisdiction to file with the Commission a *pro forma* LGIA for interconnecting generating facilities with capacities greater than 20 MW to their transmission facilities.⁴¹ In Order No. 2003, the Commission ruled that an interconnection customer that initially funds the cost of required network upgrades is entitled to a cash-equivalent refund on a dollar-for-dollar basis equal to its costs paid for the network upgrades plus tax gross-up or other related tax payments.⁴² In Order No. 2003-A, the Commission reaffirmed that an interconnection customer that initially funds the cost of required network upgrades associated with interconnecting its generation facilities with the transmission system is entitled to reimbursement of its costs on a dollar-for-dollar basis plus interest.⁴³ As shown above, the Amended and Restated LGIA is consistent with this policy.

⁴⁰ *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,019 at P 21 (2005); *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,210 at P 17 (2008).

⁴¹ Order No. 2003.

⁴² Order No. 2003 at PP 694, 696.

⁴³ Order No. 2003-A at P 9.

Later, the Commission approved an amended *pro forma* LGIA filed by the Midwest ISO which contained a provision permitting an interconnection customer to recover only 50 percent of its costs in building certain network upgrades.⁴⁴ The Commission has also approved 100 percent recovery regimes whereby certain transmission providers within the Midwest ISO may recover 100 percent of the costs for network upgrades to the transmission system.⁴⁵

More recently, the Commission approved an interim tariff change for network upgrade costs in the Midwest ISO under which generators are required to pay “100 percent of the costs for network upgrades rated below 345 kV and . . . 90 percent of the costs for network upgrades rated at or above 345 kV with the remaining 10 percent of such costs being recoverable on a system-wide basis.”⁴⁶ However, that *October 23, 2009 Order* did not purport to alter, and by its own terms does not alter, the existing and effective Amended and Restated LGIA.

Despite the concerns of MDU, the Commission has recently denied attempts in a similar case by a transmission owner to modify the 100% repayment provisions for network upgrade costs contained in the applicable LGIA. In that case, the transmission owner, Ameren Services Company, and the transmission provider, the Midwest ISO, requested the Commission’s approval for deleting the 100% repayment provisions applicable to costs for network upgrades that were contained in the original Large

⁴⁴ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106 (2006), *order on reh’g*, 117 FERC ¶ 61,241 (2006), *aff’d sub nom. PSC of Wis. v. FERC*, 545 F.3d 1058 (D.C. Cir. 2008).

⁴⁵ See *Am. Transmission Company LLC.*, 120 FERC ¶ 61,221 (2007), *reh’g denied*, 123 FERC ¶ 61,065 (2008); *Int’l Transmission Co.*, 120 FERC ¶ 61,220 (2007), *reh’g denied*, 123 FERC ¶ 61,065 (2008). *ITC Midwest, LLC*, 124 FERC ¶ 61,150 (2008).

⁴⁶ See *Midwest Independent Transmission Systems Operator, Inc. and the Midwest ISO Transmission Owners*, 129 FERC ¶ 61,060, at P 8 (October 23, 2009) (hereafter, “*October 23, 2009 Order*”).

Generator Interconnection Agreement entered into with Prairie State Generating Company, LLC (“Prairie State”) (the “Prairie State LGIA”) and replacing such provisions with 50/50 repayment provisions. The Commission in fact rejected four attempts to revise the 100% repayment provisions in that case.

On the first occasion, the Commission rejected the attempt to apply the 50/50 repayment provisions to costs for network upgrades to the Prairie State LGIA because these changes did not conform to the Midwest ISO’s *pro forma* LGIA that was in effect at the time.⁴⁷ On the second occasion, the Commission rejected this same attempt because Ameren Services Company had failed to show why these nonconforming changes were required due to either unique circumstances or other operational reasons that would necessitate these revised repayment provisions.⁴⁸ On the third occasion, the Commission rejected this same attempt and reiterated that the circumstances of the Prairie State interconnection were not unusual, did not raise unusual reliability concerns, did not involve unusual technical characteristics, and did not involve novel legal issues that would necessitate changes to the currently effective 100% repayment provisions in the Prairie State LGIA.⁴⁹ On the fourth occasion, the Commission rejected an attempt to apply the 50/50 repayment provisions to costs for network upgrades relating to generating capacity that was identified in the original Prairie State LGIA and ordered that “Midwest ISO must revise the New Interconnection Agreement so that the 100 percent crediting

⁴⁷ *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,019 at P 21 (2005).

⁴⁸ *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,237 at P 17 (2005).

⁴⁹ *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,281 at P 14 (2005).

provision from the Existing Interconnection Agreement applies to the \$76.5 million cost of network upgrades associated with the original 1,500 MW request.”⁵⁰

In sum, the Commission’s rejections of the attempts by MDU to modify the 100% repayment provisions applicable to Tatanka for its costs incurred for network upgrades serve as binding precedent on the Commission’s ultimate ruling of the underlying issues in this case. Further, the Commission’s similar rejections of attempts by a transmission owner to modify the 100% repayment provisions in the Prairie State case provides evidence of the uniformity of the Commission’s treatment of such issues and its consistent enforcement as to LGIA language requiring repayment of Network Upgrade costs.

IV. HARM CAUSED BY MDU AND REQUEST FOR RELIEF

MDU’s failure to repay Tatanka for 100% of its costs incurred in building the applicable network upgrades has been to the financial detriment of Tatanka. As stated in Section II above, Tatanka has already incurred \$4,036,892.67 in costs, before interest, associated with constructing such upgrades. Since such costs have not yet been repaid by MDU, Tatanka has been financially disadvantaged by having to carry this expense on its balance sheet for which it has not yet been reimbursed.

Moreover, Tatanka has been forced to incur attorney fees in attempting to resolve these issues with MDU both through negotiations, informal mediation, and now the filing of this complaint. Finally, Tatanka has been disadvantaged in operational and practical terms by having to devote substantial time and energy of its employees and management

⁵⁰ *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,210 at P 17 (2008). The Commission stated that the 50/50 repayment provisions would only apply to the \$30,000 of costs incurred for network upgrades associated with a 150 MW increase in generating capacity of the Prairie State generating facility. *Id.*, *reh’g denied*, 128 FERC ¶ 61,170 (2009).

team to diligently work to resolve these issues, which time and energy could instead have been devoted to developing its current business and exploring new business opportunities in the renewable energy sector.

Accordingly, Tatanka requests that the Commission issue an order on the merits of this case directing MDU to repay Tatanka \$4,036,892.67 for its costs incurred in constructing the relevant network upgrades, plus applicable interest. To do otherwise would allow MDU to circumvent its repayment obligations under Article 11.4.1 of the Amended and Restated Tatanka LGIA and to continue to violate the Commission's policies and regulations governing generator interconnection agreements contained in Order Nos. 2003 and 2003-A.

V. DISPUTE RESOLUTION

Pursuant to Rule 206(b)(9) of the Commission's Rule of Practice and Procedure,⁵¹ Tatanka states that it has engaged in extensive discussions with MDU in an effort to resolve MDU's failure to repay Tatanka for 100% of its costs incurred for network upgrades. Moreover, MDU and Tatanka have engaged in informal mediation initiated under the Midwest ISO tariff dispute resolution procedures in which Mr. Stephen Kozey, Vice President, General Counsel and Secretary of Midwest ISO, served as the mediator. Despite good faith attempts, including conference calls, letters and an in-person mediation effort at Midwest ISO offices, these dispute resolution efforts have not resulted in any resolution.

Therefore, Tatanka believes that alternative dispute resolution procedures under Commission supervision will not successfully resolve the issues underlying this

⁵¹ 18 C.F.R. § 385.206(b)(9).

complaint. Tatanka respectfully requests that the Commission issue an order on the merits in this proceeding.

VI. COMMISSION JURISDICTION TO RULE ON COMPLAINT

The Commission has primary jurisdiction to rule on this complaint under the three-factored analysis for determining whether the Commission should assert primary jurisdiction over contractual matters as set forth in the *Arkansas Louisiana Gas Company v. Hall* case.⁵² These factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.⁵³

In this case, each of these factors is met. First, the Commission possesses special expertise concerning the subject matter of the Amended and Restated LGIA, regulatory authority to enforce a party's obligations under the Amended and Restated LGIA, and proficiency to interpret its own policies governing generator interconnection agreements under Order Nos. 2003 and 2003-A. Second, there is a need for uniformity of interpretation of the repayment provisions contained in the Amended and Restated LGIA and the policies governing generator interconnection agreements under Order Nos. 2003 and 2003-A because such interpretation may be relied on by other generators and transmission owners that are subject to similar provisions contained in applicable generator interconnection agreements and in the Commission's policies concerning such agreements in Order Nos. 2003 and 2003-A. Third, this complaint is important in

⁵² *Arkansas Louisiana Gas Company*, 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979).

⁵³ *Arkansas Louisiana Gas Company*, 7 FERC at 61,322.

relation to the regulatory responsibilities of the Commission because the ultimate ruling on this complaint may serve as precedent to similarly situated parties with respect to the Commission's policies on enforcing contracts and interpreting its policies on generator interconnection agreements.

VII. REQUIREMENTS FOR COMPLAINTS UNDER RULE 206(B)

Tatanka respectfully submits that it has complied with the requirements for complaints under Rule 206(b) of the Commission's Rules of Practice and Procedure⁵⁴ as set forth in more detail below.

1. Rule 206(b)(1). The inaction by MDU which is alleged to violate applicable statutory standards or regulatory requirements – failure to reimburse Tatanka for 100% of the cost of Network Upgrades – is clearly identified in Sections II and III of this complaint.

2. Rule 206(b)(2). An explanation of how the inaction of MDU violates applicable statutory standards or regulatory requirements is set forth in Sections II, III and IV of this complaint.

3. Rule 206(b)(3). The business, commercial, economic, and other issues presented by MDU's inaction discussed herein are set forth in Sections III and IV of this complaint.

4. Rule 206(b)(4). A good faith estimate of the financial impact created for Tatanka as a result of MDU's inaction is set forth in Section IV of this complaint.

5. Rule 206(b)(5). The practical, operational, or other nonfinancial impacts imposed as a result of MDU's inaction are set forth in Section IV of this complaint.

⁵⁴ 18 C.F.R. § 385.206(b)(1)-(11).

6. Rule 206(b)(6). The issues presented herein are not pending in an existing Commission proceeding or a proceeding in any other forum in which Tatanka is a party.

7. Rule 206(b)(7). The specific relief or remedy requested is set forth in Section IV of this complaint and the basis for that relief is set forth in Section III of this complaint.

8. Rule 206(b)(8). The documents supporting the facts of the complaint that have been obtained by Tatanka are attached hereto.

9. Rule 206(b)(9). The Enforcement Hotline, Dispute Resolution Service, and tariff-based dispute resolution mechanisms used and an explanation as to whether Tatanka believes that alternative dispute resolution under the Commission's supervision could successfully resolve this complaint are set forth in Section V of this complaint.

10. Rule 206(b)(10). The form of notice of the complaint suitable for publication in the Federal Register is attached below.

11. Rule 206(b)(11). This information is not applicable to this complaint because Tatanka has not requested Fast Track processing pursuant to Rule 206(h).

VIII. CONCLUSION

For the foregoing reasons, Tatanka respectfully requests that the Commission grant the relief requested in this complaint as expeditiously as possible.

Respectfully submitted,

/s/ Thomas McCann Mullooly

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Dated: February 9, 2010

Comment Date: 5:00 pm Eastern Time on (insert date).

Kimberly D. Bose
Secretary

CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.206(c), I hereby certify that the foregoing document was this day served, via electronic mail, upon the following representatives of Respondent and other parties that may be expected to be affected by the complaint:

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Dated at Milwaukee, Wisconsin, this 9th day of February, 2010.

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Attorney for Tatanka Wind Power, LLC

LIST OF ATTACHMENTS

- A. Affidavit of Iker Chocarro
- B. Amended and Restated Tatanka LGIA (filed with the Commission on December 21, 2008)
- C. Commission Order Accepting for Filing Amended and Restated Tatanka LGIA (issued on February 7, 2008)