

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

TATANKA WIND POWER, LLC,)	
)	
Complainant,)	
)	
v.)	Docket No. EL10-41-000
)	
MONTANA-DAKOTA UTILITIES)	
CO., a division of MDU Resources)	
Group, Inc.,)	
)	
Respondent.)	

**MOTION TO INTERVENE AND
ANSWER OF MONTANA-DAKOTA UTILITIES CO.**

Pursuant to Rules 213 and 214 of the Rules and Practice and Procedure, 18 CFR § 385.213, .214 (2009), Montana-Dakota Utilities Co., a division of MDU Resources Group, Inc. (“Montana-Dakota”) moves to intervene in this docket and answer the February 9, 2010 complaint filed by Tatanka Wind Power, LLC (“Tatanka”) (“Complaint”). In the Complaint, Tatanka alleges that Montana-Dakota breached its obligations under section 11.4.1 of the Amended and Restated Large Generation Interconnection Agreement (the “LGIA”)¹ among Tatanka (the “Interconnection Customer”), Montana-Dakota (the “Transmission Owner”), and Midwest Independent Transmission System Operator, Inc. (“MISO”) (the “Transmission Provider”) by failing to fully repay Tatanka for 100 percent of Tatanka’s costs, plus interest, for

¹ Throughout this pleading, “LGIA” is used to refer to the initial and revised interconnection agreement with Dakota Wind Harvest, LLC, and the Amended and Restated interconnection agreement with Tatanka because they are essentially the same agreement stemming from the same transaction. *See* Second Revised Service Agreement No. 1519 under the Midwest ISO FERC Electric Tariff, Third Revised Vol. No. 1, Docket No. ER08-352-000 (filed Dec. 21, 2007).

network upgrades relating to the interconnection of Tatanka’s 180 megawatt wind Generating Facility (“Project”).

I. COMMUNICATIONS

Please address all communications in this proceeding to the following persons:

Daniel S. Kuntz*
Associate General Counsel
MDU Resources Group, Inc.
Bismarck, ND 58506-5650
Tel. (701) 222-7612
Fax (701) 222-7607
Email: Dan.Kuntz@MDUresources.com

Andrea L. Stomberg*
Vice President – Electric Supply
Montana Dakota Utilities Co.
400 North 4th Street
Bismarck, ND 58501-4092
Tel. (701) 222-7752
Fax (701) 222-7606
Email: Andrea.Stomberg@MDU.com

Evan C. Reese*
Andrew Art
Adam Schiche
Van Ness Feldman, P.C.
1050 Thomas Jefferson St., NW
Washington, DC 20007
Tel. (202) 298-1800
Fax (202) 338-2416
Email: ECR@VNF.com
ABA@VNF.com
AAS@VNF.com

* Denotes persons designated for service.²

II. SUMMARY

Tatanka alleges that Montana-Dakota breached section 11.4.1 of the LGIA by not reimbursing, in one lump sum payment, over \$4,000,000 in purported costs associated with the design and construction of the Network Upgrades identified in the LGIA. Montana-Dakota has not breached section 11.4.1 of the LGIA. There are however, material issues of fact in dispute between the parties regarding the amount, if any, that Montana-Dakota is obligated to pay Tatanka for the appropriate costs associated with the construction of the Network Upgrades. In

² Montana-Dakota requests waiver of Rule 203(b)(3), 18 C.F.R. §385.203(b)(3) (2009).

this proceeding, Montana-Dakota urges the Commission to address whether the claimed amount of \$4,036,892.67, plus applicable interest, is the proper amount of costs that Montana-Dakota should be required to pay. As demonstrated below and in the supporting affidavits, the facilities built by Tatanka deviate materially from the required Network Upgrades described in the LGIA and the design specifications that were given to Tatanka by Montana-Dakota. In accordance with section 5.2(10) of the agreement, Montana-Dakota is not required to approve or accept Network Upgrades built by the Interconnection Customer if those facilities do not meet the standards and specifications of the Transmission Owner.

Moreover, the Interconnection Customer's election of the "Option to Build" and self-imposed delays and failures by Tatanka's predecessor, Dakota Wind Harvest, LLC ("Dakota Wind"), to meet the milestones for the construction of the Network Upgrades identified in the LGIA caused significant cost overruns from the estimate of costs in the LGIA. Because Dakota Wind, predecessor to Tatanka, chose the "Option to Build" provision under section 5.1.3 of the LGIA and Tatanka assumed Dakota Wind's obligation, Montana-Dakota should be held harmless from the increase in costs above the \$1.8 Million dollar estimate that is included in the currently effective LGIA on file with the Commission.

Finally, because Tatanka failed to construct the network upgrade facilities described in the LGIA and failed to meet the design specifications that Montana-Dakota provided to Tatanka, Montana-Dakota will be required to expend at least \$500,000 to replace several items at the Tatanka substation to make it minimally acceptable for long-term reliable use on Montana-Dakota's transmission system. The Commission should exclude this amount from any amount that Montana-Dakota is ultimately determined to owe Tatanka.

For the reasons set forth herein, Montana-Dakota urges the Commission to find that it has not breached section 11.4.1 of the LGIA, but set for hearing the material issue of fact in dispute between the parties to the LGIA: the appropriate amount, if any, that Montana-Dakota will be obligated to repay Tatanka for the costs associated with its construction of the Network Upgrades.

III. BACKGROUND

On August 7, 2004, MISO received a request from Dakota Wind to interconnect a 180-megawatt wind generation project to the Montana-Dakota transmission system. MISO conducted the requisite system impact and facility studies for the Project and tendered its *pro forma* interconnection agreement to both Dakota Wind and Montana-Dakota on August 9, 2004. The MISO *pro forma* interconnection agreement was modeled after the Commission's *pro forma* interconnection agreement developed as part of the standardization of the Large Generator Interconnection Procedures and Large Generator Interconnection Agreement in Order No. 2003.³

Dakota Wind, Montana-Dakota, and MISO negotiated the final terms of the interconnection agreement, including the appendices which identified the necessary interconnection facilities, network upgrades, and certain specific milestones related to the Project. At the time, Dakota Wind provided an in-service date of October 15, 2005. The costs associated with the Network Upgrades were estimated at approximately \$1.8 Million. Because Montana-Dakota determined it could not meet the aggressive construction schedule needed for the Dakota Wind milestone dates, Dakota Wind was allowed to choose the "Option to Build"

³ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 2001-2005 FERC Stats. & Regs. Regs. Preambles ¶ 31,146 (2003) ("Order No. 2003"), *order on reh'g*, Order No. 2003-A, 2001-2005 FERC Stats. & Regs. Reg. Preambles ¶ 31,160 (2004) ("Order No. 2003-A"), *order on reh'g*, Order No. 2003-B, 2001-2005 FERC Stats. & Regs. Regs. Preambles ¶ 31,171 (2005) ("Order No. 2003-B"), *order on reh'g*, Order No. 2003-C, 2001-2005 FERC Stats. & Regs., Regs. Preambles ¶ 31,190 (2005) ("Order No. 2003-C"), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007). MISO adopted the Commission's default transmission credit pricing provisions in Section 11.4 of the LGIA. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,027 at P 28 (2004).

provision under the LGIA which requires it to build Interconnection Facilities and Network Upgrades consistent with the LGIA and the specifications of the Transmission Owner.

MISO filed the unexecuted agreement with the Commission on March 2, 2005 in Docket No. ER05-667-000 due to Montana-Dakota's concern regarding the impact on its native load customers as a result Montana-Dakota's responsibility under the LGIA to reimburse Dakota Wind with respect to the construction of Network Upgrades. The Commission conditionally accepted the agreement on October 24, 2005, with an effective date of February 28, 2005, and retained in the LGIA the language in section 11.4 of MISO's *pro forma* interconnection agreement.⁴

On May 19, 2006, Dakota Wind provided notice that it was placing the Project in suspension, retroactive to March 31, 2005.⁵ Between March 2005 (following the filing of the LGIA) and October 2006, Montana-Dakota had virtually no contact with Dakota Wind. In October 2006, representatives for Montana-Dakota were contacted by HDR, Inc., ("HDR") an architectural, engineering, and consulting firm, that had been hired to perform the design and construction work for the Interconnection Facilities and Network Upgrades identified in the LGIA. Despite Montana-Dakota's understanding that the Project was in suspension, it became clear that work on the design of the Interconnection Facilities and Network Upgrades had been done without any consultation with Montana-Dakota. Soon after this initial contact, Montana-Dakota provided standard drawings and design specifications to HDR, the contractor hired to perform design and construction work.

⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 113 FERC ¶ 61,082 (2005). The Commission required MISO to submit a compliance filing to eliminate certain non-conforming provisions that had been included in the original agreement. MISO made its compliance filing on November 23, 2005, which the Commission accepted by Letter Order on April 21, 2006.

⁵ See Exhibit MDU-B, Affidavit of Henry Ford, Exh. MDU-B at Exh. MDU-B.4 (letter from Erich Bachmeyer, Dakota Wind Harvest, LLC, to Jerry Fohey, Midwest ISO, Inc., and Andrea Stromberg, Vice President of Electric Supply, Montana-Dakota Utilities Co. (May 19, 2006)).

On December 1, 2006, HDR provided substation diagrams to Montana-Dakota that deviated substantially from the LGIA and the specifications Montana-Dakota provided in October. Montana-Dakota promptly informed HDR that the substation design was unacceptable. The contractor informed Montana-Dakota that the Project developer would be paying for design and construction of the facilities, and that it therefore would not be following Montana-Dakota's specifications.

Montana-Dakota understands that on December 31, 2006, Dakota Wind formally assigned its interest in the LGIA to Tatanka. Dakota Wind did not seek Montana-Dakota's consent to the assignment of the LGIA.⁶ Tatanka proposed a new in-service date for the Project of October 1, 2007.

In January 2007, Montana-Dakota again raised concerns about the proposed facility design with HDR. However, nothing was done to address Montana-Dakota's concerns. As a result, the Network Upgrades that were ultimately built by Tatanka differ substantially from the facilities described in the LGIA and the design specifications that were provided to Tatanka by Montana-Dakota.

MISO filed the restated LGIA, unexecuted, with the Commission on December 21, 2007 in Docket No. ER08-352-000, reflecting the assignment of the LGIA to Tatanka as well as amendments to certain LGIA appendices. The \$1.8 million cost estimate with respect to the construction of Network Upgrades, as well as the description of the Network Upgrades, remained unchanged from the original LGIA. Montana-Dakota again noted its objections to the

⁶ In its Complaint, Tatanka claims that Dakota Wind is Tatanka's predecessor. Section 19.1 of the LGIA permits a party to assign the LGIA only upon written consent of the other party unless the assignee is an affiliate of the party. Presumably, Tatanka's claim is that it is an affiliate of Dakota Wind and therefore did not need Montana-Dakota's consent to assignment. Montana-Dakota has no basis for confirming Tatanka's assertion, but reserves its right to argue that the LGIA was not properly assigned to Tatanka in the first instance if discovery demonstrates Tatanka's assertions to be inaccurate.

reimbursement provisions of section 11.4 because of the impact on its native load customers. The LGIA was accepted by Letter Order on February 7, 2008, with an effective date of December 22, 2007.⁷

On July 2, 2008, Montana-Dakota received notice from Tatanka that the generating facility was in the final stages of start-up and commissioning and that Tatanka was transferring control of the switching substation to Montana-Dakota. Tatanka later forwarded to Montana-Dakota an invoice in the amount of \$4,863,125. Montana-Dakota provided a notice of dispute to Tatanka and MISO on October 22, 2008, stating its objections to the costs claimed by Tatanka, and provided a list of seven grounds for disagreement with the invoice. Efforts to negotiate and mediate a resolution of the dispute were unsuccessful. On February 5, 2010, Tatanka sent a revised invoice in the amount of \$4,036,892.67, plus interest of \$239,895.00, to Montana-Dakota. Four days later, on February 9, 2010, Tatanka filed the instant Complaint alleging that Montana-Dakota had breached section 11.4.1 of the LGIA by failing to repay Tatanka the invoiced amount.

IV. MOTION TO INTERVENE

Montana-Dakota is a party to the LGIA and the named respondent to Tatanka's Complaint in this proceeding. Accordingly, Montana-Dakota has a direct and substantial interest in the outcome of this proceeding that cannot be adequately represented by any other party, and its participation is in the public interest. Therefore, Montana-Dakota requests that the Commission grant its motion to intervene in this proceeding.

V. ANSWER

Tatanka's Complaint alleges that Montana-Dakota has breached section 11.4.1 of the LGIA by failing to repay Tatanka in a 100%, lump-sum repayment for Tatanka's February 5,

⁷ *Letter Order*, Docket No. ER08-352-000 (issued Feb. 7, 2008).

2010 invoice of \$4,036,892.67, plus interest of \$239,895.00. Tatanka purports that section 11.4.1 of the LGIA requires Montana-Dakota to reimburse Tatanka in a lump-sum cash repayment for all of the costs Tatanka claims to have expended for Network Upgrades, plus interest, and that Montana-Dakota breached its obligation to do so when invoiced by Tatanka. Montana-Dakota denies Tatanka's allegations in their entirety and demonstrates Tatanka's complaint has no merit. First, the Network Upgrades built by Tatanka deviate in several material ways from those described in the LGIA and from the standards and design specifications Montana-Dakota provided to Tatanka. Despite Montana-Dakota identifying those deviations, Tatanka did not remedy those deficiencies. As a result, Tatanka breached sections 5.2(1) and (6) of the LGIA and has no right to reimbursement. Second, by assuming the LGIA and the self-build option under section 5.1.3, Tatanka assumed liability for the failure of its predecessor to meet its self-imposed milestone dates for construction of the Network Upgrades. Tatanka also assumed the risk of delay and resulting cost overruns in excess of the \$1.8 million cost estimate. Finally, Tatanka has not established the elements of breach in the instant Complaint.

A. Because the Network Upgrades Do Not Conform to the LGIA or to Montana-Dakota's Standards and Design Specifications, Tatanka has no Right to Reimbursement.

An Interconnection Customer that chooses the "Option to Build" for the construction of Interconnection Facilities and Network Upgrades is not permitted to disregard the LGIA's description of the facilities or the standards and design specifications of the Transmission Provider. To the contrary, the Commission has unequivocally stated that "the Interconnection Customer is required to use . . . the standards and specifications provided in advance by the Transmission Provider."⁸ Section 5.2 of the LGIA memorializes the Commission's directive and

⁸ Order No. 2003 at P 356 (emphasis added). *See also* Order No. 2003-A at P 219 ("We expect Interconnection Customer to comply with the Transmission Provider's standards and specifications for the construction of

describes the general conditions applicable to the Interconnection Customer's option to build.

Section 5.2 states in relevant part:

If Interconnection Customer assumes responsibility for the design, procurement and construction of the . . . Stand Alone Network Upgrades after receipt of all required approvals from Governmental Authorities necessary to commence construction,

(1) the Interconnection Customer shall engineer, procure equipment, and construct the . . . Stand Alone Network Upgrades (or portions thereof) using Good Utility Practice and using standards and specifications provided in advance by the Transmission Owner, or as required by any Governmental Authority;

. . . .

(3) . . . Transmission Owner shall be entitled to review and approve the engineering design, equipment acceptance tests (including witnessing of acceptance tests), and the construction (including monitoring of construction) of the . . . Stand Alone Network Upgrades, and shall have the right to reject any design, procurement, construction or acceptance test of any equipment that does not meet the standards and specifications of Transmission Provider, Transmission Owner and any Governmental Authority;

. . . .

(6) at any time during construction, should any phase of the engineering, equipment procurement, or construction of the . . . Stand Alone Network Upgrades not meet the standards and specifications provided by Transmission Owner, the Interconnection Customer shall be obligated to remedy deficiencies in that portion of the . . . Stand Alone Network Upgrades to meet the standards and specifications provided by Transmission Provider and Transmission Owner;

. . . .

(10) . . . Transmission Owner shall approve and accept for operation and maintenance the . . . Stand Alone Network Upgrades to the extent engineered, procured, and constructed in accordance with this Article 5.2 only if the . . . Stand Alone Network Upgrades meet the standards and specifications of Transmission Provider, Transmission Owner and any Governmental Authority. . . .

In its construction of the Network Upgrades, Tatanka: (1) failed to construct the Network Upgrades as described in the LGIA; (2) failed to construct the Network Upgrades consistent with the standards and design specifications provided in advance by Montana-Dakota, in violation of

facilities.”).

section 5.2(1); and (3) failed to remedy deficiencies in the Network Upgrades identified by Montana-Dakota in violation of section 5.2(6).

As more fully described in the Affidavit of Don Raveling, Exhibit No. MDU-A and Exhibit Nos. MDU-A.1 through MDU-A.3, Montana-Dakota was initially contacted in October 2006 by a representative of HDR, the architectural, engineering and consulting firm, hired by Tatanka⁹ to perform the design work for the generator Interconnection Facilities and Network Upgrades identified in the LGIA. On October 16, 2006, Montana-Dakota sent drawings and detailed specifications for the design and construction of the facilities to be installed at the substation. In December 2006, Montana-Dakota received a one-line diagram from HDR with the proposed design of the Tatanka substation. Montana-Dakota immediately determined that the proposed design did not meet the facility description of the Network Upgrades included in the LGIA or the design specifications that were sent to Tatanka. Montana-Dakota informed HDR that the design for the substation deviated substantially from the design specifications Montana-Dakota had provided, and that the substation design proposed by HDR was unacceptable to Montana-Dakota.¹⁰

Montana-Dakota was told that HDR's client (Tatanka) was paying for the design work and the construction of the facilities that were being built and, therefore, the design specifications provided by Montana-Dakota did not need to be followed. Exh. MDU-A at P 9. In addition, on January 31, 2007, an email identifying a concern with the phasing associated with the substation three circuit breaker ring bus was sent to HDR. Exh. No. MDU-A at P 11. HDR responded that

⁹ In October 2006, Montana-Dakota had not yet received a notice of the assignment of the LGIA to Tatanka.

¹⁰ The Affidavit of Mr. Raveling identifies the material deviations from the design specifications he provided to Tatanka in preparation for the construction of the Network Upgrades. Exhibit MDU-A, Affidavit of Don Raveling, Exh. MDU-A at PP 9-10.

it could not meet Montana-Dakota's specifications with respect to the phasing. *Id.*, *see also id.* at Exh. MDU-A.3.

In the Affidavit of Mr. Henry Ford, Exhibit No. MDU-B, and Exhibit Nos. MDU-B.1 through MDU-B.7, Mr. Ford summarizes some of the major deviations from the Montana-Dakota design specifications and describes the reliability issues associated with those deviations. For example, Mr. Ford identifies the following:

- A failure to incorporate any use of line switches in accordance with the LGIA description of the Network Upgrades or the Montana-Dakota specifications. Exh. MDU-B at P 9(a).
- A failure to install a Station Service Voltage Transformer (SSVT), which is required to provide power to the substation for lighting, station battery charging and general power use, as specified in detail in Montana-Dakota's specifications. *Id.* at P 9(b).
- An unauthorized installation of Nickel Cadmium type station batteries of an inadequate size, rather than the Montana-Dakota design specification of Lead-Acid station batteries to provide 120 volt Direct Current power for system protection circuits within the substation and an uninterruptible source of DC power to these protection systems for a specified period of time during a loss of station power. *Id.* at P 9(c).
- A failure to construct a control house with the dimensions required by Montana-Dakota's specification and failure to include a partitioned battery room therein. *Id.* at P 9(d).

- A failure to adhere to Montana-Dakota’s design specification for the general physical arrangement of the substation three ring bus, switches, and breakers within the fenced area of the substation. *Id.* at P 9(e).

As a result of the substation design flaws that Montana-Dakota communicated to HDR, Montana-Dakota never formally approved the design work that was presented to Montana-Dakota for review, as it had a right to do pursuant to section 5.2(3). Exh. MDU-A at PP 12-14. Tatanka failed to remedy the design flaws that Montana-Dakota identified in violation of section 5.2(6). Tatanka cannot claim that it is now entitled to reimbursement for 100% of the \$4,036,892.67, plus interest of \$239,895.00, when it did not comply with sections 5.2(1) and 5.2(6) of the LGIA.

Moreover, these failures to conform to Montana-Dakota’s design specifications have resulted in several configuration and substation reliability issues that have occurred following the energization of the substation. Exh. MDU-B at PP 8-9. Also described in the Ford Affidavit, Montana-Dakota will have to expend no less than \$500,000 to bring the facilities built by Tatanka up to a minimal standard for it to operate them in a safe and reliable manner. *Id.* at P 10.

Section 5.2(10) of the LGIA states that the Transmission Owner shall approve and accept for operation and maintenance the Stand Alone Network Upgrades “to the extent engineered, procured, and constructed in accordance with this Article 5.2 *only if* the . . . Stand Alone Network Upgrades meet the standards and specifications of Transmission Provider, Transmission Owner and any Governmental Authority.”¹¹ To date, Montana-Dakota has never formally approved and accepted the “as built” facilities, including the substation or any other Network Upgrades associated with the Tatanka Generating Facility interconnection, because the facilities as-built do

¹¹ Exh. MDU-C, LGIA at Original Sheet No. 31 (emphasis added).

not meet the LGIA's description of the Network Upgrades or the design standards and specifications of Montana-Dakota as Transmission Owner. Exh. MDU-A at P 14.

Because the facilities constructed by Tatanka do not currently meet the LGIA's description of the Network Upgrades or the standards and specifications of Montana-Dakota, Montana-Dakota cannot approve and accept the deficient "as built" facilities. In this case, because of its refusal to construct the Network Upgrades in conformance with the LGIA and the design specifications provided by Montana-Dakota, in violation of sections 5.2(1) and (6), at present Tatanka is not entitled to cost reimbursement from Montana-Dakota.

B. By Choosing the Self-Build Option, Tatanka Should Assume the Risk for Cost Overruns Associated With its Design and Construction Practices and Delays in Construction.

Dakota Wind, Tatanka's predecessor, chose the self-build option in the Original LGIA and established certain milestones for the completion of the Project.¹² An Interconnection Customer is permitted to choose the self-build option under section 5.1.3 of the LGIA only under limited circumstances. If the Transmission Owner is unable to meet the milestone dates chosen by the Interconnection Customer, then, and only then, may the Interconnection Customer take advantage of the self-build option.¹³

1. Dakota Wind did not meet its own self-imposed milestone dates in violation of section 5.1.3.

In this case, Dakota Wind was able to choose the "Option to Build" provision of section 5.1.3 of the LGIA because it chose aggressive milestone dates and Montana-Dakota indicated that it would not be able to meet this tight construction schedule. Promptly after filing the LGIA with the Commission, Dakota Wind essentially failed to make any effort whatsoever to meet the

¹² The LGIA is attached hereto as Exhibit MDU-C.

¹³ See Order No. 2003-A at P 218 ("The Interconnection Customer may exercise its right under the 'option to build' only as a last resort if the Transmission Provider is unable to meet the milestones established by the Interconnection Customer.").

milestone dates included in the LGIA. Montana-Dakota had no meaningful contact from Dakota Wind from March 2005 until May 2006 when Dakota Wind provided notice that it was placing the Project in suspension effective retroactive to March 31, 2005 – less than one month after the LGIA was filed with the Commission.

Section 5.1.3 permits the Interconnection Customer to exercise the self-build option in order to construct the facilities “by the dates originally designated by the Interconnection Customer [.]” Dakota Wind, predecessor to Tatanka, made no attempt to meet those dates. Because Dakota Wind failed to meet its self-imposed deadlines, it violated the terms of section 5.1.3 which requires the Interconnection Customer to design and build Interconnection Facilities and Network Upgrades by the milestone dates included in the LGIA. Tatanka should not be permitted to benefit from the recalcitrance of its predecessor. Due to the failure to even attempt to meet the milestone dates included in the Dakota Wind LGIA, Tatanka should not be reimbursed for the costs of the Network Upgrades above and beyond the \$1.8 million cost estimate agreed to under the LGIA. The \$1.8 Million cost estimate was never changed in the LGIA, even after the LGIA was assigned to Tatanka, and the \$1.8 million estimate is the current estimate in the amended and restated LGIA on file with the Commission.

2. Tatanka assumed the risk for costs in excess of the \$1.8 Million estimate included in the LGIA.

According to the terms of Article 5 of the Commission’s *pro forma* LGIA, if the Interconnection Customer’s milestone dates are unacceptable to a Transmission Owner, the Transmission Owner may agree to build the facilities under the Alternate Option in section 5.1.2 or the Negotiated Option under 5.1.4 that provide for possible incentive payments to the Transmission Owner. Recovery of incentive payments would allow the Transmission Owner to incur the extra costs associated with outside design consultants, engineers, and accelerated

equipment procurement and construction. Sections 5.1.2 and 5.1.4 are clear, however, that such incentive payments by the Interconnection Customer to allow for these added expenses are at the cost of the Interconnection Customer and not subject to refund by the Transmission Owner. Accordingly, the Transmission Owner and its retail customers are held harmless from the additional costs necessary for the Transmission Owner to build facilities within the Interconnection Customer's self-imposed, aggressive milestone dates. If the Transmission Owner accepts the build responsibility under sections 5.1.2 or 5.1.4, but then fails to meet the aggressive milestone schedule, it could be subject to liquidated damages under section 5.3. Alternatively, the Interconnection can select the "Option to Build" under section 5.1.2.

In choosing the Option to Build, the Interconnection Customer assumes the risk associated for any delay in constructing the facilities identified in the interconnection agreement or for any extra expense incurred in building the facilities. The Transmission Owner, and its customers, should be held harmless from any increase in costs related to the construction of Network Upgrades in the same manner they are held harmless from extra expense incurred to meet the Interconnection Customer's schedule under sections 5.1.2 and 5.1.4. The Option to Build exists solely for the benefit and convenience of the Interconnection Customer and Transmission Owner's native load customers should not bear the burden of having to absorb the increased costs between the estimate to construct Network Upgrades included in the interconnection agreement and the actual costs incurred to meet the Interconnection Customer's self-imposed milestones or its election to use the self-build option. Increased costs associated with the exercise of a more expensive self-build option process — *e.g.*, retaining third-party design professionals and other third-party contractors, inflationary costs caused by the Interconnection Customer's delay in scheduling the design and construction of the Network

Upgrades outside the LGIA milestones, or expediting costs to accelerate design and construction that are necessitated by delays of the Interconnection Customer — are all costs incurred solely for the benefit of the Interconnection Customer and do not benefit the Transmission Owner or its native load customers.

In this case, the LGIA includes a \$1.8 million estimated cost for the construction of Network Upgrades needed to accommodate the Project. When this estimate was made, there was no argument from Dakota Wind that the figure was too small, or inaccurate in any way. After Tatanka took over the project, it too did not object to the estimate included in the LGIA and that estimate remains on file with the Commission. As Mr. Ford affirms in his Affidavit, Montana-Dakota could have built the Network Upgrades within the estimated \$1.8 Million amount if Montana-Dakota had built the facilities. Exh. MDU-B at 11. Instead, Tatanka alleges it incurred \$4,036,892, or nearly 225% of MDU estimated costs, to construct deficient facilities that don't meet the design and specifications of the LGIA and Montana-Dakota.

Dakota Wind made the affirmative decision to place the Project in suspension. It later assigned the agreement to Tatanka who brought the Project out of suspension only months after the suspension notice was given. Dakota Wind is the predecessor company of Tatanka and accordingly Tatanka assumed the same risks as Dakota Wind. As noted above, the \$1.8 million cost estimate was never changed in the Tatanka LGIA and remains in effect and on file with the Commission.

The Commission determined in Order No. 2003 that the Interconnection Customer must “pay all reasonable costs that the Transmission Provider incurs in suspending work” once the Interconnection Customer decides to place the facility in suspension.¹⁴ Although the Commission suggests these costs should be limited to only those incurred “to ensure reliability

¹⁴ Order No. 2003 at P 411.

and safety of the . . . [s]ystem,”¹⁵ the Interconnection Customer should not be able to place exorbitant costs on the customers of a Transmission Owner because of its creation of aggressive (and possibly unreasonable) milestone schedules and its exercise of the self-build option.

As a result, the Commission should limit Montana-Dakota’s exposure to the costs for the construction of the Network Upgrades to the amount identified in the LGIA; namely, \$1.8 million.

C. The Cost of Replacement Facilities Should Be Deducted From Any Amount Owing to Tatanka.

As more fully described *supra*, the facilities constructed by Tatanka deviate materially from the design specifications that Montana-Dakota provided to Tatanka. As a result, Montana-Dakota will be required to replace certain facilities at the Tatanka substation in order to make those facilities functionally compatible with the facilities underlying the Montana-Dakota bulk transmission system. Mr. Ford’s affidavit explains each of the minimally required replacement items and testifies that the estimate for the construction work associated with these replacements is at least \$500,000. Exh. MDU-B at PP 9-10. Any amount that the Commission ultimately determines that Montana-Dakota owes Tatanka should fully account for any additional costs imposed by Tatanka’s failure to construct the Network Upgrades as designed, which would not have otherwise been incurred but for the installation of nonconforming facilities by Tatanka at the Tatanka substation.¹⁶

D. Montana-Dakota Has Not Breached Section 11.4.1 of the LGIA.

Section 11.4.1 of the LGIA states, in relevant part:

¹⁵ Order No. 2003-A at P 321.

¹⁶ Such costs may include any item to conform the Network Upgrades to Montana-Dakota’s design specifications including the cost to remove unspecified equipment and costs incurred to redesign and rebuild the Network Upgrades.

Interconnection Customer shall be entitled to a cash repayment by the Transmission Owner and the Affected System Owner that owns the Network Upgrades, equal to the total amount paid respectively to Transmission Owner and Affected System Operator, if any, for the Network Upgrades . . . to be paid to Interconnection Customer on a dollar-for-dollar basis for the non-usage sensitive portion of transmission charges, **as payments are made under the Tariff and Affected System's Tariff for transmission services with respect to the Large Generating Facility.**¹⁷

Section 11.4.1 contemplates credit for transmission service under the Open Access Transmission Tariff ("OATT") administered by the Transmission Provider, in this case MISO, until the full amount expended for Network Upgrades is reimbursed to the Interconnection Customer. To date, Montana-Dakota has not been informed by MISO, as the Transmission Provider under the LGIA, that Tatanka is entitled to any amount of money as a credit against transmission service associated with the Tatanka Generating Facility. To the best of Montana-Dakota's knowledge, Tatanka has not yet triggered the transmission crediting repayment provisions of the LGIA. In addition, Tatanka filed the instant Complaint alleging that Montana-Dakota had breached the LGIA only four days after presenting Montana-Dakota with its revised invoice.

The Commission's transmission credit pricing policy is well established. Interconnection customers are entitled to a cash equivalent refund equal to the amount the interconnection customer paid for Network Upgrades as payments are made for transmission service under the Transmission Provider's OATT.¹⁸ As the Commission described the proposed pricing policy in Order No. 2003:

The refund would be paid to the Interconnection Customer on a dollar-for-dollar basis, as credits against the Interconnection Customer's payments for transmission services, with the full amount to be refunded . . . within five years of the date the Network Upgrades are placed in service, so long as the

¹⁷ Exh. MDU-C, LGIA at Original Sheet No. 56-57 (*emphasis added*).

¹⁸ As more fully described below, there are important limitations on the amount an interconnection customer may seek in way of reimbursement.

Transmission Provider continues to receive payments for transmission service with respect to the Generating Facility during this period.¹⁹

Thus, the *pro forma* LGIA requires the Transmission Provider to provide credits to the Interconnection Customer only against transmission delivery service taken with respect to the interconnecting Generating Facility.

MISO adopted the Commission's default transmission credit pricing provisions and incorporated the same language used in the *pro form* Interconnection Agreement into the MISO *pro forma* agreement.²⁰ In affirming its decision to accept MISO's proposal to adopt the Commission's default credit pricing policy, the Commission stated: "[u]nder [MISO's] language in Article 11.4.1, the Interconnection Customer will be credited only for payments for transmission service taken with respect to the Generating Facility."²¹

The LGIA at issue here contains the section 11.4.1 language the Commission considered and clarified above. Tatanka errs by claiming that Montana-Dakota has breached section 11.4.1 of the LGIA by failing to make a lump-sum reimbursement to Tatanka for all of its claimed costs for Network Upgrades under the LGIA, plus interest. Such reimbursement is inconsistent with the express provisions in the LGIA that govern the timing of the transmission credit reimbursement to the Interconnection Customer. As described above, under the LGIA, the obligation to repay the Interconnection Customer does not begin until payments are made under the MISO Tariff for transmission services with respect to the Tatanka Generating Facility. Such reimbursements are then made as payments are made under the MISO Tariff for transmission services with respect to the Tatanka Generating Facility.²²

¹⁹ Order No. 2003 at P 676.

²⁰ Midwest Indep. Transmission Sys. Operator, Inc., 108 FERC ¶ 61,027.

²¹ Midwest Indep. Transmission Sys. Operator, Inc., 109 FERC ¶ 61,085 at P 56 (2004).

²² To the extent Tatanka takes issue with the crediting aspect of Section 11.4.1, the proper complaint procedure is to submit a complaint against the MISO alleging the section is unjust and unreasonable, not against Montana-Dakota

Tatanka and Montana-Dakota have not made any alternative arrangements for Tatanka to receive money it expended in constructing Network Upgrades. Tatanka cannot point to any provision in the LGIA that otherwise amends the crediting provisions of section 11.4.1 that would entitle Tatanka to anything other than payment once it demonstrates that it has taken transmission service under the MISO OATT.

In summary, neither the express provisions of the LGIA, nor the Commission's crediting policy allow Tatanka as Interconnection Customer to demand that Montana-Dakota, as Transmission Owner, repay in one lump-sum 100% of the costs advanced for Network Upgrades, plus interest. Accordingly, Montana-Dakota requests that the Commission find that Montana-Dakota has not breached its repayment obligations under the LGIA.

alleging a failure to remit a lump sum payment.

VI. CONCLUSION

WHEREFORE, for the reasons set forth above, Montana-Dakota requests that the Commission: (1) find that Montana-Dakota has not breached section 11.4.1 of the LGIA; and (2) set for hearing the material issue of fact in dispute between the parties to the LGIA, namely, the appropriate amount, if any, that Montana-Dakota will be obligated to repay Tatanka for the costs associated with its construction of the Network Upgrades.

Respectfully submitted

/s/ Evan C. Reese

Evan C. Reese
Andrew Art
Adam Schiche
Van Ness Feldman, P.C.
1050 Thomas Jefferson St., NW
Washington, DC 20007
Tel. (202) 298-1800
Fax (202) 338-2416

Daniel S. Kuntz
Associate General Counsel
MDU Resources Group, Inc.
Bismarck, ND 58506-5650
Tel. (701) 222-7612
Fax (701) 222-7607

Counsel for Montana-Dakota Utilities Co.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person included on the official service list compiled by the Secretary in this proceeding in accordance with Section 385.2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission.

Dated at Washington, D.C., this 1st day of March 2010.

/s/ Andrew B. Art
Andrew B. Art
Van Ness Feldman, P.C.
1050 Thomas Jefferson St., N.W.
Washington, DC 20007-3877
(202)298-1917