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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PUBLIC SERVICE COMMISSION

TATANKA WIND POWER, LLC)
)
Complainant)
)
v.)
)
MONTANA-DAKOTA UTILITIES)
CO., a division of MDU Resources)
Group, Inc.)
)
Respondent)

Docket No. EL10-41-000

MOTION FOR LEAVE TO FILE ANSWER AND
ANSWER OF MONTANA-DAKOTA UTILITIES COMPANY

Pursuant to Rules 212 and 213 of the Rules and Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 CFR § 385.212, .213 (2009), Montana-Dakota Utilities Company, a division of MDU Resources Group, Inc. (“Montana-Dakota”) hereby moves to file an answer to the March 16, 2010 answer filed by Tatanka Wind Power, LLC (“Tatanka”) in the above-referenced proceeding.

I. BACKGROUND

On February 9, 2010, Tatanka filed a complaint against Montana-Dakota in the above-referenced proceeding (“Complaint”). The Complaint is limited to a single allegation: that Montana-Dakota breached its obligations under Section 11.4.1 of the Amended and Restated Large Generation Interconnection Agreement (the “LGIA”) among Tatanka, Montana-Dakota and the Midwest Independent Transmission System Operator, Inc. (“MISO”) by failing to repay Tatanka for 100 percent of Tatanka’s costs, plus interest, for network upgrades relating to the

interconnection of Tatanka's 180 MW wind generating facility. On March 1, 2010, Montana-Dakota answered Tatanka's Complaint ("Montana-Dakota's Answer"). Montana-Dakota's Answer demonstrated that it had no obligation to repay Tatanka in lump sum for 100 percent of Tatanka's costs, plus interest, for network upgrades, and that Montana-Dakota had not breached Section 11.4.1 of the LGIA. Nevertheless, Montana-Dakota acknowledged that the Commission should resolve the dispute between Montana-Dakota and Tatanka regarding the amount, if any, that Tatanka would be owed for the design and construction of the Stand Alone Network Upgrades that Tatanka constructed under the self-build option in the LGIA.

In its Answer, Montana-Dakota demonstrated that Tatanka is not presently entitled to any reimbursement for its costs associated with the Network Upgrades because Montana-Dakota has not accepted ownership of the facilities due to the fact that they materially deviate from the requirements of the LGIA and Montana-Dakota's standards and design specifications. Montana-Dakota also demonstrated that Tatanka had not justified the cost increase over the estimate included in the currently effective LGIA that is on file with the Commission. By choosing the self-build option under the LGIA, Tatanka assumed the risk for any cost overruns associated with its design and construction practices and delays in construction that are solely attributable to it and its predecessor.

In addition, Montana-Dakota sufficiently demonstrated that a minimum of \$500,000 would be required to make the minimal amount of changes to the facilities built by Tatanka to conform to the requirements of the LGIA and Montana-Dakota's standards and design specifications. Montana-Dakota asserts that Tatanka should be responsible for 100% of the additional costs to conform the facilities to the LGIA and Montana-Dakota's standards and design specifications, because these costs would not be necessary but for Tatanka's failure to

build Network Upgrades consistent with the requirements of the LGIA and the standards and design specifications. Tatanka filed an answer to Montana-Dakota's answer on March 16, 2010 ("Tatanka's Answer"). Tatanka's Answer admits that the Network Upgrades it constructed are not in conformance with the LGIA and the standards and design specifications it received from Montana-Dakota.

Tatanka's Answer, however, mischaracterizes the material facts that are not in dispute, omits significant material facts that are not in dispute, misidentifies the legal issues that need resolution in this proceeding, and presents new arguments not in its Complaint. Montana-Dakota files the instant Answer to clarify the issues that require resolution in this proceeding.

II. MOTION FOR LEAVE TO FILE ANSWER

The Commission's regulations typically do not permit answers to an answer; however, the Commission has the authority to waive this prohibition for good cause.¹ The Commission will allow such answers "when doing so will not unduly delay the proceeding or prejudice any party and the answer will clarify the issues and assist the Commission in its decision making."² Good cause exists for the Commission to accept this answer because it provides information that will aid the Commission in understanding and resolving the issues pending before it.

III. ANSWER

A. Tatanka Omits Several Material Facts and Its Statement of Issues Is Flawed.

Montana-Dakota does not agree with the list of material facts that Tatanka alleges are not in dispute. For example, the amount Tatanka is owed for the construction of the Network

¹ See 18 C.F.R. § 385.101(e)(2009).

² *Algonquin Gas Transmission, LLC*, 130 FERC 61,011 at P 11 (2010). See also, *Enterprise Texas Pipeline, LLC*, 130 FERC ¶ 61,153 at P 10 (2010); *Nevada Power Co.*, 130 FERC ¶ 61,147 at P 20 (2010); *South Carolina Elec. & Gas Co.*, 130 FERC ¶ 61,149 at P 29 (2010); *Southwest Power Pool, Inc.*, 130 FERC ¶ 61,077 at P 10 (2010); *California Independent System Operator Corp.*, 130 FERC ¶ 61,048 at P 8 (2010).

Upgrades is most certainly in dispute and, correspondingly, the amount of interest, if any, it is entitled to is also in dispute. Tatanka also failed to include the following material facts that both parties agree to:

- 1) Tatanka did not build Network Upgrades consistent with the facilities identified in Appendix A to the LGIA and the configuration included in Exhibit A1.a;
- 2) The Network Upgrades that were constructed by Tatanka do not conform to the standards and design specifications that MDU provided to Tatanka;
- 3) The as-filed LGIA and appendices have not been amended in accordance with Sections 30.9 or 30.10.

In addition, Tatanka misrepresents the ultimate issues the Commission needs to consider in this case. Montana-Dakota respectfully suggests that the Commission rule that Montana-Dakota has not breached its contract with Tatanka and MISO because the LGIA does not require lump sum repayment of 100 percent of the costs for the facilities constructed by Tatanka plus interest. Montana-Dakota further requests that the Commission decide the only remaining material issues in dispute: (1) whether Tatanka is presently entitled to reimbursement for facilities for which Montana-Dakota has not accepted ownership; (2) whether Tatanka is entitled to any reimbursement for facilities that, it admits, do not conform to the requirements of the LGIA and the Montana-Dakota standards and design specifications as Stand Alone Network Upgrades; and (3) to the extent Tatanka is entitled to any reimbursement at all, what amount will be owed to Tatanka?

B. Tatanka Is not Presently Entitled to Reimbursement for Network Upgrade Facilities for Which Montana-Dakota Has Not Accepted Ownership.

Tatanka is not eligible for reimbursement of the costs associated with the Network Upgrades until such time as Montana-Dakota accepts ownership of the facilities. Under the LGIA an Interconnection Customer may retain ownership of the Transmission Owner's

Interconnection Facilities and Stand Alone Network Upgrades.³ In Order No. 2003, the Commission discussed the Interconnection Requirements under the “Option to Build” provisions of the LGIA and required the Interconnection Customer to transfer control of the facilities, but did not require transfer of ownership.⁴ To the extent an Interconnection Customer retains ownership of the Stand Alone Network Upgrades, the Commission determined that it is not entitled to any credit or reimbursement for the costs associated with the facilities.⁵

Tatanka suggests that because the facilities were energized and the generating facility achieved Commercial Operation, Montana-Dakota has “accepted” the Network Upgrades and is required to reimburse Tatanka for the full cost of the facilities. Tatanka, however, is not entitled to reimbursement until such time as Montana-Dakota has accepted ownership of the facilities. Montana-Dakota asserts that, to date, it has not accepted ownership of the facilities because they do not conform to the LGIA or to Montana-Dakota’s design requirements.⁶ Tatanka’s Answer admits that, contrary to the requirement in Section 5.2(1), the facilities it constructed do not conform to the detailed description and one-line diagram of the Network Upgrades included in Appendix A and Exhibit A1.a of the LGIA and the standards and design specifications that Montana-Dakota provided in December 2006.⁷ Tatanka is not eligible for reimbursement of the costs associated with its nonconforming facilities until such time as Montana-Dakota acknowledges and accepts ownership of the facilities.

³ See Section 5.2(9).

⁴ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. Regulations Preambles ¶ 31,146 at P 362 (2003) (“Order No. 2003”).

⁵ Order No. 2003 at P 735.

⁶ On or about July 7, 2008, Tatanka provided Montana-Dakota with a Bill of Sale and evidence of a Warranty Deed for the facilities. Because the facilities do not conform to the facilities identified in the LGIA and Montana-Dakota’s standards and design specifications, Montana-Dakota has not acknowledged receipt of these items and has not accepted ownership of the facilities.

⁷ Tatanka Answer at p. 10.

C. Montana-Dakota Did Not Agree to nor Did It Approve Any Modifications to Its Design Specifications.

As described above, Tatanka admits that the facilities it constructed do not conform to the detailed description and one-line diagram of the Network Upgrades included in the LGIA and Montana-Dakota's standards and design specifications.⁸ Tatanka alleges that Montana-Dakota somehow approved the substantial departures from the LGIA and design specifications during "project team meetings."⁹

The LGIA on file with the Commission, however, requires all amendments to the LGIA and the appendices to be mutually agreed to by all parties and be in writing. Specifically, Section 30.9 requires any amendment to the LGIA to be mutually agreed to by written instrument duly executed by all of the parties. Similarly, Section 30.10 requires any amendment to the Appendices of the LGIA to be mutually agreed to by written instrument duly executed by all of the parties. In addition, the parties must agree in writing to waive any obligation of a party under the LGIA.¹⁰ There is no written agreement between Tatanka, Montana-Dakota, and MISO that authorizes any deviation from the terms of the LGIA, its appendices, or the design specifications Montana-Dakota provided to Tatanka. Nor did Tatanka request Montana-Dakota to provide any written waiver of Tatanka's obligations under the LGIA.

Without a written agreement to amend the LGIA between all of the parties, including MISO, Tatanka was required to follow the provisions of the LGIA on file with the Commission pursuant to Section 205 of the Federal Power Act. Section 5.2(1) of the LGIA provides that "the Interconnection Customer *shall* engineer, procure equipment, and construct the Transmission Owner's Interconnection Facilities and Stand Alone Network Upgrades . . . using standards and

⁸ Tatanka Answer at p. 10.

⁹ Id.

¹⁰ See Section 30.6. Section 30.6 of the LGIA specifies that there is no waiver of a party's obligations under the LGIA on any occasion where a party does not insist upon strict performance of any provision of the agreement.

specifications provided in advance by the Transmission Owner” The definition of “Stand Alone Network Upgrades” in the LGIA provides that the Interconnection Customer, the Transmission Owner, and the Transmission Provider must all agree as to what constitutes Stand Alone Network Upgrades and identify them in Appendix A.¹¹ Appendix A of the LGIA specifies the Transmission Owner Stand Alone Network Upgrades that Tatanka was obligated to build. These include, among other things, a 230 kV three circuit breaker ring bus, associated disconnect line switches, control house and associated equipment, station power voltage transformer, and station battery and charger.¹² Importantly, Appendix A states the “230 kV ring bus switching station shall be as detailed by MDU One-Line Drawing attached as Exhibit A1.a.” The one-line diagram illustrates the substation and interconnection configuration that governs the interconnection of the generating facility. Section 5.2(1), therefore, places an affirmative obligation on the Interconnection Customer, if it chooses the self-build option, to construct facilities that adhere to the LGIA and the design specifications of the Transmission Owner.

Tatanka states that the only “disputed fact is whether the facilities actually depart from MDU’s specifications or whether those specifications were in effect modified during the construction process.”¹³ Tatanka concedes, however, that the facilities it built do not conform to the description of Stand Alone Network Upgrades and the one-line diagram included in the LGIA or the design specifications it received from Montana-Dakota.¹⁴ As fully described in its answer to the Complaint and the supporting affidavits of Don Raveling and Henry Ford, Montana-Dakota did not approve any material modification to the LGIA or the design specifications for the Network Upgrades.

¹¹ LGIA at Original Sheet No. 20.

¹² LGIA at Appendix A.

¹³ Tatanka Answer at p. 5.

¹⁴ Tatanka Answer at p. 10.

There is no written agreement between the parties to the LGIA amending Section 5.2(1) or the appendices as would be required to change the design of the Network Upgrades under the LGIA. And Montana-Dakota has not agreed to waive any obligation of Tatanka to build facilities that conform to the LGIA and design specifications. Therefore, the Commission must find that the Parties have not consented to changes to the LGIA design specifications and Montana-Dakota is not required to accept ownership of the non-conforming facilities built by the Interconnection Customer.

D. Tatanka Has Not Justified the Increase in Costs over the Estimate It Negotiated in the LGIA.

Tatanka argues that an “estimate is an estimate”¹⁵ and implies that an Interconnection Customer should be permitted to expend any amount in the construction of facilities if it chooses the self-build option. Presumably in an effort to justify its unwarranted expense in constructing the facilities, Tatanka also argues that the \$1.8 million estimate “was not provided by Tatanka and was unrealistically low.” Tatanka even suggests that it was Montana-Dakota’s obligation to revise the estimate.

Tatanka provides no support for its claim that the estimate was unrealistically low, other than the *ex post* statement of Mr. Chocarro that it “seems unreasonably low to me and does not appear to recognize, for example the remoteness of the location and the additional complications dealing with such a site.”¹⁶ Neither Tatanka’s, nor its predecessor, Dakota Wind Harvest, LLC (“Dakota Wind”), objected to the \$1.8 million estimate that was included as part of the initial LGIA that was filed with FERC. If Tatanka truly believed the estimate was “unreasonably low,” it should have sought to change that estimate in the LGIA.

¹⁵ Tatanka Answer at p. 5.

¹⁶ Chocarro Supplemental Affidavit, at P 8.

In Order No. 2003, the Commission considered the effect of estimates included in the final agreement. Specifically, in consideration of the “Suspension” provision of the LGIA, the Commission determined that an Interconnection Customer can renegotiate any estimates included in the LGIA if it believes those estimates to be inaccurate:

Prices quoted for interconnection in the LGIA are estimates based on the results of studies conducted during the LGIP phase of the interconnection process. If it is apparent to the Parties at the time they execute the LGIA that contingencies . . . might affect the financial arrangements, the Parties should include such contingencies in their LGIA and address the effect of such contingencies on their financial obligations. If no such contingencies are accounted for in the executed LGIA, since the costs of Network Upgrades may influence an Interconnection Customer’s decision whether it can enter into an Interconnection Agreement, we leave it to the subsequent Interconnection Customer and the Transmission Provider to revisit the negotiated terms of their executed Interconnection Agreement.¹⁷

Tatanka’s predecessor, Dakota Wind, agreed to the cost estimate in its LGIA. Once Tatanka brought the project out of suspension, it did not seek to revisit or renegotiate the estimate for the construction of the Network Upgrades.

As demonstrated in the Ford Affidavit, the \$1.8 million estimate included in the initial LGIA accurately reflected the estimated costs associated with constructing the identified Network Upgrades. Tatanka provides no support for the allegation that the \$1.8 million estimate was not a reasonable estimate to include in the LGIA. Contrary to what it states in its answer, if Tatanka believed that the estimate included in its LGIA was somehow unreasonable, then Tatanka, not Montana-Dakota, should have sought to renegotiate the estimated costs.

Tatanka fails to provide any justification, in its complaint or in its answer, for expending more than 225% of the estimated costs included the LGIA on file with the Commission. Tatanka does not attempt to argue that a 225% cost increase is attributable to inflation between 2004 and 2007, when the facilities were built. Tatanka provides no evidence whatsoever as to why it

¹⁷ Order No. 2003 at P. 409.

failed to meet the negotiated cost estimate agreed to in the LGIA. Because Tatanka affirmatively agreed to the negotiated cost estimate and did not seek to negotiate a revised cost estimate with Montana-Dakota, Tatanka should bear the risk of any increase in costs above the negotiated cost estimate.

E. Tatanka Is Solely Responsible for the \$500,000 in Replacement Costs.

The entirety of the estimated \$500,000 cost that will be minimally required to conform the network upgrades to the LGIA and Montana-Dakota design requirements should be allocated to Tatanka, because but for Tatanka's improperly designed and construction of the Network Upgrades such additional expenses would be unnecessary. Tatanka should be responsible for 100% of these costs and Montana-Dakota should not be required to reimburse Tatanka for any such replacement costs.

Tatanka erroneously argues that Montana-Dakota seeks to replace, for the benefit of future interconnection customers, certain items that Tatanka built. All of the items identified in the Ford Affidavit that need to be replaced are items included in the LGIA on file with the Commission and clarified by Montana-Dakota's standards and design specifications. If Tatanka believes that any of the items included in the LGIA are somehow inappropriate to include as Network Upgrades for its generating facility, then it should have submitted a protest when the LGIA was filed with the Commission. It cannot now argue that any of the facilities identified in the LGIA are not for the benefit of the Tatanka wind project.

Irrespective of Tatanka's claims, all of the items identified in the Ford Affidavit pertain to appropriate Network Upgrades identified in the LGIA to accommodate the interconnection of the Tatanka facility. Items (a) through (c) correspond to line switches important to overall system reliability, a station power voltage transformer, and the proper battery installation. But for the

improper design and installation of nonconforming facilities by Tatanka, these items would not need to be replaced. Montana-Dakota customers should not be responsible for the incremental costs associated with replacing items that should have been installed originally.

The replacement of facilities identified in item (d) of the Ford Affidavit also pertains directly to the Tatanka project. The control room built by Tatanka is not big enough to accommodate the type and size of battery Montana-Dakota utilizes in facilities of this type. Montana-Dakota provided control room dimensions and the battery specifications it requires to Tatanka and Tatanka willfully ignored those specifications. As described in the Ford Affidavit, Montana-Dakota cannot retain the battery that was installed by Tatanka because it does not provide the proper back-up in the case of loss of station power. Nor does Montana-Dakota retain the type of battery installed by Tatanka which will lead to increased ongoing costs associated with ordering this type of battery when it needs to be replaced. Montana-Dakota needs to rebuild the control room to allow for enough safe, moveable space for its employees to maintain its preferred Lead-Acid Station battery. In any event, Tatanka agreed to build a 48' X 24' control house when it opted for the self-build option. It should be responsible for the replacement costs of its improperly constructed facility.

Lastly, in item (e) of the Ford Affidavit, Mr. Ford indicates that, because Tatanka did not adhere to the design specifications and substation configuration Montana-Dakota provided in December 2006, it is difficult to interconnect any future generating facility at the substation. Instead, Montana-Dakota will be required to pursue the more costly and less reliable duplication of substation facilities, at the interconnection customer's expense, at a location close to the Tatanka substation. This item is not included in the \$500,000 figure. Montana-Dakota simply

highlights this fact to demonstrate the deleterious and costly affects of Tatanka's willful disregard for the requirements of the LGIA and Montana-Dakota's design specifications.

Therefore, the Commission should find that Tatanka is responsible for 100 percent of the costs to conform the Network Upgrades to the LGIA and Montana-Dakota design specifications, and further find that Montana-Dakota should not be required to reimburse Tatanka for any such additional costs that would have been unnecessary but for Tatanka's improper design and construction of the Network Upgrades.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, Montana-Dakota respectfully requests that the Commission accept this answer and order such relief as requested by Montana-Dakota in its pleadings.

Respectfully submitted

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Dated: March 31, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be 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 31st day of March 2010.

/s/ Evan C. Reese

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