

132 FERC ¶ 61,103
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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AUG 04 2010

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

PUBLIC SERVICE COMMISSION

Tatanka Wind Power, LLC

Docket No. EL10-41-000

v.

Montana-Dakota Utilities
Company, a division of MDU Resources Group, Inc.

ORDER DISMISSING COMPLAINT

(Issued August 4, 2010)

1. In this order, we dismiss a complaint filed by Tatanka Wind Power, LLC (Tatanka) against Montana-Dakota Utilities Company, a division of MDU Resources Group, Inc. (Montana-Dakota) relating to a dispute over payment for certain Network Upgrades¹ constructed by Tatanka at its Dakota Wind generation facility, as described below. The Network Upgrades are the subject of a Large Generator Interconnection Agreement (LGIA) under Midwest Independent Transmission Service Operator, Inc.'s (Midwest ISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff among Tatanka (as interconnection customer), Montana-Dakota (as transmission owner), and Midwest ISO (as transmission provider). Although we dismiss the complaint, we take this opportunity to provide guidance concerning Tatanka's obligation under the LGIA to complete the Network Upgrades in accordance with the approved specifications and Montana-Dakota's obligation to pay Tatanka for the costs incurred by Tatanka to construct the Network Upgrades at such time as the Network Upgrades are completed in accordance with the LGIA's specifications.

¹ Network Upgrades are facilities on the transmission provider's side of the point of interconnection with the transmission provider's transmission system.

I. Background

A. Order No. 2003

2. In Order No. 2003, the Commission directed public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to file revised open access transmission tariffs to add Standard Large Generator Interconnection Procedures (*pro forma* LGIP) and a Standard Large Generator Interconnection Agreement (*pro forma* LGIA).² In response to Order No. 2003, Midwest ISO filed its *pro forma* LGIA in Docket No. ER04-458-000, *et al.* The Commission approved Midwest ISO's *pro forma* LGIA effective July 8, 2004.³

3. As relevant here, under Midwest ISO's *pro forma* LGIA, an interconnection customer may opt to build Network Upgrades needed to serve that customer under certain circumstances.⁴ If the interconnection customer opts to build the Network Upgrades, it is required to build those upgrades to the specifications agreed to and set forth in the LGIA that is filed with the Commission.⁵ Finally, an interconnection customer that initially funds the cost of the agreed upon Network Upgrades is entitled to full cost reimbursement.⁶

B. Original Dakota Wind LGIA

4. On March 2, 2005, Midwest ISO filed the original, unexecuted LGIA applicable to Network Upgrades that Dakota Wind Harvest, LLC (Dakota Wind) proposed to build for its 180 megawatt (MW) wind generation facility located in Dickey and McIntosh

² See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

³ See *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,027, (2004), *order on reh'g*, 109 FERC ¶ 61,085 (2004).

⁴ See Midwest ISO's *pro forma* LGIA, Article 5.1.3, "Option to Build."

⁵ *Id.* at Article 5.2, "General Conditions Applicable to Option to Build."

⁶ *Id.* at Article 11.4.1, "Repayment of Amounts Advanced for Network Upgrades."

Counties, North Dakota and McPherson County, South Dakota, within the Midwest ISO's geographic region.⁷ That facility is interconnected with the transmission grid owned by Montana-Dakota via a 230 kV single-circuit transmission line. The parties to this unexecuted LGIA were Dakota Wind, the interconnection customer, Montana-Dakota, the transmission owner, and Midwest ISO, the transmission provider (Original Dakota Wind LGIA). The Original Dakota Wind LGIA, Article 11.4.1, mirrored the language in Midwest ISO's *pro forma* LGIA, Article 11.4.1, as in effect at the time.⁸ Specifically, the Original Dakota Wind LGIA, Article 11.4.1, provided for repayment to Dakota Wind of 100 percent of its costs incurred for Network Upgrades under the option to build.⁹ In that proceeding, Montana-Dakota proposed that the Commission reject the *pro forma* crediting language and defer action on replacement language that was pending Commission action on a revised crediting mechanism that was expected to be filed by Midwest ISO in response to recommendations by Midwest ISO's Regional Expansion Criteria and Benefits Task Force. The Commission did not require Midwest ISO to change the *pro forma* crediting language in the Original Dakota Wind LGIA, and found that the revision Montana-Dakota wanted did not meet the standard for non-conforming

⁷ See Midwest Independent Transmission System Operator, Inc., Submission of Unexecuted Large Generator Interconnection Agreement, Docket No. ER05-667-000.

⁸ See *pro forma* LGIA, Article 11.4.1 which states:

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 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.

⁹ Original Dakota Wind LGIA, Article 11.4.1.

provisions.¹⁰ The Commission approved the Original Dakota Wind LGIA, subject to modification, effective February 28, 2005.¹¹

C. Revised Dakota Wind LGIA

5. In compliance with the Original Dakota Wind LGIA Order,¹² Midwest ISO filed an unexecuted copy of a revised LGIA for the Dakota Wind facility among the same parties on November 23, 2005 (Revised Dakota Wind LGIA).¹³ The Revised Dakota Wind LGIA continued to require Montana-Dakota to repay Dakota Wind 100 percent of the costs incurred by Dakota Wind for the agreed upon Network Upgrades under the option to build.¹⁴ On April 21, 2006, the Commission accepted for filing the Revised Dakota Wind LGIA, effective as of February 28, 2005.¹⁵

D. Amended and Restated Tatanka LGIA

6. Midwest ISO filed an amended and restated LGIA for the Dakota Wind facility on December 21, 2007, that, among other things, substituted Tatanka as Dakota Wind's

¹⁰ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 113 FERC ¶ 61,082, at P 27 (2005) (Original Dakota Wind LGIA Order) (“[T]he Commission has stated that non-conforming changes must be necessitated by unique circumstances or other operational reasons. The circumstances described by Montana-Dakota do not warrant the approval of its proposed non-conforming change.”).

¹¹ *Id.* Other sections of the Original Dakota Wind LGIA were conditionally accepted in part and rejected in part.

¹² The required revisions to the Original Dakota Wind LGIA did not relate to the repayment provisions of Article 11.4.1, but instead to metering issues, which were reflected in Articles 7.1 and 7.4 of the Revised Dakota Wind LGIA.

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

¹⁴ See Revised Dakota Wind LGIA, Article 11.4.1.

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

successor in interest (Amended and Restated Tatanka LGIA).¹⁶ Exhibit B of the filing 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. The Amended and Restated Tatanka LGIA provides for the repayment to Tatanka of 100 percent of its costs incurred for Network Upgrades.¹⁷ The Commission accepted the Amended and Restated Tatanka LGIA for filing on February 7, 2008, effective December 22, 2007.¹⁸

II. Tatanka's Complaint

7. On February 9, 2010, Tatanka filed a complaint in this proceeding against Montana-Dakota that alleges that Montana-Dakota breached its obligation under the Amended and Restated Tatanka LGIA by refusing to pay Tatanka for 100 percent of the costs Tatanka incurred to construct the Network Upgrades.

8. Tatanka states that, pursuant to Amended and Restated Tatanka LGIA, Article 5.1.3, Tatanka exercised its option to build the Network Upgrades,¹⁹ and all of the

¹⁶ See 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 See Amended and Restated Tatanka LGIA, Article 11.4.1.

¹⁸ See Letter Order, Docket No. ER08-352-000 (February 7, 2008) (Amended and Restated Tatanka LGIA Order).

¹⁹ Amended and Restated Tatanka LGIA, Article 5.1.3 reads as follows:

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

(continued...)

provisions applicable to the proper exercise of the option to build have been satisfied. Tatanka further states that it built the Network Upgrades identified in Amended and Restated Tatanka LGIA, section 3(a) of Appendix A, and initially paid all of the costs associated therewith. Tatanka states that it submitted an invoice to Montana-Dakota on September 30, 2008, requesting repayment of those costs in accordance with Amended and Restated Tatanka LGIA, Article 11.4.1, and, on February 5, 2009, submitted an updated invoice in the amount of \$4,036,892.67 for the Network Upgrades, plus interest of \$239,895.00, calculated pursuant to the Commission's regulations²⁰ and the Amended and Restated Tatanka LGIA, for a total of \$4,276,787.67. According to Tatanka, on October 22, 2008, Montana-Dakota notified it and Midwest ISO that Montana-Dakota disputed the original invoice. Tatanka states that, notwithstanding its efforts to resolve this dispute, Montana-Dakota refuses to repay Tatanka for the costs that it incurred building the Network Upgrades.

9. Tatanka requests that the Commission grant its complaint without setting any matters for hearing and direct Montana-Dakota to pay it a lump sum of cash totaling the entire construction costs, plus interest.

III. Notice of Filing, Answer, and Responsive Pleadings

10. Notice of Tatanka's complaint was published in the *Federal Register*,²¹ with the answer, interventions or protests due on or before March 1, 2010. Montana-Dakota filed its motion to intervene and answer on March 1, 2010. Timely motions to intervene, without substantive comments, were filed by Otter Tail Power Company (Otter Tail) and

A. Except for Stand Alone Network Upgrades, Interconnection Customer shall have no right to construct Network Upgrades under this option.

²⁰ Amended and Restated Tatanka LGIA, Article 11.4.1 states in pertinent part:

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 . . . for the Network Upgrades, . . . Any repayment shall include interest calculated in accordance with the methodology set forth in FERC's regulations at 18 C.F.R. § 35.19(a)(2)(iii) from the date of any payment for the Network Upgrades through the date on which the Interconnection Customer receives repayment of such payment pursuant to this subparagraph.

²¹ 75 Fed. Reg. 8322 (2010).

Midwest ISO. The North Dakota Public Service Commission (North Dakota Commission) filed a motion to intervene out of time.

11. On March 15, 2010, Tatanka filed an answer in opposition to Otter Tail's motion to intervene. According to Tatanka, Otter Tail's interest is speculative at best since it is not a party to and has no direct interest in the interconnection agreement that gives rise to the instant dispute between Tatanka and Montana-Dakota.

IV. Montana-Dakota's Answer

12. In its March 1, 2010 answer, Montana-Dakota denies that it breached its duty under Article 11.4.1 of the Amended and Restated LGIA to pay Tatanka for the costs of the Network Upgrades. Montana-Dakota requests that the Commission set the matter for hearing, asserting that there are material issues of fact in dispute regarding the amount, if any, that Montana-Dakota is obligated to pay Tatanka. 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 it must pay. Further, according to Montana-Dakota, the facilities built by Tatanka deviate materially from the Network Upgrades described in the Amended and Restated Tatanka LGIA and the design specifications that it provided to Tatanka.

13. Montana-Dakota states that, under the Amended and Restated Tatanka LGIA,²² it is not required to approve or accept Network Upgrades built by Tatanka if those facilities do not meet the standards and specifications approved by Montana-Dakota as set out in the Amended and Restated Tatanka LGIA. In that regard, in an affidavit filed with the March 1, 2010, answer, Mr. Henry Ford, an electrical engineer employed by Montana-Dakota, summarizes the major deviations from the approved design specifications and describes the reliability issues associated with those deviations.²³ According to Mr. Ford, these include:

²² Montana-Dakota notes that Article 5.2 (10), in relevant part, provides that:

. . . 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. . . .

²³ Montana-Dakota's March 1, 2010 Answer at Exhibit No. MDU-B, and Exhibit Nos. MDU-B.1 through MDU-B.7.

- (1) 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);
- (2) A failure to install a station service voltage transformer, 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);
- (3) 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);
- (4) 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); and
- (5) 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).

14. Montana-Dakota further asserts that Dakota Wind's election of the option to build, coupled with Dakota Wind's, and later, Tatanka's self-imposed delays and failures to meet the construction milestones, caused significant cost overruns from the \$1.8 million estimate of costs contained in the Original Dakota Wind LGIA, the Revised Dakota Wind LGIA, and the Amended and Restated Tatanka LGIA. Montana-Dakota asserts that since Dakota Wind chose the option to build provision under the Original Dakota Wind LGIA, Article 5.1.3,²⁴ Tatanka assumed Dakota Wind's obligations. Accordingly, Montana-Dakota argues that Tatanka is obligated to hold Montana-Dakota harmless from the increase in costs above the \$1.8 million cost estimate contained in the Amended and Restated Tatanka LGIA.

15. Finally, Montana-Dakota states that, because Tatanka failed to construct the Network Upgrades described in the Amended and Restated Tatanka LGIA in accordance with the design specifications that Montana-Dakota provided, it will be necessary to

²⁴ The language in Original Dakota Wind LGIA, Article 5.1.3 did not change in either of the two subsequent LGIAs.

spend at least \$500,000 to replace several items at the Tatanka substation in order to make the station minimally acceptable for long-term reliable use on the transmission system. Accordingly, Montana-Dakota argues that the Commission should exclude \$500,000 from any amount that the Commission determines Montana-Dakota owes Tatanka.

V. Tatanka's Response to Montana-Dakota's Answer

16. On March 16, 2010, Tatanka filed a response to Montana-Dakota's answer in which it asserts that the parties agree to all material facts and that the legal issues that must be resolved in this proceeding do not require resolution of any material facts. Specifically, comparing Tatanka's complaint, Montana-Dakota's answer, and the contents of Tatanka's response to Montana-Dakota's answer, Tatanka states that it is clear that the parties agree that:

- (1) the Amended and Restated Tatanka LGIA governs the dispute;
- (2) the Amended and Restated Tatanka LGIA repayment obligation for Network Upgrades specifies a repayment level of 100 percent;
- (3) there is no dispute about the identity, definition, and classification of the facilities identified in the revised invoice submitted to Montana-Dakota, a copy of which is attached to the complaint;
- (4) the \$4,036,892.67 amount identified in the revised invoice was incurred by Tatanka to construct Network Upgrades;
- (5) the \$239,895.00 included as interest due as of the date of the revised invoice was calculated in accordance with the Amended and Restated Tatanka LGIA and Commission's regulations;
- (6) the Network Upgrades have been energized and were put into commercial operation as of July 24, 2008; and
- (7) an additional \$500,000 in renovation costs would address Montana-Dakota's concerns regarding the layout and functionality of the substation.²⁵

17. According to Tatanka, the only disputed facts are whether the facilities actually depart from Montana-Dakota's specifications or whether those specifications were in effect modified during the construction process. Tatanka posits that since Montana-Dakota fully participated in the construction process but did not raise any objections or

²⁵ Tatanka Response at 4, n7, citing Montana-Dakota's Answer at 3; Ford Affidavit at ¶ 10. Tatanka acknowledges that the \$500,000 estimate is an accurate assessment of the additional costs required to be expended in order bring the Network Upgrades into compliance with the design specifications that the parties agreed to under the Amended and Restated Tatanka LGIA.

pursue any objections made in the appropriate manner, Montana-Dakota, by its actions or inaction, modified the specifications for the Network Upgrades.

18. Tatanka states that it is willing to concede that \$500,000 in renovations would resolve Montana-Dakota's concerns regarding the specifications. Concerning the renovation issues, Tatanka asserts that the Commission need only determine whether the renovations need to be done, which party should perform the renovations, and which party should be responsible for the renovation costs. If the Commission chooses to reach these issues, Tatanka argues the Commission can resolve them on the pleadings.

VI. Montana-Dakota's March 31, 2010 Answer to Tatanka's Response

19. On March 31, 2010, Montana-Dakota filed an answer to Tatanka's response. Montana-Dakota states that it does not agree with the list of material facts as to which Tatanka alleges there is no dispute. For example, Montana-Dakota disputes the amount, plus interest, that Tatanka is owed for the construction of the Network Upgrades. Montana-Dakota also points out that Tatanka failed to include the following material facts that, according to Montana-Dakota, both parties agree to, namely, (1) that Tatanka did not build Network Upgrades consistent with the facilities identified in the Amended and Restated Tatanka LGIA (including the appendices and exhibits thereto); (2) that the Network Upgrades that were constructed by Tatanka do not conform to the standards and design specifications that Montana-Dakota provided to Tatanka; and (3) that the Amended and Restated Tatanka LGIA and appendices have not been amended in accordance with Articles 30.9 or 30.10.

20. In addition, Montana-Dakota argues that Tatanka misrepresents the ultimate issues the Commission needs to consider in this case. According to Montana-Dakota, the Commission should rule that Montana-Dakota has not breached its contract with Tatanka and Midwest ISO because the Amended and Restated Tatanka LGIA does not require lump sum repayment of 100 percent of the costs for the facilities constructed by Tatanka, plus interest.²⁶ Montana-Dakota further requests that the Commission decide what it characterizes as 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 Amended and Restated Tatanka LGIA and the Montana-Dakota standards and design specifications as stand-alone Network Upgrades; and

²⁶ Montana-Dakota March 31, 2010 Answer at 4.

(3) to the extent Tatanka is entitled to any reimbursement at all, what amount will be owed to Tatanka.

VII. Tatanka's April 28, 2010 Response to Montana-Dakota's March 31, 2010 Answer

21. On April 28, 2010, Tatanka responded to Montana-Dakota's March 31, 2010 answer. Tatanka challenges Montana-Dakota's assertion that, while it may be operating the Network Upgrades, it has not accepted ownership of the Network Upgrades and therefore has no obligation to pay Tatanka's construction costs. Tatanka agrees that the Amended and Restated Tatanka LGIA distinguishes ownership of Network Upgrades from the operation of Network Upgrades for purposes of determining the transmission owner's obligation to pay the interconnection customer the full cost incurred to build Network Upgrades. However, Tatanka points out that the distinction between ownership and operation of Network Upgrades is relevant only if the interconnection customer retains ownership of the Network Upgrades.²⁷ Tatanka asserts that the Amended and Restated Tatanka LGIA, Article 5.2(9), requires that it transfer ownership of the Network Upgrades to Montana-Dakota, unless the parties otherwise agree, and that Tatanka in fact transferred ownership of the Network Upgrades to Montana-Dakota in July 2008 by delivering a bill of sale and a warranty deed for the facilities, which has been properly recorded. Tatanka further states that Montana-Dakota has paid taxes on the parcel containing the Network Upgrades.²⁸ Lastly, Tatanka points out that Montana-Dakota has not referenced and indeed cannot reference a section in the Amended and Restated Tatanka LGIA that permits Montana-Dakota to reject ownership of the facilities in order to avoid its reimbursement obligations.²⁹

22. Tatanka further argues that the design issues raised by Montana-Dakota pertain to specifications sent to Tatanka separately and were not a part of the Amended and Restated Tatanka LGIA. Thus, Tatanka argues, the requirement that modifications to the

²⁷ See Tatanka April 28, 2010 Response at 2-3.

²⁸ *Id.* at 5-6.

²⁹ Tatanka points out that, under the Amended and Restated Tatanka LGIA, Montana-Dakota can reject any design (Article 5.2(3)) and that Tatanka is obligated to remedy deficiencies that Montana-Dakota identifies (Article 5.2(6)). However, Tatanka states that Montana-Dakota never identified any deficiencies and that Article 5.2(6) only imposes an obligation on Tatanka to remedy deficiencies identified by Montana-Dakota "at any time during the construction," which, according to Tatanka, has long since been completed. *Id.* at 3-4.

Amended and Restated Tatanka LGIA be in writing is not relevant. According to Tatanka, “the changes to the layout were already known to all parties when the Amended and Restated Tatanka LGIA was filed with the Commission.[footnote omitted] While an updated version should have been attached, even an oral modification is arguably acceptable.[footnote omitted]”³⁰

23. Tatanka points out that of the five items identified in Mr. Ford’s affidavit as deviations from approved specifications, only two were actually included in the one line diagram in the Amended and Restated Tatanka LGIA. Tatanka states that it has conceded that those two items were not installed and that they would be among the items that could be added with the estimated \$500,000 in additional work that Montana-Dakota identified to resolve the deviations. Tatanka asserts that these items would be additions to the existing substation rather than a replacement of the facilities that have been constructed and accepted for commercial operation. Tatanka reiterates that, if the Commission requires it to install these additional facilities, then the installation costs should be reimbursable in accordance with Articles 5.1.3 and 11.4.1 of the Amended and Restated Tatanka LGIA.³¹

VIII. Montana-Dakota’s Motion To Reject Tatanka’s April 28, 2010 Response

24. On May 11, 2010, Montana-Dakota filed a motion to reject Tatanka’s April 28, 2010 response. According to Montana-Dakota, the response is prohibited by Commission rules; the response was filed 29 days after the Montana-Dakota March 31, 2010 answer to which it responds; and all of the issues raised have been addressed in previous pleadings in this docket. Montana-Dakota further argues that some of the evidence presented in Tatanka’s April 28, 2010 response should have been included in the initial Complaint.

IX. Tatanka’s Answer to Montana-Dakota’s Motion To Reject

25. On May 20, 2010, Tatanka filed an answer to Montana-Dakota’s motion to reject its April 28, 2010 response. In this answer Tatanka takes issue with Montana-Dakota’s assertion that some of the evidence included in the April 28, 2010 response could have been included in the Complaint. Tatanka also challenges Montana-Dakota’s assertion that some of the evidence presented in the April 28, 2010 response is irrelevant to the issues presented in the Complaint.

³⁰ Tatanka April 28, 2010 Response at 7.

³¹ *Id.* at 7-8.

X. Discussion**A. Procedural Matters**

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,³² the timely unopposed motions to intervene of Montana-Dakota and Midwest ISO serve to make them parties to this proceeding. Pursuant to Rule 214(d),³³ we will grant the North Dakota Commission's late-filed motion to intervene given its interest in this proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

27. Notwithstanding Tatanka's objection, we will grant Otter Tail's motion to intervene. Rule 214(b)(2)³⁴ requires a movant to represent that it has an interest which may be directly affected by the outcome of the proceeding or that its participation is in the public interest. We find that Otter Tail has met this standard.

28. Rule 213(a)(2)³⁵ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Tatanka's March 16, 2010, response to Montana-Dakota's answer, Montana-Dakota's March 31, 2010 answer to Tatanka's response, and Tatanka's April 28, 2010 response to Montana-Dakota's March 31, 2010 answer because they have provided information that assisted us in our decision-making process. Accordingly, we will deny Montana-Dakota's May 11, 2010 motion to reject Tatanka's April 28, 2010 response.

B. Commission Determination

29. The primary dispute here concerns Tatanka's obligation to build and Montana-Dakota's obligation to pay for Network Upgrades that Tatanka has constructed at its Dakota Wind facility under the option to build. As described above, the parties addressed these obligations in three iterations of the LGIA, with each iteration of the agreement using virtually identical language.³⁶ Based on the pleadings, we will dismiss the

³² 18 C.F.R. § 385.214 (2010).

³³ 18 C.F.R. § 385.214(d) (2010).

³⁴ 18 C.F.R. § 385.214(b)(2) (2010).

³⁵ 18 C.F.R. § 385.213(a)(2) (2010).

³⁶ Exhibit B of the Amended and Restated Tatanka LGIA 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. *See* Tatanka Complaint at 9.

complaint as premature. We find that Tatanka, by its own admission, did not build the Network Upgrades to the specifications contained in the Amended and Restated Tatanka LGIA.³⁷ Tatanka's obligation to build to the specifications contained in the Amended and Restated Tatanka LGIA precedes any obligation on the part of Montana-Dakota to repay Tatanka for the costs incurred by Tatanka in building the Network Upgrades.

1. Tatanka's obligation to build the Network Upgrades

30. Under the Original Dakota Wind LGIA, Dakota Wind contracted with Montana-Dakota to build the Network Upgrades. In light of Montana-Dakota's inability to meet Dakota Wind's proposed construction schedule, however, Dakota Wind exercised its option to build the Network Upgrades, subject to specifications provided by Montana-Dakota. This option to build was contained in the Original Dakota Wind LGIA and the Amended Dakota Wind LGIA, Article 5.1.3.³⁸ According to statements in the pleadings that do not appear to be in dispute, Dakota Wind suspended construction of the Network Upgrades soon after the Original Dakota Wind LGIA was filed with the Commission. When Tatanka assumed responsibility for the project as successor to Dakota Wind, some two and one half years after the Revised Dakota Wind LGIA was filed, Tatanka agreed to build the Network Upgrades pursuant to the same option to build that Dakota Wind elected.

31. Montana-Dakota states, and Tatanka concedes, that the Network Upgrades were not built to the exact specifications described in the Amended and Restated Tatanka LGIA.

32. Tatanka could have sought to modify the approved specifications for the Network Upgrades. Such modification could have been accomplished through mutual agreement with Montana-Dakota pursuant to Article 30.10 of the Amended and Restated Tatanka LGIA,³⁹ which modification would have been required to be filed with the Commission.

³⁷ Tatanka Response at 4, n7.

³⁸ Article 5.1.3, "Option to Build," gives the Interconnection Customer the right to assume responsibility for the construction of the Transmission Provider's interconnection facilities and stand alone network upgrades if the Transmission Provider notifies the Interconnection Customer that it cannot meet the construction completion dates.

³⁹ See Amended and Restated Tatanka LGIA, Article 30.10, "Modification by the Parties," which states:

The Parties may by mutual agreement amend the Appendices to this LGIA by a written instrument duly executed by both of the Parties. Such

(continued...)

Alternatively, Tatanka could have sought to unilaterally amend the Amended and Restated Tatanka LGIA pursuant to Article 30.11.⁴⁰ However, there is no indication that the parties mutually or Tatanka unilaterally sought to modify the approved specifications by either means.

33. Accordingly, we find Tatanka's complaint alleging that Montana-Dakota breached its obligation under the Amended and Restated Tatanka LGIA to pay Tatanka for 100 percent of the costs Tatanka incurred to construct the Network Upgrades to be premature. Pursuant to Article 12.2 of the Amended and Restated Tatanka LGIA, Montana-Dakota's obligation to repay Tatanka for the entire cost of the Network Upgrades does not attach until Tatanka submits an invoice for the final cost of Network Upgrades built in accordance with the Amended and Restated Tatanka LGIA.

2. Montana-Dakota's obligation to pay for the Network Upgrades

34. Notwithstanding our dismissal of Tatanka's complaint, we reiterate here that, under Amended and Restated Tatanka LGIA, Article 11.4, Tatanka is entitled to full reimbursement of the amount that it expends to construct the Network Upgrades under the option to build.⁴¹ As the Commission stated in Order No. 2003-B, "Order No. 2003-A reiterated that, unless the Transmission Provider and the Interconnection Customer agree otherwise, the Interconnection Customer must initially fund the cost of any

amendment shall become effective and a part of this LGIA upon satisfaction of all Applicable Laws and Regulations.

⁴⁰ See Amended and Restated Tatanka LGIA, Article 30.11, "Reservation of Rights," which states in part:

[...] Interconnection Customer shall have the right to make a unilateral filing with FERC to modify this LGIA pursuant to Section 206 or any other applicable provision of the Federal Power Act and FERC's rules and regulations thereunder; provided that each Party shall have the right to protest any such filing and to participate fully in any proceeding before FERC in which such modifications may be considered.

⁴¹ As we stated in Order No. 2003-B at P 10: "Order No. 2003-A reiterated that, unless the Transmission Provider and the Interconnection Customer agree otherwise, the Interconnection Customer must initially fund the cost of any Network Upgrades . . . The Transmission Provider must then reimburse the Interconnection Customer on a dollar-for-dollar basis, with interest."

Network Upgrades . . . The Transmission Provider must then reimburse the Interconnection Customer on a dollar-for-dollar basis, with interest.”⁴²

35. Thus, we find that Montana-Dakota is obligated to repay Tatanka for the entire cost of the Network Upgrades, plus applicable interest, at such time as Tatanka submits a final invoice for the total cost of the Network Upgrades built in accordance with the specifications set forth in the Amended and Restated Tatanka LGIA.⁴³ This conclusion follows from Amended and Restated Tatanka LGIA Article 12.2, “Final Invoice,” which provides that within six months “after completion” of the Network Upgrades, an invoice “for the final cost” of construction of the facilities shall be submitted. There is no provision in the agreement giving the interconnection customer constructing the facilities under the option to build the right to submit an invoice for the cost of an incomplete facility.

36. We are mindful of Montana-Dakota’s concern that Tatanka may have imprudently incurred costs and/or engaged in other activities that unreasonably inflated the cost to construct the Network Upgrades. However, the Amended and Restated Tatanka LGIA provides Montana-Dakota with the means by which it can protect itself from unwarranted charges being added to the costs that it must reimburse. For example, Montana-Dakota has the right to fully participate in all stages of construction,⁴⁴ and it has the right to examine information in Tatanka’s possession that verifies the costs that Tatanka incurred and to audit Tatanka’s accounts and records.⁴⁵ Moreover, Montana-Dakota has the right,

⁴² Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 at P 10.

⁴³ In Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 618, we stated:

With respect to the payment of interest, the Commission continues to believe that the Interconnection Customer is entitled to be reimbursed for all of the costs that it incurs in financing the Network Upgrades, including a reasonable estimate of the carrying cost of the upfront payment. We conclude that using Section 35.19a(a)(2)(ii) of the Commission’s Regulations as the basis for the interest calculation is appropriate because it ensures that the Interconnection Customer is fully and fairly compensated for the time value of its upfront payment for the Network Upgrades that it is required to finance.

⁴⁴ See Amended and Restated Tatanka LGIA, Article 5.2(3).

⁴⁵ See Amended and Restated Tatanka LGIA, Articles 25.1 and 25.3.

Docket No. EL10-41-000

17

under section 206 of the FPA⁴⁶ to file a complaint with the Commission if, in its opinion, any part of the final cost of the Network Upgrades, built to the agreed upon specifications, was imprudently incurred.

The Commission orders:

(A) Tatanka's complaint is hereby dismissed for the reasons stated in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁶ 16 U.S.C. § 824(e) (2006).

Document Content(s)

EL10-41-000.DOC.....1-17