UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REHEARING REQUEST OF TATANKA WIND POWER, LLC

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"),[1] Tatanka Wind Power, LLC ("Tatanka") respectfully files this request for rehearing of the Commission's August 4, 2010 order ("Order").

I. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Pursuant to Rule 713(c),[2] Tatanka provides the following statement of issues and specification of errors for which Tatanka seeks rehearing:

1. The Commission acted arbitrarily and capriciously and failed to engage in reasoned decision making when it assumed a fact that directly contradicts uncontroverted evidence presented by both sides in this proceeding.[3] Specifically, the Commission

[1] 18 C.F.R. § 385.713 (2009).

[2] 18 C.F.R. § 385.713(c).

[3] *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) (The Commission must respond to evidence and "articulate its decision *based on evidence in the record.*") (emphasis added). The Commission has an obligation to consider all evidence properly submitted in the proceeding and cannot ignore information that is germane to the issues in the proceeding. *Office of Consumers' Counsel*, 783 F.2d 206, 227 (D.C. Cir. 1986); *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992). The Commission

assumed, contrary to the evidence submitted by both sides, that construction of the Network Upgrades here was not yet complete. In fact construction was completed years ago.

2. The Commission acted arbitrarily and capriciously and failed to engage in reasoned decision making when it read into Section 12.2 of the Amended and Restated LGIA a new condition precedent for an Option to Build invoice for Network Upgrades that has no basis in the agreement itself or any of the pleadings submitted by the parties.[4] Specifically, the Amended and Restated LGIA contains clear language detailing the Transmission Owner's rights as to any deviations from specifications, which rights do not include rejecting an invoice for being untimely. Unlike the purported requirement created by the Order, the Amended and Restated LGIA contains no requirement that the existence of any deviation whatsoever from specifications, no matter how immaterial, renders a project "still under construction."

3. The Commission acted arbitrarily and capriciously and failed to engage in reasoned decision making when it departed from longstanding Commission policy on generator interconnection by modifying the interpretation of the *pro forma* LGIA provisions without providing any explanation for the departure from established policy.[5] Specifically, the Order would revise interconnection policy to allow a Transmission

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must treat fully "each of the pertinent factors" and issues before it. *Pub. Serv. Comm'n of New York v. FPC*, 511 F.2d 338, 345 (D.C. Cir. 1975).

[4] By creating, without justification, a new condition precedent where the LGIA itself had none, the Commission failed to articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994).

[5] *See, e.g., Ne. Energy Assocs. v. FERC*, 158 F.3d 150 (D.C. Cir. 1998) (remand for failure to explain deviation from past precedent and policy); *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999) ("For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious."); *Miss. Valley Gas Co. v. FERC*, 659 F.2d 488, 506-07 (5th Cir. 1981) ("An agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent.").

Owner to delay payment indefinitely on an Option to Build invoice for Network Upgrades by raising issues as to compliance with standards even after construction was complete, as evidenced here by the fact that the Transmission Owner accepted the facilities for ownership, energization and commercial operation.

II. BACKGROUND

On February 9, 2010, Tatanka filed a Complaint against Montana-Dakota Utilities Company ("MDU").[6] In its Complaint, Tatanka demonstrated that MDU refused to repay Tatanka for 100 percent of costs incurred for network upgrades and has consistently denied that it has any repayment obligation.[7] MDU's refusal and denial of its repayment obligations constitutes a breach of MDU's obligations under the currently effective Amended and Restated LGIA.[8] The refusal and denial violate the Commission's policies regarding generation interconnection agreements and procedures contained in Order Nos. 2003 and 2003-A and the Midwest ISO OATT in effect when the Amended and Restated LGIA was approved by the Commission.[9] Tatanka demonstrated that MDU's objections to its repayment obligations have been heard and rejected by the Commission in previous proceedings.[10]

On March 1, 2010, MDU filed an Answer to Tatanka's Complaint[11] in which it denied 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.[12] MDU further argued that the

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[6] *Complaint of Tatanka Wind Power, LLC*, Docket No. EL10-41 (Feb. 9, 2010).

[7] *Id.* at 6.

[8] *Id.* at 6-9.

[9] *Id.*

[10] *Id.* at 10-12.

[11] *Motion to Intervene and Answer of Montana-Dakota Utils. Co.*, Docket No. EL10-41 (Mar. 1, 2010).

[12] *Id.* at 7-8.

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] MDU argued that it was not required to approve or accept the Network Upgrades if those facilities did not meet the standards and specifications approved by MDU, as set out in the Amended and Restated Tatanka LGIA.[14]

On March 16, 2010, Tatanka filed a response to MDU's answer[15] in which Tatanka noted that the parties agreed to all material facts, and that the only disputed issues were (1) whether the facilities actually depart from MDU's specifications; and (2) whether those specifications were in effect modified during the construction process by MDU's active participation in the construction process without raising any objections.[16]

On March 31, 2010, MDU filed an answer to Tatanka's response[17] in which MDU argued that the Amended and Restated LGIA did not require a lump sum repayment of 100 percent of the costs of the facilities constructed by Tatanka, plus interest.[18] MDU additionally argued that it had not accepted ownership of the facilities.[19]

Tatanka subsequently answered on April 28, 2010.[20] In its answer, Tatanka demonstrated that MDU had accepted ownership of the Network Upgrades and paid taxes on the parcel containing the Network Upgrades.[21] Tatanka demonstrated that MDU did

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[13] *Id.* at 11.

[14] *Id.* at 12.

[15] *Motion for Leave to File an Answer, and Answer to an Answer of Tatanka Wind Power, LLC*, Docket No. EL10-41 (Mar. 16, 2010).

[16] *Id.* at 3-5.

[17] *Motion for Leave to File Answer and Answer of Montana-Dakota Utils. Co.*, Docket No. EL10-41 (Mar. 31, 2010).

[18] *Id.* at 4.

[19] *Id.* at 4-6.

[20] *Motion for Leave to File an Answer, and Answer to an Answer of Tatanka Wind Power, LLC*, Docket No. EL10-41 (Apr. 28, 2010).

[21] *Id.* at 5-6.

not and could not reference a section in the Amended and Restated Tatanka LGIA that permits MDU to reject ownership of the facilities to avoid its reimbursement obligations.[22]

On May 11, 2010, MDU filed a motion to reject Tatanka's April 28, 2010 response.[23] Tatanka answered MDU's motion on May 20, 2010.[24] The Commission denied MDU's May 11, 2010 motion to reject.[25]

On August 4, 2010, the Commission issued an order dismissing Tatanka's complaint as premature. In relevant part, the Commission affirmed MDU's obligation to pay Tatanka 100 percent of the costs incurred by Tatanka to construct the Network Upgrades.[26] The Commission further held, however, that Tatanka's complaint was premature because, pursuant to Article 12.2 of the Amended and Restated LGIA, MDU'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."[27]

III. REQUEST FOR REHEARING

A. The Commission Erred by Assuming a Fact that Directly Contradicts Evidence Presented by Both Parties in this Proceeding

The Commission erred when it assumed and relied upon a fact that is directly contradicted by the evidence provided by both sides in this proceeding. The Commission must consider all evidence properly submitted in the proceeding and cannot ignore

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[22] *Id.* at 2-5.

[23] *Montana-Dakota Utils. Co.'s Motion to Reject Tatanka's April 29, 2010 Answer*, Docket No. EL10-41 (May 11, 2010).

[24] *Tatanka Wind Power, LLC's Answer to Montana-Dakota Utils. Co.'s Motion to Reject*, Docket No. EL10-41 (May 20, 2010).

[25] Order at P 28.

[26] Order at P 34.

[27] Order at P 33.

information that is germane to the issues in the proceeding.[28] "Otherwise, the opportunities for notice and hearing in administrative proceedings would be largely illusory, with agencies free to disregard those facts or issues that prove difficult or inconvenient."[29] The Commission must also articulate a "satisfactory explanation" for its action, including "a rational connection between the facts found and the choices made."[30] Failure to consider the evidence presented constitutes clear error and grounds for rehearing.

In its Order, the Commission assumes that construction is not complete, and thus Tatanka cannot submit a final invoice.[31] Evidence presented by both sides in this proceeding directly contradicts the Commission's conclusion. The evidence presented by the parties has established that construction is complete, and the facilities are now operational. For example, the parties have noted that:

- construction of the facilities "has long since been completed";[32]
- the Transmission Owner accepted the facilities and even paid taxes on them;[33]
- the facilities have been energized;[34]
- the facilities have undergone commissioning checkouts;[35]

[28] *Office of Consumers' Counsel*, 783 F.2d at 227.

[29] *Tenneco Gas*, 969 F.2d at 1214.

[30] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

[31] Order at P 33.

[32] Tatanka's Apr. 28, 2010 Answer to MDU's Answer at 4. *See, e.g.*, MDU's Mar. 31, 2010 Answer at 4, 8 (offering that both parties agree that the Network Upgrades "were constructed"); MDU's Mar. 2, 2010 Answer at 6 ("[T]he Network Upgrades . . . were ultimately built").

[33] Tatanka's Apr. 28, 2010 Answer to MDU's Answer at 5, Exh. I.

[34] Tatanka's Mar. 16, 2010 Answer at 8; Chocarro Affidavit, Attachment A-4, page 29; Ford Affidavit, Exh. MDU-B, page 4 ("[T]his station was energized on November, [sic] 29, 2007").

[35] Tatanka's Mar. 16, 2010 Answer at 8; Raveling Affidavit, Exh. MDU-A, page 4 (indicating that a final walk through of the project occurred prior to energization).

- Tatanka sent the required notice of Commercial Operation dated as of July 24, 2008;[36]
- the facilities are currently in operation;[37] and
- thus "the project has been energized and is in commercial operation and has been since July 24, 2008."[38]

Without discussing this evidence or responding to the arguments the parties have made,[39] the Commission instead assumed a fact — not in the record — that has been directly and repeatedly contradicted.

There was never a dispute between the parties about whether construction was indeed complete, as the facts in evidence detailed above attest. In fact, Tatanka repeatedly argued that MDU did not timely raise objections "during construction."[40] But MDU never responded in any of its numerous pleadings with a claim that construction had not been completed.[41] Indeed, how could it, given that MDU accepted the facilities for ownership, energization and Commercial Operation?

For the Commission to fail to consider the uncontroverted evidence presented, and instead to adopt a fact directly contradicted by both parties' evidence, is clear error. It simply defies logic to assert that construction is not complete for facilities in Commercial Operation. Accordingly, the Commission should grant rehearing of this issue.

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[36] Attachment D to Tatanka's Mar. 16, 2010 Answer.

[37] *Id.*; Tatanka's Apr. 28, 2010 Answer to MDU's Answer at 4; MDU's Mar. 2, 2010 Answer at 5.

[38] Tatanka's Mar. 16, 2010 Answer at 4 (item #6 of list of agreed upon material facts).

[39] MDU argued it never "formally" accepted the facilities, while Tatanka demonstrated that MDU's actions show it not only accepted the facilities but also now owns and operates them. Tatanka further demonstrated that under the Amended and Restated LGIA this means MDU can no longer raise objections about specifications.

[40] Tatanka's Mar. 16, 2010 Answer at 7-8; Tatanka's April 28, 2010 Answer at 3.

[41] *See, e.g.*, MDU's Mar. 31, 2010 Answer at 1-4 (summarizing MDU's positions).

B. The Commission Erred by Creating a New Condition Precedent that Does Not Exist in the Amended and Restated LGIA

The Commission erred by reading into Section 12.2 a requirement that the final invoice cannot be submitted until the facilities are built in exact accordance with the specifications in the Amended and Restated LGIA.[42] This conclusion has no basis in the Amended and Restated LGIA, which does not include such a condition precedent. The Amended and Restated LGIA provision at issue is Section 12.2:

> 12.2 Final Invoice. Within six months after completion of the construction of the Transmission Owner's Interconnection Facilities, Transmission Owner's System Protection Facilities, Distribution Upgrades and the Network Upgrades, Transmission Owner shall provide an invoice of the final cost of the construction of the Transmission Owner's Interconnection Facilities, Transmission Owner's System Protection Facilities, Distribution Upgrades and the Network Upgrades and shall set forth such costs in sufficient detail to enable Interconnection Customer to compare the actual costs with the estimates and to ascertain deviations, if any, from the cost estimates. Transmission Owner shall refund, with interest (calculated in accordance with 18 C.F.R. Section 35.19a(a)(2)(iii), to Interconnection Customer any amount by which the actual payment by Interconnection Customer for estimated costs exceeds the actual costs of construction within thirty (30) Calendar Days of the issuance of such final construction invoice.

In issuing its Order, the Commission must articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made.[43] Failure to articulate a rational basis for its decision is arbitrary, capricious, and grounds for rehearing. Yet in its Order, the Commission did not provide any explanation of why it interpreted the Amended and Restated LGIA in such a way as to avoid the plain

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[42] Order at P 33.

[43] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *N. States Power*, 30 F.3d at 180.

language of the agreement, *i.e.* that an invoice can be submitted after completion of construction.

The Amended and Restated LGIA contains no requirement that the existence of any deviation whatsoever from specifications, even if immaterial or located not in the Amended and Restated LGIA but in separate communications, renders the project "still under construction." To the contrary, the Amended and Restated LGIA contains clear language detailing the Transmission Owner's rights as to any purported deviations. As noted in Tatanka's March 16, 2010 Answer,[44] the Amended and Restated LGIA addresses variations from the design specifications by explicitly providing MDU the right to reject any design, procurement, construction, or acceptance test "*at any time during construction.*"[45] At such time, Tatanka would have been required to "remedy deficiencies."[46] Similarly, under Section 6.1, prior to Commercial Operation, testing and modifications may be required at the Interconnection Customer's expense "to ensure safe and reliable operation" of facilities. But here, construction has been complete at the site for several years, no new construction has occurred since energization and Commercial Operation, and no reasonable understanding would suggest that the facility is still under construction.

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[44] *See also* Tatanka's April 28, 2010 Answer at 3.

[45] Amended and Restated LGIA § 5.2(6) (emphasis added). In full, Section 5.2(6) states:

"[A]t any time during construction, should any phase of the engineering, equipment procurement, or construction of the Transmission Owner's Interconnection Facilities and 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 Transmission Owner's Interconnection Facilities and Stand Alone Network Upgrades to meet the standards and specifications provided by Transmission Provider and Transmission Owner."

[46] *Id.*

As Tatanka pointed out, the Amended and Restated LGIA explains the relationship between the Transmission Owner's acceptance of the facilities and the Transmission Owner's "standards and specifications" and shows that the time for raising such issues has passed.

> Section 5.2(10) is explicit that "*Transmission Owner shall approve and accept for operation and maintenance* the Transmission Owner's Interconnection Facilities and Stand Alone Network Upgrades to the extent engineered, procured, and constructed in accordance with this Article 5.2 *only if the Transmission Owner's Interconnection Facilities and Stand Alone Network Upgrades meet the standards and specifications of Transmission Provider, Transmission Owner and any Governmental Authority.*" MDU has "approved and accepted" the facilities "for operation and maintenance," and thus cannot now raise old design issues regarding meeting "standards and specifications."[47]

Of course, even now the Transmission Owner continues to have the right to inspect and modify the facilities at its own expense per Section 6.2 to ensure continued interconnection in a safe and reliable manner. But such rights have nothing to do with an Option to Build customer's right to be reimbursed for the cost of Network Upgrades after construction is complete.

Because the Commission's decision reads into Section 12.2 a new condition precedent that has no basis in either the Amended and Restated LGIA or the parties' pleadings in this matter, the Commission should grant rehearing of this issue.

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[47] Tatanka's April 28, 2010 Answer at 4 (quoting Amended and Restated LGIA § 5.2(10)) (emphasis added).

C. The Commission Erred by Failing to Fully Explain Departures From Established Policy

The Commission committed clear error by deviating from its longstanding policies governing generator interconnection without providing persuasive reasons for so doing. The Commission must fully explain any departure from established policy.[48] While the Commission is entitled to depart from previous policies, to engage in reasoned decision making the Commission must explain the basis for any departure.[49]

The Commission's consistent approach to generator interconnection, established in the Order No. 2003 series,[50] has long provided generators with standard procedures by which to interconnect, including the *pro forma* LGIA. The plain language of Section 12.2 in the *pro forma* LGIA provides no right to the Transmission Owner to raise objections after construction has been completed. The Transmission Owner's rights and its ability to raise issues as to construction details and compliance are spelled out in Section 5.2(6) under the Option to Build scenario. Such rights exist "at any time during construction."[51] To our knowledge, never before has the Commission recognized or created a requirement under Section 12.2 that an invoice submitted after construction is complete may nonetheless be considered premature if the Transmission Owner wishes, belatedly, to raise issues regarding the compliance of the facility with its standards.

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[48] *See, e.g., La. Pub. Serv. Comm'n*, 184 F.3d at 897 ("For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious.").

[49] *Miss. Valley*, 659 F.2d at 506-07.

[50] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh'g*, 106 FERC ¶ 61,220 (2004) (Order No. 2003-A), *order on reh'g*, 109 FERC ¶ 61,287 (2004) (Order No. 2003-B), *order on reh'g*, 111 FERC ¶ 61,401 (2005) (Order No. 2003-C).

[51] Amended and Restated LGIA, § 5.2(6).

Indeed, such a new requirement would not be good policy and would lead to negative consequences. Transmission Owners could delay payment for constructed and operational facilities for an indefinite period simply by claiming the facilities need additional tweaks. The costs of such further work, particularly in cases like this one where the construction crews and facilities left the site years ago, would necessarily be higher than needed. The *pro forma* LGIA, in fact, has the policy just right: the Transmission Owner must raise any such objections "at any time during construction" but not after. Issues that arise as to the safe and reliable operation of the facilities after Commercial Operation can be the subject of inspection and testing under Section 6.2, but such issues are not related to reimbursement for the costs of completed Network Upgrades.

While the Commission may change its policies, to do so requires a full, persuasive explanation of the change.[52] Not only has the Commission not provided such a full, persuasive explanation, but also the Commission failed to provide any explanation at all. Rather, the Commission provided a one-sentence conclusion that the repayment obligation did not attach until the Network Upgrades were completed in accordance with specifications, even though this purported requirement is not in the text of section 12.2 and is contradicted by section 5.2(6), which provides a full opportunity to raise specification issues during construction.

This summary approach does not rise to the level of the necessary explanation to justify a departure from Commission precedent and thus constitutes clear error and grounds for rehearing.

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[52] *La. Pub. Serv. Comm'n*, 184 F.3d at 897.

IV. CONCLUSION

The Commission has erred by (1) concluding that the construction of the facilities was incomplete, even though both parties repeatedly stated that construction was complete; (2) reading into the Amended and Restated LGIA a condition precedent that does not exist; and (3) departing from existing Commission policy without providing a full explanation for the departure. For the foregoing reasons, Tatanka respectfully requests that the Commission grant this request for rehearing.

Respectfully submitted,

/s/ Thomas McCann Mullooly
Thomas McCann Mullooly
Trevor D. Stiles
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
Telephone: (414) 297-5566
Facsimile: (414) 297-4900
E-mail: tmullooly@foley.com

Attorneys for Tatanka Wind Power, LLC

Dated: September 3, 2010

CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010, I hereby certify that the foregoing document was this day served, via electronic mail, upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Milwaukee, Wisconsin, this 3rd day of September, 2010.

/s/ Trevor D. Stiles
Trevor D. Stiles
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
Telephone: (414) 319-7346
Facsimile: (414) 297-4900
E-mail: tstiles@foley.com

Attorney for Tatanka Wind Power, LLC