

149 FERC ¶ 61,224  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Midcontinent Independent  
System Operator, Inc.

Docket Nos. ER14-2464-000  
ER14-2464-001

ORDER CONDITIONALLY ACCEPTING FACILITIES CONSTRUCTION  
AGREEMENT

(Issued December 12, 2014)

1. On July 18, 2014, as amended on October 14, 2014, Midcontinent Independent System Operator, Inc. (MISO), pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> submitted for filing an unexecuted non-conforming Facilities Construction Agreement (Border Winds Facilities Construction Agreement) among Border Winds Energy, LLC (Border Winds) as the Interconnection Customer, Otter Tail Power Company (Otter Tail) as the Transmission Owner, and MISO as the Transmission Provider (collectively, Parties). In this order, we conditionally accept the unexecuted non-conforming Border Winds Facilities Construction Agreement, to become effective July 19, 2014, as requested, subject to the removal of the proposed revisions that deviate from the *pro forma* Facilities Construction Agreement.

**I. Background**

2. In August 2009, as supplemented in November 2009, MISO submitted proposed revisions to its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to, among other things, include a new *pro forma* Facilities Construction Agreement.<sup>2</sup> The Commission conditionally accepted the *pro forma* Facilities Construction Agreement subject to modification regarding suspension language.<sup>3</sup>

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<sup>1</sup> 16 U.S.C. § 824d (2012).

<sup>2</sup> As proposed by MISO, Facilities Construction Agreement shall mean the form of facilities construction agreement, set forth in Appendix 8 to these Generator Interconnection Procedures. The Facilities Construction Agreement shall be used when

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3. In October 2009, the Commission accepted MISO's currently-effective participant funding policy, which revised Attachment FF to increase the cost responsibility of an interconnection customer to 100 percent of network upgrade costs, with a possible 10 percent reimbursement for projects that were 345 (kilovolt) kV and above.<sup>4</sup> At that time, MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff provided three alternatives for funding the costs of network upgrades for generator interconnections. Attachment FF described two of these alternatives (Option 1<sup>5</sup> and Option 2<sup>6</sup>), which were incorporated into MISO's *pro forma* Generator Interconnection Agreement by reference, while Article 11.3 in MISO's *pro forma* Generator

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an Interconnection Customer causes the need for the construction of Network Upgrades or System Protection Facilities on the transmission system of an Affected System.

As defined in its Generator Interconnection Procedures, Affected System shall mean an electric transmission or distribution system or the electric system associated with an existing generating facility or of a higher queued Generating Facility, which is an electric system other than the Transmission Owner's Transmission System that is affected by the Interconnection Request. An Affected System may or may not be subject to FERC jurisdiction.

<sup>3</sup> *Midwest Independent Transmission System Operator, Inc.*, 129 FERC ¶ 61,301 (2009) (December Order).

<sup>4</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 8 (2009).

<sup>5</sup> Under Option 1, the interconnection customer provides up-front funding for the network upgrades subject to participant funding, then the transmission owner refunds 100 percent of such costs, plus interest, back to the interconnection customer upon completion of the network upgrades, and the transmission owner then assesses the interconnection customer a monthly network upgrade charge based on a formula contained in Attachment GG of the MISO Tariff. Under Option 1, the transmission owner could unilaterally elect Option 1 to fund the costs of network upgrades for generator interconnections.

<sup>6</sup> Under Option 2, also referred to as the customer-fund option, the interconnection customer provides up-front funding for the cost of the network upgrades subject to participant funding with no further financial obligations on the interconnection customer for the cost of the upgrades.

Interconnection Agreement<sup>7</sup> contemplated a third (self-fund option).<sup>8</sup> However, the MISO Tariff does not address how MISO's participant funding methodology would be implemented under the self-fund option.<sup>9</sup>

4. In response to a complaint filed in March 2011, the Commission issued an order on October 20, 2011 directing the removal of Option 1 from Attachment FF, finding that this option increased the costs directly assigned to the interconnection customer with no corresponding increase in service compared to other funding options.<sup>10</sup> The Commission found that it was unjust and unreasonable to require an interconnection customer to provide up-front funding for network upgrades and then permit the transmission owner to repay the amount and charge the interconnection customer for the transmission owner's

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<sup>7</sup> Article 11.3 is found in the *pro forma* Generator Interconnection Agreement, which is located in Attachment X of the MISO Tariff.

<sup>8</sup> Under the self-fund option, the transmission owner can elect to provide the up-front funding for the capital cost of the network upgrades. This option was originally identified in Order No. 2003. *See Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 720 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at PP 618 and 658, *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), *cert. denied*, 552 U.S. 1230 (2008).

<sup>9</sup> MISO Tariff, Attachment X, *pro forma* Generator Interconnection Agreement, Article 11.3:

Network Upgrades, System Protection Facilities and Distribution Upgrades. Transmission Owner shall design, procure, construct, install, and own the Network Upgrades, Transmission Owners' System Protection Facilities and Distribution Upgrades described in Appendix A. Interconnection Customer shall be responsible for all costs related to Distribution Upgrades and/or Generator Upgrades. Transmission Owner shall provide Transmission Provider and Interconnection Customer with written notice pursuant to Article 15 if Transmission Owner elects to fund the capital for the Network Upgrades and Transmission Owners' System Protection Facilities; otherwise, such facilities, if any, shall be solely funded by Interconnection Customer.

<sup>10</sup> *E.ON Climate & Renewables North America, LLC*, 137 FERC ¶ 61,076, at P 34 (2011) (*E.ON*), *order on reh'g*, 142 FERC ¶ 61,048, at P 34 (2013).

capital costs and income tax allowance.<sup>11</sup> The Commission also found that leaving the election of Option 1 to the sole discretion of a transmission owner “creates unacceptable opportunities for undue discrimination by affording a transmission owner the discretion to increase the costs of the interconnection service by assigning both increased capital costs, as well as non-capital costs . . . to particular interconnecting generators, but not others.”<sup>12</sup>

## **II. Proposed Non-Conforming Border Winds Facilities Construction Agreement**

5. MISO explains that it is filing the non-conforming Border Winds Facilities Construction Agreement unexecuted at Border Winds’s<sup>13</sup> request because Border Winds determined that negotiations regarding Otter Tail’s election to self-fund network upgrades being constructed under the Facilities Construction Agreement and related provisions are at an impasse.<sup>14</sup> MISO designated the Border Winds Facilities Construction Agreement as Original Service Agreement No. 2678 under its FERC Electric Tariff, Fifth Revised Vol. No. 1.<sup>15</sup>

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<sup>11</sup> *E.ON*, 137 FERC ¶ 61,076 at P 37.

<sup>12</sup> *Id.* P 38.

<sup>13</sup> Xcel Energy Services, Inc. (Xcel Energy) states on behalf of its utility operating affiliate, Northern States Power Company, that Border Winds is a limited liability company formed to construct and own a 150 MW wind power project and related facilities within Rolette County, North Dakota (Border Winds Facility). Northern States Power Company selected RES America Development, Inc. to construct the Border Winds Facility on a build-transfer basis using a competitive bid process in order to satisfy its obligations under the Minnesota Renewable Energy Standards. Northern States Power Company will take ownership shortly after the Border Winds Facility has been placed into commercial operation through a Purchase and Sale Agreement, if all conditions precedent are satisfied. As a result of the Border Winds Facility’s location it will require Otter Tail to construct certain Network Upgrades and System Protection Facilities on the Otter Tail transmission system in order to interconnect the Border Winds Facility to a section of the Northern States Power Company transmission system located in North Dakota. As Otter Tail is an Affected System in this instance a Facilities Construction Agreement between Border Winds and Otter Tail is required.

<sup>14</sup> MISO July 18 Transmittal Letter at 4.

<sup>15</sup> MISO, FERC Electric Tariff, [SA 2678, OTP-Border Winds Energy FCA \(J290\), 31.0.0.](#)

6. MISO requests waiver of the Commission's 60-day prior notice requirement<sup>16</sup> to permit the Border Winds Facilities Construction Agreement to become effective on July 19, 2014. MISO states that the Parties indicated their intention for and support of an effective date of July 19, 2014.

7. On September 16, 2014, Commission staff issued a deficiency letter (September 16 Deficiency Letter) requesting additional information regarding the Border Winds Facilities Construction Agreement. Specifically, the September 16 Deficiency Letter directed MISO to "provide a step-by-step derivation [of] the proposed 15.8 percent fixed charge rate, along with a detailed narrative description of each step in such derivation and completely populated versions of the currently-effective Attachment O and Attachment GG rate formula templates that support the proposed 15.8 percent fixed charge rate" and to "explain and demonstrate how the proposed fixed charge rate would be applied" including whether it would be "applied over time or . . . up front" and whether it would be "applied to gross or net plant."<sup>17</sup>

### **III. Notice of Filings and Responsive Pleadings**

8. Notice of MISO's July 18, 2014 filing was published in the *Federal Register*, 79 Fed. Reg. 43,463 (2014), with interventions and protests due on or before August 8, 2014. Notice of MISO's October 14, 2014 filing was published in the *Federal Register*, 79 Fed. Reg. 63,114 (2014), with interventions and protests due on or before November 4, 2014.

9. On July 29, 2014, E.ON Climate and Renewables North American LLC filed a motion to intervene. On August 8, 2014, Otter Tail filed a motion to intervene and comments, Xcel Energy<sup>18</sup> filed a motion to intervene, comments, and a conditional protest, Border Winds filed a motion to intervene and protest, and American Wind Energy Association (American Wind Energy) filed a motion to intervene and protest. On August 11, 2014, International Transmission Company d/b/a ITC *Transmission*, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC (collectively, ITC Companies) filed a motion to intervene out-of-time and comments. On August 13,

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<sup>16</sup> See 18 C.F.R. § 35.3(a) (2014).

<sup>17</sup> September 16 Deficiency Letter at 2.

<sup>18</sup> Xcel Energy states that it submits the motion to intervene, comments, and conditional protest on behalf of its utility operating affiliate, Northern States Power Company. To avoid confusion, this order will only refer to Xcel Energy when discussing the motion to intervene, comments, and conditional protest.

2014, Ameren Illinois Company (Ameren) filed a motion to intervene out-of-time and comments. On August 25, 2014, Otter Tail filed a motion for leave to answer and answer.

#### **IV. Discussion**

##### **A. Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant ITC Companies' and Ameren's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Otter Tail's answer because it has provided information that assisted us in our decision-making process.

##### **B. Substantive Matters**

###### **1. MISO's Proposal**

13. MISO proposes changes in section 3.2.1 of the *pro forma* Facilities Construction Agreement to reflect Otter Tail's election to self-fund network upgrades and system protection facilities. MISO states that the Border Winds Facilities Construction Agreement conforms to the *pro forma* Facilities Construction Agreement with the exception of language in section 3.2.1 to reflect Otter Tail's election to self-fund network upgrades and system protection facilities. MISO claims that the self-fund option for network upgrades and system protection facilities is available under the Border Winds Facilities Construction Agreement based on Commission precedent.<sup>19</sup> MISO states that this is the first time a transmission owner has requested the self-fund option in a MISO Facilities Construction Agreement and argues that the non-conforming language in section 3.2.1 of the Border Winds Facilities Construction Agreement meets the

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<sup>19</sup> MISO July 18 Transmittal Letter at 2 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,111 (2013) (*Hoopeston*), where the Commission accepted the self-fund option for a Generator Interconnection Agreement).

Commission's standard for case-specific deviations from the *pro forma* text because the proposed revision addresses the novel legal issue to clarify the application of the self-fund option to the Facilities Construction Agreement.<sup>20</sup> MISO proposes to add the phrase "except to the extent that Transmission Owner elected to self-fund the Network Upgrades and System Protection Facilities as detailed in Appendix A" to section 3.2.1 of the Border Winds Facilities Construction Agreement.<sup>21</sup> MISO states that, if the Commission accepts the proposed revision, MISO would propose this edit to its *pro forma* Facilities Construction Agreement and its *pro forma* Multi-Party Facilities Construction Agreement in Attachment X of the MISO Tariff.<sup>22</sup>

14. MISO states that the *pro forma* Facilities Construction Agreement does not contain a provision allowing the Transmission Owner to self-fund network upgrades that must be constructed on an affected system and is ambiguous with regard to the election of the self-fund option. MISO states that the proposed revision to section 3.2.1 would clarify the alleged ambiguity, and that the clarification would treat comparably an affected system operator to a transmission owner and is just and reasonable.<sup>23</sup> MISO states that both affected system operators and transmission owners are obligated to build upgrades to accommodate generation interconnections, and are therefore similarly situated and should have the same rights and obligations with regard to constructing, funding, and recovery options for such upgrades. MISO states that to conclude otherwise would be unduly discriminatory and prohibited under the FPA.<sup>24</sup>

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<sup>20</sup> *Id.* (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 120 FERC ¶ 61,066, at P 35 (2007), which requires an explanation that "non-conforming provisions are necessary due to reliability concerns, novel legal issues or other unique factors").

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 3 (citing *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,161, at P 63 (2009) ("[W]e find that since Merchant Transmission Facilities and zones are similarly situated, they should be comparably treated and such comparable treatment is not unduly discriminatory or preferential.") and *South Carolina Elec. & Gas Co.*, 143 FERC ¶ 61,058, at P 48 (2013) ("The comparability principle requires public utility transmission providers . . . to develop a transmission system plan that meets the specific service requests of their transmission customers and otherwise treats similarly-situated customers . . . comparably in transmission system planning.")).

<sup>24</sup> *Id.*

15. MISO states that the Transmission Owner's election to self-fund the network upgrades and system protection facilities is consistent with Order No. 2003, which establishes that non-independent transmission owners could elect to self-fund such upgrades,<sup>25</sup> and with Article 11.3 of the MISO *pro forma* Generator Interconnection Agreement, which permits the Transmission Owner with which a generating facility is interconnecting to self-fund the network upgrades and system protection facilities necessary for the interconnection.<sup>26</sup>

16. Furthermore, MISO states that the proposed revisions are appropriate and just and reasonable because they are consistent with similar revisions previously accepted by the Commission to implement the self-funding option. MISO explains that the Commission has accepted a Generator Interconnection Agreement which contained terms and conditions necessary to implement a transmission owner's election to self-fund the upgrades for a generator interconnection.<sup>27</sup> MISO states that the Commission held that it is "just and reasonable and not unduly discriminatory for the transmission owner to recover capital costs for network upgrades through a network upgrade charge established using the formula in Attachment GG and consistent with MISO's participant funding allocation methodology."<sup>28</sup> MISO states that the Commission further held that it is appropriate for a transmission owner to recover "the return of and on the capital costs of the network upgrades from an interconnection customer under the self-funding option."<sup>29</sup>

## 2. Protests

17. American Wind Energy and Border Winds argue that MISO has not met its burden to justify the proposed non-conforming provisions to the Border Winds Facilities

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<sup>25</sup> *Id.* at 2 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 720).

<sup>26</sup> *Id.* at 2-3 (citing MISO, FERC Electric Tariff, Attachment X, app. 6, § 11.3 ("Transmission Owner shall provide Transmission Provider and Interconnection Customer with written notice pursuant to Article 15 if Transmission Owner elects to fund the capital for the Network Upgrades and Transmission Owner's System Protection Facilities.")).

<sup>27</sup> *Id.* at 3 (citing *Hoopeston*, 145 FERC ¶ 61,111 and *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER13-125-000 (Dec. 12, 2012) (delegated letter order)).

<sup>28</sup> *Id.* (quoting *Hoopeston*, 145 FERC ¶ 61,111 at P 41).

<sup>29</sup> *Id.* (quoting *Hoopeston*, 145 FERC ¶ 61,111 at P 42).



Construction Agreement because MISO has neither explained the necessity for the deviations nor has it demonstrated how this case rises to the level of a novel legal issue.<sup>30</sup> American Wind Energy and Border Winds therefore request that the Commission direct MISO to remove the non-conforming language from the Border Winds Facilities Construction Agreement. Border Winds further argues that, if MISO wishes to provide for self-funding under its facilities construction agreements, MISO should suggest revisions to Attachment X that are open for public comment and applicable to all interconnection customers. Border Winds continues that, if the Commission accepts MISO's proposed revisions and directs MISO to revise Attachment X, Border Winds requests that the Border Winds Facilities Construction Agreement be conditionally accepted, subject to future modifications that result from MISO's proceeding to incorporate self-funding into the *pro forma* Facilities Construction Agreement.<sup>31</sup>

18. Border Winds argues that self-funding should not be permitted as applied by MISO and Otter Tail in the Border Winds Facilities Construction Agreement, where Otter Tail's return of and on capital costs creates unnecessary economic inefficiencies and hardship.<sup>32</sup> Border Winds further argues that self-funding is not an unconditional right and that it should only be available when economic inefficiencies favor utility funding, and when self-funding cannot act as a financial barrier to interconnection.<sup>33</sup> Border Winds also argues that self-funding, in the absence of reasonable conditions, disrupts the business decisions of mature customers and undermines the cost certainty that the Commission and MISO have worked to secure for late-stage projects through queue reform.<sup>34</sup> American Wind Energy asserts that the self-fund option should only be

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<sup>30</sup> To support their argument, American Wind Energy and Border Winds cite to *PJM Interconnection, L.L.C.*, 111 FERC ¶ 61,163, at P 18 (2005), which states that “a Transmission Provider seeking a case-specific deviation from its *pro forma* [agreement] bears a high burden to justify and explain that its changes are . . . not merely ‘consistent with or superior to’” the *pro forma* agreement, but are necessary changes. American Wind Energy Protest at 2; Border Winds Protest at 2-3.

<sup>31</sup> Border Winds Protest at 3-4.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 4-5 (citing *Hoopeston*, 145 FERC ¶ 61,111 at P 41).

<sup>34</sup> *Id.* at 5, 6.

elected when economic efficiencies favor a utility funding, and that Otter Tail's election in this case unnecessarily inflates the costs of Border Winds' interconnection services.<sup>35</sup> American Wind Energy further argues that the non-conforming language may discourage new generation because it substantially increases the amount of capital that would need to be raised.<sup>36</sup>

19. Xcel Energy states that the Border Winds facility is not interconnecting to the Otter Tail transmission system, but rather it will interconnect to a 230 kV Northern States Power Company transmission line that is adjacent to the Otter Tail transmission system; however, the Commission's consideration of the self-fund option has been limited only to instances involving the "direct development of an interconnection."<sup>37</sup> Therefore, Xcel Energy requests that the Commission clarify whether the self-fund option is a permissible funding mechanism for a Facilities Construction Agreement, and if the Commission determines that it is, the Commission should clarify whether Otter Tail may unilaterally elect the self-fund option.<sup>38</sup> Xcel Energy also requests that the Commission clarify whether MISO must first revise its *pro forma* Facilities Construction Agreement to provide for the self-fund option before a transmission owner is permitted to elect the self-fund option.<sup>39</sup>

20. Otter Tail, ITC Companies, and Ameren support the proposal to allow transmission owners to elect to self-fund network upgrades and system protection facilities under the Border Winds Facilities Construction Agreement.<sup>40</sup> Specifically, Otter Tail points to the principle of comparability, which Otter Tail states requires that

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<sup>35</sup> American Wind Energy Protest at 3 (citing *Hoopeston*, 145 FERC ¶ 61,111 at P 41).

<sup>36</sup> *Id.* at 3-4.

<sup>37</sup> Xcel Energy Protest at 9.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 10.

<sup>40</sup> Otter Tail Comments at 5; ITC Companies Comments at 1; Ameren Comments at 2-3.

similarly-situated entities receive similar treatment,<sup>41</sup> and cites to provisions in Order No. 2003 and its progeny to show that affected system operators<sup>42</sup> are similarly situated to transmission owners.<sup>43</sup> Otter Tail argues that Commission precedent not only recognizes that affected system operators are similarly-situated to transmission owners, but also provides that the policy regarding an affected system operator should be consistent with the policy for a transmission owner.<sup>44</sup> Otter Tail continues that treating affected system operators and transmission owners comparably should include permitting an affected system operator to self-fund network upgrades on its transmission system.<sup>45</sup> ITC Companies also support MISO revising the *pro forma* Facilities Construction Agreement and the *pro forma* Multi-Party Facilities Construction Agreement in Attachment X of the MISO Tariff to clarify the transmission owner's option to self-fund.<sup>46</sup>

### 3. Otter Tail Answer

21. In its answer, Otter Tail argues that the Commission should dismiss Border Winds's and American Wind Energy's claims because they make unsupported assertions and mischaracterizations of Commission precedent. Otter Tail argues that, by stating that

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<sup>41</sup> Otter Tail Comments at 6 (citing *South Carolina Elec. & Gas Co.*, 143 FERC ¶ 61,058, at P 48 (2013), *order on reh'g*, 147 FERC ¶ 61,126 (2014) and *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,161, at P 63 (2009), *reh'g denied*, 139 FERC ¶ 61,243 (2012)).

<sup>42</sup> Otter Tail argues that, although the unexecuted Border Winds Facilities Construction Agreement refers to Otter Tail as the Transmission Owner, Otter Tail is in fact an affected system operator. *Id.* at 4 n.13.

<sup>43</sup> *Id.* at 6-7.

<sup>44</sup> *Id.* at 7-8.

<sup>45</sup> *Id.* See also ITC Companies Comments at 3; Ameren Comments at 2-3 (arguing that transmission owners that are affected systems should not be required to accept customer funding for network upgrades to accommodate a generation interconnection without a sufficient return of and on their capital, and that an affected system transmission owner should not be required to charge a less compensatory rate for constructing network upgrades than that of the directly interconnection transmission owner).

<sup>46</sup> ITC Companies Comments at 1, 3.

“[t]he concept of utilities self-funding network upgrades originally appeared in Order No. 2003, where the Commission mentioned the option without much elaboration as a method for utilities to avoid the administrative difficulties of issuing reimbursements for the costs of network upgrades,”<sup>47</sup> Border Winds ignores the Commission’s discussion of the self-fund option in the context of the Commission’s overall interconnection pricing policy.<sup>48</sup> Otter Tail argues that Border Winds erroneously concludes that “the Commission [in Order No. 2003] effectively acknowledged that a utility does not *always* have the option to self-fund network upgrades, but rather that a utility always has the right to self-fund network upgrades *provided* that it can do so more cost effectively than the customer.”<sup>49</sup> Otter Tail argues that the Commission in this context was referring to the interest rate to be charged to compensate an interconnection customer for its upfront payment of network upgrades.<sup>50</sup> Furthermore, Otter Tail argues that Border Winds and American Wind Energy mischaracterize the Commission’s holding in *Hoopeston*, claiming that the Commission held that “self-funding . . . should only be available when economic efficiencies favor utility funding.”<sup>51</sup> Otter Tail argues that the Commission never held that self-funding must be predicated on economic efficiencies favoring the transmission owner, and that Border Winds and American Wind Energy omit the fact that their “holding” is dicta, and that the Commission’s actual holding in *Hoopeston* is that it is just and reasonable and not unduly discriminatory for a transmission owner to recover its capital costs for network upgrades using the formula in Attachment GG.<sup>52</sup>

#### **4. Commission Determination**

22. As discussed further below, we agree with American Wind Energy and Border Winds that MISO has not met its burden to justify the proposed non-conforming provisions to the Border Winds Facilities Construction Agreement. Accordingly, we conditionally accept the unexecuted Border Winds Facilities Construction Agreement, to become effective July 19, 2014, as requested, subject to MISO’s revising the Border

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<sup>47</sup> Otter Tail Answer at 6 (quoting Border Winds Protest at 4).

<sup>48</sup> *Id.* (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at PP 22, 675-676).

<sup>49</sup> *Id.* at 7 (quoting Border Winds Protest at 4 (emphasis in original)).

<sup>50</sup> *Id.* at 8 (explaining its interpretation of Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 618).

<sup>51</sup> *Id.* (citing Border Winds Protest at 4 and American Wind Energy Protest at 3).

<sup>52</sup> Otter Tail Answer at 10.

Winds Facilities Construction Agreement to conform to MISO's *pro forma* Facilities Construction Agreement. As discussed below, MISO should report the executed Border Winds Facilities Construction Agreement in MISO's electric quarterly reports, and submit an informational filing in this docket to notify the Commission of the agreement's execution.

23. We note that using a *pro forma* agreement minimizes opportunities for undue discrimination.<sup>53</sup> Using a *pro forma* agreement also eliminates the need for parties to negotiate the individual terms of each agreement and eliminates the need for a transmission provider to file conforming agreements with the Commission, instead allowing the relevant information to be included in the transmission provider's electric quarterly reports.<sup>54</sup>

24. Nonetheless, the Commission recognizes that agreements that do not conform to *pro forma* agreements may be necessary in situations with specific reliability concerns, novel legal issues, or other unique factors. A transmission provider seeking Commission acceptance of a non-conforming agreement bears a high burden to justify and explain that the non-conforming aspects of the agreement are not merely "consistent with or superior to" a *pro forma* agreement, but are in fact *necessary*.<sup>55</sup> Due to this high standard, the Commission has rejected various types of deviations from *pro forma* agreements as unnecessary.<sup>56</sup>

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<sup>53</sup> See, e.g., *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 11, 12 (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, 374 U.S. App. D.C. 406 (D.C. Cir. 2007).

<sup>54</sup> See *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, at P 152-153, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 120 FERC ¶ 61,334 (2003).

<sup>55</sup> See, e.g., *PJM Interconnection, LLC*, 111 FERC ¶ 61,163 (2005) (*PJM*).

<sup>56</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,277 (2008) (rejecting agreements containing deviations that were based on superseded *pro forma* language because new *pro forma* language had been accepted before the agreements were executed); *MidAmerican Energy Co.*, 116 FERC ¶ 61,018 (2006)

(continued ...)

25. As noted above, MISO's current *pro forma* Facilities Construction Agreement was accepted in the December Order, effective October 20, 2009. In its filing MISO does not assert any specific reliability concerns, novel legal issues, or other unique factors to justify the proposed non-conforming provisions to the Border Winds Facilities Construction Agreement. Rather, MISO's proposal merely reflects the use of the self-fund option, and we find that application of the self-fund option is an issue that is not novel or unique to this particular interconnection. We therefore direct MISO to revise the Border Winds Facilities Construction Agreement to conform to MISO's *pro forma* Facilities Construction Agreement as stated in Attachment X of its Tariff, and to remove provisions implementing the self-fund option from the appendices to the Border Winds Facilities Construction Agreement.<sup>57</sup> We further note that the other issues protested in this filing have been rendered moot by our decision on the self-funding issue and therefore we need not address them here.

26. We direct MISO to revise the Border Winds Facilities Construction Agreement to conform to MISO's *pro forma* Facilities Construction Agreement. Because an agreement that conforms to the *pro forma* Facilities Construction Agreement must be reported only in MISO's electric quarterly reports,<sup>58</sup> MISO should report the executed Border Winds Facilities Construction Agreement in MISO's electric quarterly reports. We direct MISO to submit an informational filing in this docket to notify the Commission of the execution of the revised Border Winds Facilities Construction Agreement within 15 days of the agreement's execution.

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(rejecting non-conforming deviations including stylistic changes, clarifying phrases, and modifications to insurance provisions; rejecting deviations that were requested by the customer; and rejecting deviations that the customer asserted were necessary to reflect the positions of the parties); *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,121 (2005) (rejecting deviations to correct mistakes in the *pro forma* agreement); *PJM*, 111 FERC ¶ 61,163 (rejecting a one-sided indemnification provision and changes corresponding to a cancelled agreement).

<sup>57</sup> We note that, though we reject the non-conforming provisions of the Border Winds Facilities Construction Agreement that implement the self-fund option, we do not pre-judge whether it would be just and reasonable to amend the *pro forma* Facilities Construction Agreement to adopt the self-fund option on a generic basis.

<sup>58</sup> See Order No. 2001, FERC Stats. &- Regs. ¶ 31,127 at P 18.

The Commission orders:

(A) MISO's Border Winds Facilities Construction Agreement is hereby conditionally accepted, effective July 19, 2014, as discussed in the body of this order.

(B) MISO is directed to report the executed revised Border Winds Facilities Construction Agreement in MISO's electric quarterly reports.

(C) MISO is directed to submit an informational filing in this docket to notify the Commission of the execution of the revised Border Winds Facilities Construction Agreement within 15 days of the agreement's execution.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

Document Content(s)

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