

153 FERC ¶ 61,081
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc.

Docket No. ER15-2533-000

ORDER CONDITIONALLY ACCEPTING UNEXECUTED GENERATOR
INTERCONNECTION AGREEMENT

(Issued October 23, 2015)

1. On August 26, 2015, Midcontinent Independent System Operator, Inc. (MISO) filed, pursuant to section 205 of the Federal Power Act (FPA)¹ and Part 35 of the Commission's regulations,² an unexecuted Generator Interconnection Agreement (Unexecuted GIA) among MISO, the transmission provider, Geronimo Huron Wind, LLC (Huron Wind), the interconnection customer, and International Transmission Company (ITC), the transmission owner (August 26 Filing).³ MISO requests an effective date for the Unexecuted GIA of October 25, 2015. We conditionally accept MISO's Unexecuted GIA, effective October 25, 2015, subject to the outcome of Docket No. ER12-309, *et al.*, and subject to a further compliance filing due within 30 days of the date of this order, as discussed below.

I. MISO's Filing

2. Huron Wind is developing a 100 MW wind generating facility in Huron County, Michigan (Apple Blossom project), and seeks to interconnect with ITC's transmission facilities, which are under the functional control of MISO. The Unexecuted GIA

¹ 16 U.S.C. § 824d (2012).

² 18 C.F.R. pt. 35 (2015).

³ MISO has designated the Unexecuted GIA as Original Service Agreement No. 2831 under MISO's FERC Electric Tariff, Fifth Revised Vol. No. 1, and designated the project as Project No. J340 in its interconnection queue.

provides for \$15,150,000 in network upgrades to be constructed by ITC, including \$7,980,000 for the addition of a transformer and associated equipment at ITC's Grassmere Substation (Transformer) and \$7,170,000 for 5.3 miles of new double-circuit towers from the existing Harvest Wind tap point to Grassmere Substation.⁴ In the August 26 Filing, MISO states that Huron Wind requested that MISO file the Unexecuted GIA as permitted by the MISO tariff and that MISO was filing the Unexecuted GIA to meet its Tariff deadlines. However, MISO also states that it does not take a position with respect to the feasibility of the timing of payments for construction upgrades in dispute between Huron Wind and ITC, noting that certain project milestones in the Unexecuted GIA negotiated by Huron Wind and ITC have now passed. MISO further states that although the GIA remains unexecuted, MISO would not amend the construction schedule until such milestones are met.

3. MISO explains that Huron Wind requested that MISO file the GIA unexecuted because Huron Wind objects to Interconnection Customer Milestone No. 5 in Appendix B of the Unexecuted GIA, which requires Huron Wind to make a payment of \$4,166,000 by August 1, 2015, for the full cost of the long lead time items, including the Transformer. Huron Wind's position is that the \$4,166,000 payment should either be required at a later date or at least be broken into smaller payments.

4. Further, MISO indicates that Huron Wind's position is that ITC should not need to receive full payment for the long lead time items because the procurement of such items involves down payments that are only a fraction of the total cost of purchase and that ITC bears no risk of cancellation for the items. In addition, according to MISO, Huron Wind believes that ITC could use one of its spare transformers in the event there is a delay in acquiring the new Transformer. Huron Wind stresses the importance of maintaining the 2016 in-service date for the project so that Huron Wind can avail itself of the critically necessary federal production tax credits for wind energy that are set to expire on December 31, 2016. Finally, MISO states, Huron Wind would like MISO and ITC to agree to a revised payment schedule for the long lead time items, while also maintaining, or allowing only a slight deviation in, the current in-service date.

5. With respect to ITC's position, MISO states that during the negotiation phase of the Unexecuted GIA, ITC informed Huron Wind that the 2016 in-service date was contingent upon ITC receiving the first milestone payment of the Unexecuted GIA by July 1, 2015. ITC claims it cannot temporarily utilize its spare transformer to proceed with construction of the network upgrades, as Huron Wind suggests, because it must maintain a spare transformer to ensure system reliability. Finally, according to MISO,

⁴ August 26 Filing at Exhibit A9.

ITC cannot begin the construction on the network upgrades until the first milestone payment is made so that ITC can begin its procurement process.

6. MISO asks that the Commission conditionally accept the Unexecuted GIA subject to any subsequent revisions to be accepted by the Commission in Docket No. ER12-309, *et al.*, and to provide guidance to the parties in this matter.

II. Notice and Responsive Pleadings

7. Notice of the August 26 Filing was published in the *Federal Register*, 80 Fed. Reg. 53,148 (2015) with protests and interventions due on or before September 16, 2015. On September 16, 2015, Huron Wind filed a motion to intervene and protest, and ITC filed a motion to intervene and comments. On October 1, 2015, MISO and ITC each filed a motion for leave to answer and answer. On October 8, 2015, Huron Wind filed a motion for leave to answer and answer.

8. Huron Wind protests aspects of the payment schedule as defined in Appendix B of the Unexecuted GIA. Huron Wind requests that the Commission order MISO and ITC to adjust certain milestones to remove an obstacle to the financing and development of the Apple Blossom project.⁵ Huron Wind further submits that the requested adjustments can be made without changing the 2016 in-service date for the Apple Blossom project and with no adverse impacts on reliability and no additional financial burdens or risks to MISO or ITC.⁶

9. Huron Wind protests the Unexecuted GIA payment schedule in two significant respects. First, Huron Wind objects to the initial payment of \$3,114,000, as specified in Milestone No. 3b of Appendix B of the GIA (Initial Payment). Under the Unexecuted GIA, the due date for this Initial Payment is the sooner of July 1, 2015, or 30 days following the effective date of the Unexecuted GIA. Second, Huron Wind objects to the second (upfront) payment of \$4,166,000 for Transformer costs, as specified in Milestone No. 5, which was due August 1, 2015.

10. Regarding its first objection, Huron Wind asks that the Commission order MISO and ITC to revise the Initial Payment to 30 days following the effective date of the Unexecuted GIA because the Initial Payment due date had already passed by the time of the filing of the Unexecuted GIA. Huron Wind argues that it is no longer possible to meet that deadline and, further, that MISO has no legal authority to bind Huron Wind to a

⁵ Huron Wind Protest at 1.

⁶ *Id.*

payment deadline that has expired and that precedes the effective date of the parties' agreement. Huron Wind asserts that Commission precedent makes clear that the intent of the initial payment obligation under Article 11.5 of MISO's *pro forma* GIA is to require the interconnection customer to make a payment *after* the execution or effective date of the Unexecuted GIA.⁷ Huron Wind also contends that the express language of the GIA itself requires that the initial milestone payment must be made within 30 days of acceptance of the GIA "if the GIA is filed unexecuted and the payment is being protested by Interconnection Customer."⁸

11. In regard to its second objection, Huron Wind asks the Commission to order MISO and ITC to revise the second (upfront) payment date and instead allow Huron Wind to make three installment payments equal to one-third of the amount of that upfront payment (or \$1,388,667) which would be made on the same dates as the other three payments required in Appendix B of the Unexecuted GIA, i.e., November 25, 2015, January 1, 2016, and July 15, 2016. Huron Wind argues that requiring the full cost of the Transformer to be paid upfront has adversely impacted its ability to finance the Apple Blossom project and is not necessary to protect ITC from exposure to financial risk.

12. Huron Wind claims that when it discussed the payment schedule contained in the revised GIA circulated on June 8, 2015, with the prospective financier of the Apple Blossom project, that party was not willing to pay the full upfront costs of the Transformer because the payment schedule did not match the actual incurrence of project costs and therefore did not reduce project risks. Huron Wind also argues that ITC does not need to receive upfront payment for the full cost of the Transformer to be protected against financial risks from ordering the Transformer because a vendor of the Transformer will not require ITC to submit the full cost of the Transformer at the time it places the order, only a down payment equal to a fraction of the cost of the Transformer.⁹ Huron Wind also claims that ITC would have the right to cancel the Transformer purchase with little or no risk. Huron Wind reasons that under its proposed milestone adjustments, ITC would still receive an amount in the initial milestone payment that is

⁷ *Id.* at 10 (emphasis in original) (citing *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,104, at P 29 (2015) ("[I]t is evident that all forms of the Initial Payment ... must be posted soon after the execution or acceptance of the GIA pursuant to Article 11.5 of the GIA."); *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233, at P 178 (2012) ("We conditionally accept MISO's proposed Article 11.5 of the GIA regarding the size and timing of the Initial Payment after the execution of a GIA.")).

⁸ *Id.* (quoting Section 11.5 of the Unexecuted GIA, Original Sheet No. 54).

⁹ *Id.* at 11.

more than enough to cover the \$3.73 million cost of the Transformer plus other preliminary costs that ITC may need to incur at that time.¹⁰

13. Huron Wind argues that its proposed payment schedule changes should not require an alteration to the 2016 in-service date. Huron Wind states that the 2016 in-service date is critical to its ability to obtain financing for the Apple Blossom project, since federal tax credits are set to expire on December 31, 2016. Huron Wind contends that a major reason for ITC's need for substantial time to complete the network upgrades was ITC's own estimate of the time needed to procure the Transformer from one of its preferred vendors. However, Huron Wind claims that other vendors exist which could deliver the Transformer in a faster timeframe. According to Huron Wind, even assuming that ITC needs more than a one-year lead time to acquire the Transformer, ITC could use a spare transformer already in its possession in the event that the newly procured Transformer is not received by September 2016. Huron Wind also asserts that its proposal will not have any adverse impact on reliability because even after the commencement of construction of the network upgrades, Huron Wind would agree to allow ITC to use the spare transformer in the event it becomes needed for reliability reasons.

14. Finally, Huron Wind urges that, if the Commission does order an extension of the in-service date, the Commission should confirm that ITC is obligated to use commercially reasonable efforts to work with Huron Wind to achieve a temporary arrangement to connect the Apple Blossom project in 2016.¹¹ According to Huron Wind, doing so would help it meet the requirements for qualifying for tax credits.

15. In its comments, ITC objects to the substitution of its spare transformer, as well as the modification of the payment schedule and the project in-service date contained in the Unexecuted GIA. Regarding the spare transformer, ITC argues that it cannot earmark its spare transformer for Huron Wind's project because ITC must maintain its spare to ensure that it has the flexibility and resources to ensure reliability for all of its customers.¹² ITC avers that the temporary unavailability of its spare transformer would cause undue risk to network customers in the event of an outage, a risk that should not be borne simply because Huron Wind did not provide ITC with the funds to procure a transformer pursuant to the terms of the GIA.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 15.

¹² ITC Comments at 3.

16. ITC argues that although Huron Wind did not specifically object to the Initial Payment prior to the filing of its protest, it nevertheless failed to make the Initial Payment. ITC claims that during the negotiations of the GIA, ITC informed Huron Wind that the November 15, 2016 in-service date in the GIA was contingent on ITC receiving the Initial Payment. ITC argues that the Commission has stated that an interconnection customer's ability to build long lead times into its milestones while taking no action towards achieving commercial operation coupled with the lack of financial commitment to reach commercial operation has significantly contributed to the problem of late-stage terminations and the potential for cascading and iterative restudies.¹³ ITC contends that Huron Wind is merely attempting to keep the Apple Blossom project alive without meeting the required financial milestones of the GIA and therefore Huron Wind should not be permitted to modify the payment schedule. ITC stresses that because of Huron Wind's inability to make the Initial Payment and the second (upfront) payment, Huron Wind has failed to demonstrate its financial commitment to the Apple Blossom project; thus, the Commission should reject Huron Wind's request to modify the payment schedule.

17. ITC further argues that the in-service date, i.e., November 15, 2016, stated in the Unexecuted GIA is no longer tenable and that the Commission should disregard Huron Wind's request to maintain it. ITC asserts that, even if the Transformer were ordered immediately, it would take approximately 16 months to receive, pushing the project in-service date into 2017. ITC also contends that real estate rights of way must be obtained prior to the commencement of the design process for the project, which involves "significant uncertainties." Finally, according to ITC, because Huron Wind has not provided the funds to begin the real estate acquisition process, the in-service date cannot be met due to this factor alone.¹⁴

18. In its answer, ITC asserts that Huron Wind's claim that the in-service date can be maintained, despite other modifications to the Unexecuted GIA, without an adverse impact on reliability or financial risks for ITC is untrue. ITC argues that Huron Wind's proposed project timeline is untenable because, in addition to the Transformer, ITC must acquire five miles of expanded real estate right of way. Further, according to ITC, Huron Wind's proposed accelerated timeline is complicated by the fact that the Apple Blossom project will require extensive coordination with an existing wind farm and large industrial customer, which affords ITC less flexibility in accommodating the project. ITC asserts that there is no set of circumstances under which it could agree to meet Huron Wind's

¹³ *Id.* at 4 (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,223, at P 178 (2012)).

¹⁴ *Id.* at 5.

proposed project timeline as set forth in its protest. ITC further argues that ITC used its best efforts to facilitate the Apple Blossom project from the outset, despite Huron Wind's suggestion to the contrary in its protest.

19. MISO, in its answer, argues that the Commission should reject Huron Wind's requests for multiple reasons. First, MISO contends that under Article 5 of the Unexecuted GIA, project construction schedules require mutual agreement between Huron Wind and ITC. Although MISO declares that it does not take a position on the feasibility of specific milestones, MISO defers to ITC as the party in the best position to determine construction and equipment acquisition deadlines that it can meet consistent with ITC's obligations. MISO further suggests that, even assuming it would have been reasonable to accelerate design, procurement, and construction schedules, Huron Wind could have incented ITC to meet accelerated milestones pursuant to Article 5 of the Unexecuted GIA, an option it failed to take.

20. Additionally, MISO argues that the Commission should neither force ITC to proceed without funding nor potentially compromise reliability by using ITC's spare transformer to accommodate the Apple Blossom project. Again, MISO refers to Article 5 of the Unexecuted GIA, which states that the "Transmission Provider or Transmission Owner shall not be required to undertake any action which is inconsistent with its standard safety practices, its material and equipment specifications, its design criteria and construction procedures, its labor agreements, Applicable Laws and Regulations and Good Utility Practice." Therefore, according to MISO, the Commission should deny Huron Wind's request to force ITC to go beyond "Reasonable Efforts" under the GIA which include Good Utility Practice and steps that a Transmission Owner would use to protect its own interests.

21. MISO also argues that, pursuant to Article 11.5 of the Unexecuted GIA, Huron Wind's Initial Payment should have been due within 30 days of the filing of the Unexecuted GIA, rather than 30 days after Commission acceptance, because Huron Wind is not protesting the Initial Payment, only requesting a more convenient payment schedule. MISO urges the Commission not to allow such delay tactics by Huron Wind, and interconnection customers more generally, because by allowing delay to be affected by a mere protest of the timing of payments, the Commission would be undercutting the intent of requiring the initial payment to be timely tendered to the transmission owner.

22. Finally, in its answer, MISO wishes to correct and expand the record regarding the timing of an amendment requested by Huron Wind in its protest. Thus, MISO states that it has provided a non-public attachment of its answer in order to provide confidential email communications between the parties during the negotiation period of the Unexecuted GIA.

23. In its answer, Huron Wind reiterates the same arguments raised in its protest. In addition, Huron Wind proposes an alternate solution to using ITC's spare transformer to

meet the 2016 in-service date, urging that ITC should instead purchase the Transformer from a vendor other than ITC's preferred vendor. Huron Wind attached an affidavit to its answer in which it identified three specific transformer vendors, all of which could deliver the Transformer in approximately 10.5 months, in sufficient time to meet Huron Wind's requested timeline. Moreover, Huron Wind states it is willing to pay ITC any acceleration costs necessary to ensure the upgrades are completed in 2016.

III. Discussion

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers submitted by ITC, MISO, and Huron Wind because they have provided information that assisted us in our decision-making process.

B. Commission Determination

26. We conditionally accept MISO's Unexecuted GIA, effective October 25, 2015, subject to the outcome of Docket No. ER12-309, *et al.*, and subject to a further compliance filing due within 30 days of the date of this order, as discussed below.

27. In regard to the timing of the Initial Payment, Huron Wind seeks to move the due date from July 1, 2015, to 30 days within the Commission's acceptance of the Unexecuted GIA. Because the GIA was filed unexecuted and the Initial Payment was protested by Huron Wind (albeit as to timing not to the amount), we will require the Initial Payment to be provided to ITC within 30 days of acceptance by the Commission.¹⁵

¹⁵ See Article 11.5 of the Unexecuted GIA, Original Sheet No. 54 ("The initial payment shall be provided to Transmission Owner by Interconnection Customer pursuant to this Article 11.5 within the later of a) thirty (30) days of the execution of the GIA by all Parties, or b) thirty (30) days of acceptance by FERC if the GIA is filed unexecuted and the payment is being protested by Interconnection Customer, or c) thirty (30) days of the filing if the GIA is filed unexecuted and the initial payment is not being protested by Interconnection Customer.").

28. We decline Huron Wind's request to revise the second (upfront) payment to allow Huron Wind to make three installment payments equal to one-third of the amount of the total Transformer payment. We do not find it unreasonable for ITC to require full payment to start its procurement process. As to the date for that payment, we will permit the parties to revise it given our ruling on the Initial Payment date above.

29. We reject Huron Wind's arguments that ITC should be required to use its spare transformer in order for Huron Wind to meet its milestones, or that the Commission should require ITC to use an alternate vendor for purchasing the Transformer. We find that Huron Wind has not demonstrated a basis under which the Commission could grant these requests.

30. Finally, given our rulings above regarding the timing of the initial payment and the second upfront payment, and given that ITC states that the in-service date of November 15, 2016, was, among other things, contingent upon the payment schedule contained in Appendix B of the GIA, the existing in-service date may need to be revised.¹⁶ Pursuant to Article 5 of the GIA, the dates, i.e., the In-Service Date, Initial Synchronization Date, and Commercial Operation Date, must be subject to the acceptance of the transmission owner.¹⁷ Accordingly, we will require a compliance filing to include a revised in-service date, as necessary.¹⁸

31. We therefore direct MISO, in a compliance filing due within 30 days of the date of this order, to file a revised GIA modifying Appendix B, Interconnection Customer Milestone No. 3b, to reflect that the Initial Payment is due 30 days after the issue date of this order and to include other revised milestones, as necessary.

The Commission orders:

(A) The Unexecuted GIA is hereby conditionally accepted to become effective October 25, 2015, subject to the outcome of Docket No. ER12-309, *et al.*, as discussed in the body of this order.

¹⁶ ITC Comments at 5.

¹⁷ Unexecuted GIA at Article 5.1.

¹⁸ *Id.*

Docket No. ER15-2533-000

- 10 -

(B) MISO is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

ER15-2533-000.DOCX.....1-10