

120 FERC ¶ 61,293
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Midwest Independent Transmission System Operator, Docket No. ER07-815-000
Inc. ER07-815-001

ORDER CONDITIONALLY ACCEPTING AMENDED FACILITIES
CONSTRUCTION AGREEMENT

(Issued September 28, 2007)

1. On April 30, 2007, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed an Amended and Restated Facilities Construction Agreement (Amended Agreement)¹ among itself, Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (collectively, the Generator), and Duke Energy Shared Services, Inc. (Duke Energy). It requests waiver of the prior notice requirement so that the Amended Agreement may become effective May 1, 2007. In this order, the Commission accepts the Amended Agreement effective May 1, 2007, as requested, subject to a compliance filing regarding termination as a result of suspension and certain provisions of the Amended Agreement that do not conform to the Midwest ISO's *pro forma* large generator interconnection agreement (Midwest ISO *pro forma* LGIA).

I. Background

2. On April 30, 2004, the Midwest ISO filed a facilities construction agreement (Original Agreement)² in which Duke Energy³ agreed to construct network system

¹ The Midwest ISO has designated the Amended Agreement as First Revised Service Agreement No. 1376 under the Midwest ISO FERC Electric Tariff, Third Revised Volume No. 1.

² The Original Agreement was accepted for filing on June 10, 2004. *See Midwest Indep. Trans. Sys. Oper., Inc.*, Docket No. ER04-800-000 (June 10, 2004) (unpublished letter order).

³ Duke Energy was formerly known as Cinergy Services, Inc. It is an Affected System as defined in the Midwest ISO *pro forma* LGIA; that is, the generating facility will be interconnected to the LG&E and KU transmission system, not to the Duke Energy
(continued...)

upgrades to accommodate the Generator's Trimble County Generating Unit Number 2 (Trimble Generator). The original commercial operation date for the Trimble Generator was January 7, 2007; however, the Generator invoked its right under Article 3.1.2.1 of the Original Agreement to request that Duke Energy suspend construction on the network system upgrades. Subsequently, the project's commercial operation date was changed to April 1, 2010.

3. The Midwest ISO states that the Amended Agreement reflects the change in the schedule for the construction of network system upgrades and other related changes to the Original Agreement. It also states that the Amended Agreement revises the Original Agreement to replace references to "Cinergy Services, Inc." with "Duke Energy" and to clarify certain provisions. In addition, the Midwest ISO states that the parties disagree on proposed revisions regarding suspension of work and termination as a result of suspension of work. The Midwest ISO requests waiver of the prior notice requirement so that its filing will become effective on May 1, 2007.

A. Section 3.1.2.1 – "Right to Suspend"

4. As proposed, section 3.1.2.1 includes the following additional language pertaining to suspension of work:

Generator may exercise its right to suspend the performance of work of the Transmission Owner multiple times; provided, that the aggregate amount of time of all Generator-requested suspensions does not exceed three (3) years.

5. The Midwest ISO and Duke Energy interpret the Commission's rules⁴ to allow a generator to suspend a project's in-service date, without losing its place in the queue, for up to three years from the original in-service date.⁵ They believe that the suspension can

transmission system, but the interconnection will require upgrades on Duke Energy's transmission system.

⁴ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, (2004) (Order No. 2003-A) *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 Assn. of Regulatory Utility Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

⁵ The Midwest ISO makes conflicting statements on this point. In its filing, it states that it and Duke Energy interpret the Commission's rules to allow a generator to suspend a project either one time or multiple times totaling a maximum of three years from the original in-service date of the project. *See* Midwest ISO Filing at 2. In its

be either a one-time, three-year suspension or multiple shorter suspensions totaling a maximum of three years from the original in-service date of the project. The Midwest ISO states that interpreting the provision to provide for multiple suspensions and only counting the time in suspension towards the three-year limit would severely limit its ability to maintain the queue. In addition, Midwest ISO argues that article 5.16.1 of its *pro forma* LGIA⁶ supports its interpretation and that the Commission's acceptance of that provision of the Midwest ISO *pro forma* LGIA demonstrates that Midwest ISO's reading of the provision is compatible with Order No. 2003.

B. Section 3.1.2.3 - "Termination"

6. The parties also disagree on the proposed revision addressing termination as a result of suspension of work, shown below in redline and strikeout:

In the event Generator suspends the performance of work by ~~Cinergy~~Duke Energy pursuant to this section 3.1.2 and has not requested resumption of such work required hereunder by written request to Transmission Provider and ~~Cinergy on or before the last day of the thirty-sixth (36th) month after such requested suspension;~~ this Agreement shallDuke Energy on or before the date that is 18 months prior to the construction completion date listed in section 1.5 of Appendix A, to allow for timely completion under Article 3.1.4, then this Agreement may be deemed terminated.

7. The Midwest ISO asserts that this is a reasonable way to ensure that a project will meet its time schedule under the Midwest ISO's interpretation of the three-year suspension provision. It argues that this provision does not shorten the time that the project may be suspended (i.e., a total of three years), but only provides early notice that the revised in-service date cannot be met to allow the parties to renegotiate for different timelines if they wish.

answer, however, Midwest ISO states that the three-year suspension period begins on the date of the initial suspension request. *See* Midwest ISO Answer at 3.

⁶ Article 5.16.1 of the Midwest ISO's *pro forma* LGIA provides, in part:

In the event Interconnection Customer suspends work by Transmission Owner required under this LGIA pursuant to this Article 5.16, and has not requested Transmission Owner to recommence the work required under this LGIA on or before the expiration of three (3) years following commencement of such suspension, this LGIA shall be deemed terminated. The three-year period shall begin on the date the suspension is requested, or the date of the written notice to Transmission Provider, if no effective date is specified.

II. Notices and Responsive Pleadings

8. Notice of the Midwest ISO's filing was published in the *Federal Register*, 72 Fed. Reg. 26,623 (2007), with interventions and comments due by May 21, 2007. Duke Energy filed a timely motion to intervene. E.ON U.S. LLC (E.ON U.S.), on behalf of LG&E and KU,⁷ timely filed a motion to intervene and comments, and the Midwest ISO filed an answer.

9. On June 28, 2007, Commission staff sent the Midwest ISO a deficiency letter stating that the proposed amendment extends the commercial operation date by more than three years (from January 7, 2007 to April 1, 2010) and requesting that the Midwest ISO indicate whether the changed commercial operation date constitutes a material modification (i.e., would any lower-queued interconnection customers be harmed because of the changed commercial operation date). On July 30, 2007, the Midwest ISO filed a response to the deficiency letter.

10. Notice of the Midwest ISO's response to the deficiency letter was published in the *Federal Register*, 72 Fed. Reg. 45,033 (2007), with interventions and comments due by August 20, 2007. E.ON U.S. filed comments supporting the Midwest ISO's response to the deficiency letter.

11. In its comments to the filing, E.ON U.S. provides a time line of its suspension of the Original Agreement. On May 5, 2004, E.ON U.S. invoked its right under section 3.1.2.1 of the Original Agreement to suspend construction. Beginning in mid-2005, the parties began negotiating the Amended Agreement and on November 17, 2006, E.ON U.S. notified Duke Energy and the Midwest ISO that the suspension should be lifted under the terms of the Original Agreement.⁸ E.ON U.S. also notified Duke Energy and the Midwest ISO that the new in-service date would be April 1, 2010.

12. E.ON U.S. states that Midwest ISO and Duke Energy interpret section 3.1.2.1 to allow suspension for three years beginning on the initial suspension date, and extending no further than three years after the initial suspension date, whether or not the suspension was lifted for any portion of time during the three years. E.ON U.S. argues that this interpretation conflicts with Order No. 2003 and that, consistent with the Commission's policy, the three-year suspension period should be cumulative and not include any periods in which construction takes place.

⁷ LG&E and KU are public utility subsidiaries of E.ON US.

⁸ Thus construction was suspended over 18 months from May 5, 2004 to November 17, 2006 under the original agreement.

13. E.ON U.S. also adds that the Midwest ISO's other recently filed facilities construction agreements provide that "[f]or the purposes of this Agreement, the three-year (3-year) period shall be interpreted such that Interconnection Customer may not suspend construction for a cumulative period of more than three years."⁹ It states that these other agreements are consistent with Order No. 2003 and Order No. 2003-A. In addition, E.ON U.S. refutes the Midwest ISO's argument that Article 5.16.1 of the Midwest ISO *pro forma* LGIA supports the Midwest ISO's and Duke Energy's interpretation of section 3.1.2.1 of the Amended Agreement. E.ON U.S. questions why the Midwest ISO did not use the Midwest ISO's *pro forma* LGIA language for the Amended Agreement.

14. In addition, E.ON U.S. states that section 3.1.2.2 of the Amended Agreement provides that construction following a suspension will progress on a revised schedule agreed to by the parties and that the Generator is responsible for any costs incurred in recommencing the work, including any additional system impact study. E.ON U.S. argues that having assumed the risk of suspension, the Generator should be afforded the full three-year suspension period.

15. With regard to the proposed revision to section 3.1.2.3 pertaining to termination as a result of suspension, E.ON U.S. states that the eighteen month notice provision conflicts with the three-year suspension period. If there is a suspension, the provision effectively requires the Generator to request resumption of construction by January 1, 2008.¹⁰ In any case, E.ON U.S. disputes the necessity for the reduced notice requirement, given the extended time schedule to which the parties have agreed.

16. Finally, E.ON U.S. states that despite its concerns, it executed the Amended Agreement in an effort to move the Trimble Generator project forward. E.ON U.S. requests that the Commission clarify that, for future facilities construction agreements, the Generator may enjoy a full three-year suspension period and that future facilities construction agreements cannot be terminated unless the Generator fails to request resumption of construction at the end of the three-year suspension period.

17. In its answer, the Midwest ISO reiterates many of the arguments it made in its filing. In addition, it requests that the Commission clarify the policy for suspension of

⁹ See E.ON U.S. Comments at 7 & n. 8 (*citing* recently-filed facilities construction agreements among Midwest ISO and third parties).

¹⁰ E.ON US states that under section 3.1.2.3, the Generator must request resumption of construction on or before the date that is eighteen months prior to the construction completion date listed in Section 1.5 of Appendix A of the Amended Agreement. The construction completion date here is June 1, 2009 making January 1, 2008 the date that is eighteen months before the construction completion date.

work for any future facilities construction agreements into which the Midwest ISO may enter. In its response to the deficiency letter, the Midwest ISO states that no lower-queued projects would be harmed if the commercial operation date for the project is delayed until April 1, 2010.

III. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Commission Determination

20. For the reasons discussed below, the Commission accepts the Amended Agreement,¹¹ effective May 1, 2007, as requested, subject to the Midwest ISO revising section 3.1.2.3 and certain other provisions of the Amended Agreement to conform with corresponding provisions of the Midwest ISO's *pro forma* LGIA or otherwise justify why the proposed language is just and reasonable.¹²

¹¹ We note that the Midwest ISO requested waiver of Rule 2010 to permit it to provide electronic service of the filings. 18 C.F.R. § 385.2010 (2007). The Midwest ISO's request for electronic service is consistent with Order No. 653, which revised the Commission's regulations to require senders and recipients to serve documents upon one another by electronic means, with the exception of those who are unable to receive such service unless the parties agree otherwise. *Electronic Notification of Commission Issuances*, Order No. 653, 70 Fed. Reg. 8,720 (Feb. 23, 2005), FERC Stats. & Regs. ¶ 31,176 (2005); *order on reh'g*, Order No. 653-A, 70 Fed. Reg. 21,330 (April 26, 2005) FERC Stats. & Regs. ¶ 31,178 (2005).

¹² We note that instead of executing an agreement with provisions it does not support, an interconnection customer may request that the transmission provider file the unexecuted LGIA with the Commission. See Order No. 2003, *pro forma* Large Generator Interconnection Procedures (LGIP) at § 11.3.

21. As a preliminary matter, we find that the Original Agreement was filed with the Commission before the effectiveness of the Midwest ISO's *pro forma* LGIA¹³ and that Order No. 2003 did not abrogate existing interconnection (or facilities construction) agreements.¹⁴ However, amendments to such existing agreements must be shown to be just and reasonable¹⁵ and the rule offers useful guidance as to interconnection terms and conditions that the Commission considers just and reasonable.¹⁶

a. Extension of Commercial Operation Date

22. First we address how, as is the case here, a suspension of work may affect a project's commercial operation date. Although Order No. 2003 allows for a total of three years for suspension of work, a suspension may cause changes in a project's commercial operation date. Accordingly, suspensions of work must be considered in light of the rules regarding extensions of commercial operation dates.

23. Order No. 2003 allows for extension of the commercial operation date, without regard to the cause of the delay, for a cumulative period of three years; however, an extension greater than three years may be considered a material modification requiring a customer to withdraw from the interconnection queue and submit a new interconnection request if lower-queued interconnection customers are harmed.¹⁷ Thus, where, as here, a suspension causes the commercial operation date to be extended beyond three years, such

¹³ The original agreement was filed on April 30, 2004 whereas the Commission accepted the Midwest ISO's compliance filing to Order No. 2003 and 2003-A on July 8, 2004. *See Midwest Indep. Trans. Sys. Oper., Inc.*, 108 FERC ¶ 61,027, *order on reh'g*, 109 FERC ¶ 61,085 (2004).

¹⁴ *See* Order No. 2003 at P 187.

¹⁵ No such showing would be necessary where *pro forma* language already accepted by the Commission is being used in an agreement.

¹⁶ *See, e.g., Illinois Power Co.*, 120 FERC ¶ 61,237, at P 18 (2007); *PSEG Power In-City I, LLC*, 109 FERC ¶ 61,189, at P 14 (2004).

¹⁷ Section 4.4.5 of the *pro forma* LGIP provides that extensions of less than three cumulative years in the commercial operation date of a generating facility are not considered material modifications requiring a customer to withdraw from the interconnection queue and submit a new interconnection request. *See* Order No. 2003, *pro forma* LGIP at § 4.4.5.

extension may be considered a material modification unless it can be shown that no lower queued generators will be harmed.¹⁸

24. In the deficiency letter, Commission staff noted that the commercial operation date had been changed from January 7, 2007 to April 1, 2010, and requested that the Midwest ISO indicate whether the change constitutes a material modification. In response, the Midwest ISO stated that it did not identify any lower-queued projects that would be harmed if the commercial operation date for the project is delayed until April 1, 2010. In addition, E.ON U.S. stated that it supports the Midwest ISO's determination that the change in the commercial operation date for the Trimble Generator does not harm any lower-queued customers. Because no lower-queued customers are harmed, we find that the change in the commercial operation date is not a material modification.

25. In addition, we find that because the commercial operation date has already been extended beyond the three-year maximum as a result of the 18-month suspension of work, any subsequent extension of the commercial operation date could be deemed a material modification.

b. Right to Suspend

26. With regard to proposed section 3.1.2.1, the Commission finds that the language of the Amended Agreement does not conform to article 5.16.1 of the Midwest ISO *pro forma* LGIA and is not required to so conform because the agreement pre-dates the effectiveness of Order No. 2003 in the Midwest ISO. However, we do not agree with the Midwest ISO's and Duke Energy's interpretation of the suspension provision. We note that the Midwest ISO and Duke Energy interpret the Commission's rules to allow a generator to suspend a project either one time for a three-year period or multiple times totaling a maximum of three years from the original in-service date of the project.¹⁹ The Commission finds that this interpretation misapprehends our policy set forth in Order No. 2003.

27. Under Order No. 2003, an interconnection agreement is terminated if the interconnection customer has not asked the transmission provider to recommence work within three years from the date of the suspension request.²⁰ In addition, the Commission

¹⁸ Cf. *Illinois Power Co.*, 120 FERC ¶ 61,237, at P 20 (finding that transmission provider had not shown that allowing interconnection customer to extend its milestones beyond three years would harm lower queued generators).

¹⁹ As noted above, the Midwest ISO refers to the original in-service date in its filing and to the date of the initial suspension request in its answer.

²⁰ Order No. 2003, *pro forma* LGIP at § 5.16.

has found that limiting a generating facility to only one suspension period is unreasonable.²¹ We have stated that the interconnection customer can make a single request for a three-year suspension or several requests for suspension, *if the sum of the suspensions* does not exceed three years.²² This means that in the case of multiple suspensions the individual period of suspensions are added together to arrive at the allowed three-year total. In other words, the clock for counting the three total years of suspension starts on the date when each suspension is requested (or the date of the written notice to the transmission owner, if no effective date of suspension is specified)²³ and stops when work recommences. Further, the sum of the suspensions must include only time that a project is suspended, not intervening periods during which the project is in construction. Allowing the interconnection customer up to three years of suspension time gives it the flexibility necessary to accommodate permitting and other delays that are particularly likely to affect large projects.²⁴ However, as discussed above, we note that any suspension that results in the commercial operation date being extended more than three years beyond the original commercial operation date could be deemed a material modification.

c. Termination as a Result of Suspension

28. With regard to section 3.1.2.3, we find that the proposed non-conforming provision addressing termination associated with suspension may not allow the Generator full use of the three-year suspension period to which it is entitled. The Midwest ISO asserts that the termination provision, as amended, is a reasonable means to ensure that a project will meet its time schedule under the Midwest ISO's interpretation of the three-year suspension provision. As discussed above, we reject the Midwest ISO's interpretation. Further, although the Generator has suspended work on the project for approximately 18 months (from May 5, 2004 to November 16, 2005), it is still entitled to approximately 18 more months of suspension. Under the proposed revision to section 3.1.2.3, however, the Generator may be unable to request a termination and resume work by January 1, 2008, the date that is 18 months before the construction completion date. For example, if the Generator were to invoke its right to suspend work on November 1, 2007, under proposed section 3.1.2.3 it would have to resume work by January 1, 2008, which would enable the Generator to use only two out of the approximately 18 months available to it under the Commission's three-year suspension policy. Accordingly, we find that the proposed revision to section 3.1.2.3 does not conform with the Midwest ISO

²¹ *Id.* at P 412.

²² Order No. 2003-A at P 319 (emphasis added).

²³ *See* Order No. 2003-A at P 318.

²⁴ *See* Order No. 2003 at P 410.

pro forma LGIA and may not allow the Generator full use of the three-year suspension period to which it is entitled. We direct the Midwest ISO to revise section 3.1.2.3 accordingly.

d. Name Changes and Other Textual Changes

29. The Commission will accept the proposed revisions to the agreement replacing “Cinergy Services, Inc.” with “Duke Energy,” as these changes update the legal name of one of the parties. We will not, however, accept the proposed revisions that the Midwest ISO characterizes as clarifying. We find that these revisions include substantive, non-substantive and stylistic variations from the Midwest ISO *pro forma* LGIA. As discussed above, this agreement pre-dates the effectiveness of Order No. 2003 in the Midwest ISO, and therefore, strict compliance with Order No. 2003 is not required. However, the Midwest ISO has not offered any support or justification for these revisions beyond stating that they are “clarifying.” Accordingly, we direct the Midwest ISO to make a compliance filing either conforming these provisions to the Midwest ISO *pro forma* LGIA or providing information justifying why the proposed revisions are just and reasonable.

30. Finally, for good cause shown, we will grant the Midwest ISO’s request for waiver of Rule 2010 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2007) and the prior notice requirement²⁵ and accept the filing, subject to conditions as discussed above, effective May 1, 2007.

The Commission orders:

(A) The Amended Agreement is hereby accepted, effective May 1, 2007, as discussed in the body of this order.

(B) The Midwest ISO is directed to make a compliance filing as discussed in the body of this order, within 30 days of the date of issuance of this Order.

By the Commission.

Kimberly D. Bose,
Secretary.

²⁵ See *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).