Ameren Services Co. v. FERC, 880 F.3d 571 (D.C. Cir. 2018)

When new sources of power generation connect to the existing transmission grid, the grid often requires new construction beyond the point of interconnection in order to accommodate the increased flows of electricity. FERC issued a series of orders empowering incoming generators within the Midcontinent Independent System Operator (MISO) region to elect to self-fund this new construction, or to seek financing from third parties, regardless of whether the current grid owners wish to fund the construction themselves.

The Commission justified the orders on two grounds. First, it found that allowing transmission owners to choose between funding options—and thus, potentially, to impose subsequent charges to generators via transmission owner funding—could allow the transmission owners to discriminate among generators. Secondly, it held that the charges to generators would be (or could be) unjust and unreasonable under the Federal Power Act. Petitioning transmission owners challenge both grounds. We conclude that Petitioners are correct regarding the discrimination point: there is neither evidence nor economic logic supporting FERC's discriminatory theory as applied to transmission owners without affiliated generation assets.

FERC's second ground raises a unique and important conceptual issue. Petitioners argue that involuntary generator funding compels them to construct, own, and operate facilities without compensatory network upgrade charges—thus forcing them to accept additional risk without corresponding return as essentially non-profit managers of these upgrade facilities. We do not think that FERC adequately responded to this argument. We therefore remand the case to the Commission.

I.

We have previously explained the series of steps FERC took to unbundle the electric power system, enabling and encouraging new independent generators to create a competitive market for power generation. Transmission owners, which had previously served their own vertically integrated sources of power generation, were obliged to accept power from any source on a non-discriminatory basis.

For independent generators to utilize the grid, they must first connect to it. FERC thus used its rulemaking powers to issue Order No. 2003, which standardized the procedures for generator interconnection and directed each transmission network to maintain a pro forma generator interconnection agreement. Order No. 2003 also established the "at or beyond" rule, which distinguished between two types of new construction necessary to connect new generation sources into the grid. The first category, called "interconnection facilities," includes those facilities and equipment that lie between the generation source and the point of interconnection with the transmission network. Under the "at or beyond" rule, the cost of interconnection facilities are the sole responsibility of the incoming generator. That allocation of costs is undisputed in this proceeding. And Petitioners do not own or manage those "interconnection facilities." The second category includes those additional facilities and equipment that are needed beyond the "point of interconnection"—in other words, any new construction that occurs within Petitioners' transmission grid itself to accommodate the incoming flows of new power.

This latter category of construction, called "network upgrades," is the focus of the present dispute.

* * *

As we have also explained, FERC encouraged the creation of Regional Transmission Organizations (RTOs) to integrate the fragmented transmission grid on a regional basis, along with Independent System Operators (ISOs) as non-profit entities which would control access to the grid within their respective regions. In Order No. 2003, the Commission set a default rule that transmission owners would bear responsibility for the network upgrades, but gave ISOs "flexibility to customize its interconnection procedures and agreements to meet regional needs." In this case, we encounter MISO, which qualifies as both an RTO and an ISO.

Originally, MISO had allocated the costs equally between the incoming generator and the transmission owner. As such, under transmission owner funding—which it could choose—the transmission owner would initially provide the capital for construction, but would recover 50 percent of that capital (a "return of" capital), along with an appropriate return on that capital, through network upgrade charges. It would fund the other 50 percent of the costs by passing them on to all of its customers through its rates—again, including an appropriate rate of return. Under generator funding, the generator would initially provide the capital for construction, and would receive 50 percent of that capital from the transmission owner through credits for transmission service.

But a problem arose: this 50/50 arrangement placed most of the cost burden on the pricing zone where interconnection occurred, but the power from the new generation sources often exceeded the load within those local zones in which they connected. As a result, the local customers of the transmission owner bore a disproportionate share of the cost burden of upgrades that supported power that would ultimately benefit more remote customers throughout the MISO region. Rather than forcing their local customers to shoulder this regional burden, several local transmission owners threatened to withdraw from MISO if the cost allocation remained unchanged.

To remedy this problem, MISO proposed (and FERC approved) a new allocation of capital costs: for network upgrades rated at 345 kilovolts or above, the interconnecting generator bears 90 percent of those costs, and transmission owners (and their local customers) bear 10 percent. In other words, the 10 percent would be included in the transmission owner's rate base. For projects rated below 345 kilovolts, the interconnecting generator bears 100 percent of the costs. This reallocation was intended to comport with FERC's "principle that network upgrades should be paid for by the parties that cause and benefit from such upgrades."

The manner in which the incoming generator and transmission owner actually pay these capital costs depends upon the way the network upgrades are funded. Originally, the MISO tariff contained three options for providing the capital required to construct the network upgrades. We need not discuss the first because it was removed by the Commission in its E.ON decision.

Under the second alternative, Option 2 or "generator funding," the interconnecting generator would provide the funding for the network upgrades prior to construction. The transmission

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