

154 FERC ¶ 61,172
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc.

Docket No. ER16-471-000

ORDER ON NOTICE OF TERMINATION

(Issued March 4, 2016)

1. On December 4, 2015, Midcontinent Independent System Operator, Inc. (MISO), pursuant to section 205 of the Federal Power Act (FPA)¹ and Part 35 of the Commission's regulations,² filed a notice of termination of the Generator Interconnection Agreement (GIA) entered into by enXco Development Corporation (subsequently assigned to Merricourt Power Partners, LLC (Merricourt)), Montana-Dakota Utilities Company (Montana-Dakota) and MISO (Merricourt GIA).³ As explained below, we accept the notice of termination.

I. Background

2. On August 17, 2015, in Docket No. EL15-90-000, Merricourt filed a complaint pursuant to section 206 of the FPA⁴ against MISO (Complaint). Merricourt alleged that MISO had unreasonably and unduly discriminatorily refused to let Merricourt know that MISO would not terminate the Merricourt GIA after December 1, 2015 and refused to amend the Merricourt GIA to extend the Commercial Operation Date (COD) from its original COD of December 1, 2012, to December 31, 2016.

¹ 16 U.S.C. § 824d (2012).

² 18 C.F.R. § 35.15 (2015).

³ Service Agreement No. 2191 under MISO's FERC Electric Tariff, Fifth Revised Volume No. 1 effective October 10, 2011.

⁴ 16 U.S.C. § 824e (2012).

3. The Commission denied Merricourt's Complaint. The Commission found that the Complaint was premature because MISO had not filed to terminate the Merricourt GIA, and the Commission stated that it was not pre-judging the merits of either extension or termination.⁵ The Commission also stated that it expected that MISO would implement the MISO Open Access Transmission, Energy and Operating Reserve Tariff (Tariff) in a non-discriminatory manner should it seek to terminate the Merricourt GIA. The Commission also noted that when considering whether to accept the termination of a GIA or to extend milestones, the Commission takes into account many factors, including whether the extension would harm generators lower in the interconnection queue and any uncertainty that speculative projects may present to other projects in the queue.⁶

II. MISO's Filing

4. As noted above, on December 4, 2015, MISO filed its notice of termination of the Merricourt GIA. The Merricourt GIA addresses Merricourt's proposed 150 MW wind farm located in Dickey and McIntosh Counties, North Dakota (the Project). The COD in the Merricourt GIA is December 1, 2012. MISO states that it seeks termination of the Merricourt GIA because Merricourt "has ceased (in this case, never achieved) Commercial Operation for three consecutive years following its COD pursuant to Section 2.3.1 of the GIA."⁷ Thus, MISO states that, as of December 1, 2015, the Project has never achieved Commercial Operation.

⁵ See *Merricourt Power Partners, LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,082, at P 34 (2015) (Complaint Order). The Commission also noted that the Commission's Dispute Resolution Service was available. *Id.* n.30.

⁶ Complaint Order, 153 FERC ¶ 61,082 at P 35.

⁷ MISO December 4 Filing at 1 and Exh. 1.

Article 2.3.1 under the Merricourt GIA "Written Notice" provides as follows:

This GIA may be terminated by Transmission Provider if the Generating Facility has ceased Commercial Operation for three (3) consecutive years, beginning with the last date of Commercial Operation for the Generating Facility, after giving Interconnection Customer ninety (90) Calendar Days advance written notice. The Generating Facility will not be deemed to have ceased Commercial Operation for purposes of this Article 2.3.1 if Interconnection Customer can

(continued...)

5. MISO asserts that the provision in Article 2.3.1 of the Merricourt GIA, which allows Merricourt to extend its COD if it can show “significant steps to maintain or restore operational readiness,” was intended to apply to generating facilities that reached Commercial Operation but then subsequently ceased operating – not generating facilities that never achieved Commercial Operation, such as the Project. MISO further states that to interpret this language otherwise would write into the Merricourt GIA a *de facto* suspension of indeterminate length, rather than a provision that recognizes operational challenges that may arise after the generating facility is actually built. MISO states that this interpretation is reflected in the reference to “significant steps to *maintain or restore* operational readiness of the Generating Facility for the purpose of *returning* the Generating Facility to Commercial Operation as soon as possible.”⁸

6. MISO argues that even if the “significant steps” provision of Article 2.3.1 applies to generating facilities that are not constructed, MISO does not believe that Merricourt has shown sufficient evidence of “significant steps” towards maintaining or restoring operational readiness of the Project.⁹ While MISO states that it appreciates that Merricourt has paid for and Montana-Dakota has built the network upgrades for the Project, MISO argues that these steps do not apply to the operational readiness of the Project. Moreover, MISO states that Merricourt’s own inaction has resulted in failing to achieve Commercial Operation within three years of the COD in the Merricourt GIA. MISO also states that Merricourt’s plan in the Merricourt Complaint for reaching Commercial Operation showed that several steps have yet to be completed. Because these steps remain, MISO argues that there is a potential harm for interconnection customers regarding whether the Project will proceed and for transmission owners that must account for it for planning purposes.

document that it has taken other significant steps to maintain or restore operational readiness of the Generating Facility for the purpose of returning the Generating Facility to Commercial Operation as soon as possible.

⁸ *Id.* at 3 (emphasis by MISO).

⁹ *Id.* at 4. MISO states that, in the Merricourt Complaint, Merricourt provided the Commission with its plan to commence construction and achieve Commercial Operation if it was granted an additional year or more. MISO does not believe that such a plan, nor any steps taken by Merricourt, should qualify as “significant steps” as described in the language of Article 2.3.1 of the Merricourt GIA.

7. MISO states that it does not believe that a plan for future actions constitutes sufficient evidence of significant steps toward maintaining or restoring operational readiness.¹⁰ MISO argues that Merricourt's delay in meeting the COD provides grounds for termination under Article 2.3.1 and Commission precedent.¹¹ Also, MISO states that under the Queue Reform III Order, the Commission has said that once an interconnection customer has executed a GIA, it should be prepared to proceed to meet those obligations if it is not speculative.¹²

8. MISO also states that termination is just and reasonable, not unduly discriminatory, and consistent with the public interest.¹³ MISO maintains that any extension of the COD would harm lower-queued projects or create uncertainty because a speculative project would remain in the MISO queue. Citing Merricourt's failure to meet its COD, MISO argues that Merricourt has not demonstrated that continued delay would not cause uncertainty for other projects. MISO states that keeping Merricourt's Project in the queue would not allow other projects currently in the queue to continue and would potentially require "cascading" restudies from numerous other projects lower in the queue. MISO argues that permitting projects to remain indefinitely in the queue is incompatible with effective processing of the queue.

9. MISO argues that even when network upgrades have been built, a potential harm still exists. MISO notes that in *New Era*, the Commission found that, even though network upgrades were completed and paid for and no other customers were relying on New Era's upgrades, "the potential harm still exists for interconnection customers that will not know whether the Project will proceed and for transmission owners that must

¹⁰ *Id.*

¹¹ MISO cites to *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008, at P 25 (2011) (*Lakeswind I*), *reh'g denied*, 145 FERC ¶ 61,038 (2013) (*Lakeswind II*); *see also* *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114 (2013) (*Ellerth Wind*) (order accepting MISO notice of termination for a project that had not met milestone payments). *See* MISO Filing at n.4.

¹² MISO Filing at 12 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233 at P 179 (Queue Reform III Order), *order on reh'g*, 139 FERC ¶ 61,253 (2012) (Queue Reform III Rehearing Order); *Midwest Indep. Transmission Sys. Operator, Inc.*, 141 FERC ¶ 61,050, at P 34 (2012)).

¹³ *Id.* at 2.

account for the Project for planning purposes.”¹⁴ Further, MISO states that the Commission distinguished *Lakeswind I* (where milestones were amended), noting that Lakeswind requested its amendment to reflect its revised cost responsibility whereas New Era sought an extension to account for setbacks it claimed were delaying approval of construction. MISO states that the Commission was not persuaded by New Era’s argument. MISO believes that Merricourt is similar to New Era because it seeks an extension of time “to account for setbacks . . . that stalled construction” of its Project.¹⁵

10. MISO requests an effective date of March 3, 2016.

III. Notice of Filing and Responsive Pleadings

11. Notice of MISO’s filing was published in the *Federal Register*, 80 Fed. Reg. 76,971 (2015), with interventions and protests due on or before December 28, 2015. On December 16, 2015, Merricourt filed a motion to intervene. On December 28, 2015, Merricourt filed a protest. On January 12, 2016, MISO filed a motion for leave to answer and an answer to Merricourt’s protest. On January 20, 2016, Merricourt filed a motion for leave to answer and an answer to MISO’s answer. On February 2, 2016, Merricourt filed a pleading requesting action “no later than a few days before February 16, 2016.” On February 17, 2016, Merricourt filed a redacted letter informing the Commission that Merricourt had received a non-public communication from the load-serving entity with which Merricourt proposes to execute a power purchase agreement (PPA).

A. Merricourt’s Protest

12. Merricourt states that it has not breached any payment milestones under its contract and argues that the Project is not speculative in that, among other things, it has spent over \$20 million in developing the Project, including \$17.8 million in network upgrades that are operational, and it has a letter of intent for a PPA. Merricourt is requesting a new COD of September 30, 2017.

13. In further support that its Project is not speculative, Merricourt states that: it has secured a right of first refusal on a 230 kV main power transformer from a supplier; it has 10 percent of the required wind turbines in storage, and its parent company has entered into “a binding definitive agreement” with a supplier (Vesta) for the purchase of the balance of the wind turbines; the North Dakota Public Service Commission

¹⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,198 (2014) (*New Era*).

¹⁵ MISO Filing at 31.

(North Dakota Commission) re-issued a site permit for the Project that is valid until 2019; Merricourt obtained a letter of intent from a load-serving entity within MISO to purchase the full output from the generating facility under a long-term PPA, for which the parties are close to finalizing a PPA so long as continued interconnection service is confirmed. Further, Merricourt states that it has funds available and ready to be deployed to construct the Project.¹⁶

14. Merricourt argues that its Project is distinguishable from *New Era* and *Ellerth Wind*, in which GIA termination was accepted by the Commission, because it has undertaken numerous actions that demonstrate “good faith efforts” to complete the Project and to do so in the near term. In this regard, it argues that it is like *Lakeswind*, where milestones were extended. Merricourt further argues that MISO’s arguments that the Project is speculative are theoretical. It also argues that *Lakeswind* did not rest on a showing of finalized business arrangements to demonstrate project viability, but, even if they were a relevant factor, it has made such a showing.¹⁷

15. Merricourt contends that MISO provides no evidence to demonstrate harm to lower-queued projects, and Merricourt states that it is not aware that any lower-queued projects in its Group Study or otherwise are relying on, and might be responsible for, Merricourt’s network upgrades. Regarding MISO’s reference to the Queue Reform III Order, Merricourt argues that MISO has not provided any evidence that its queue is still backlogged or that allowing Merricourt to bring its Project online in 2017 will cause a queue backlog.¹⁸ Merricourt also disputes MISO’s claim of harm to Montana-Dakota as unsupported, and it notes that Montana-Dakota has stated that it does not oppose COD extension. Merricourt also argues that there is no harm to transmission owner planning, stating that all the transmission planning has been completed, modeling Merricourt as operating in 2017 and thereafter.¹⁹

16. Merricourt reiterates its arguments from its Complaint that its termination is unduly discriminatory compared to MISO’s extension of CODs in *Mankato* and

¹⁶ Merricourt Protest at 8-9.

¹⁷ *Id.* at 10-12.

¹⁸ *Id.* at 12-13.

¹⁹ *Id.* at 16.

South Fork.²⁰ It argues that Mankato got an extension of its COD before the three year period had expired, and South Fork had not reached Commercial Operation three years after its COD but MISO withdrew a notice of termination of South Fork's GIA. Merricourt also disputes MISO's claim that termination is in the public interest, arguing that the Project is located within MISO and will contribute to meeting the resource adequacy and energy needs of MISO.

17. Merricourt argues that MISO cannot interpret Article 2.3.1 of the Merricourt GIA to allow it to terminate a project that never achieved Commercial Operation (claiming the language expressly applies only to terminating projects that have achieved Commercial Operation but then cease operation), but then interpret the "significant steps" provision to avoid GIA termination to only apply to a project that achieves but then ceases operation. If MISO's position were correct, then Merricourt argues that MISO would not have a basis to terminate the Merricourt GIA after December 1, 2015, because Article 2.3.1 would not apply to generating facilities that had not yet achieved Commercial Operation. Moreover, Merricourt argues there is no reasonable basis to allow a project that ceased Commercial Operation to demonstrate significant steps to proceed with its project but deny a project that has never achieved Commercial Operation the same opportunity.²¹

B. MISO's Answer

18. MISO contends that it properly used its discretion in deciding to file the instant notice of termination of the Merricourt GIA. MISO states that while some degree of project construction may have shifted the analysis, failure to construct any on-site portion of the Project guided MISO's decision that termination was proper, as Article 2.3.1 specifically references the generating facility. MISO states that it looked to Commission precedent and it found the Project similar to cases where termination was proper and dissimilar to those instances where termination was not supported. MISO also states that it believes its queue processes and the public good are best served if the Project, should it elect to do so, re-enter the queue and be reevaluated based on the five years that have passed since it executed its first GIA. MISO states that it found the Project to have made

²⁰ *Id.* at 17-23 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,180 (2015) (*Mankato*); *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER15-954-000 (proceeding involving MISO's January 30, 2015 filing to terminate the South Fork GIA; the filing was withdrawn on April 29, 2015) (*South Fork case*)).

²¹ *Id.* at 24-26.

no on-site construction progress on any generating facility due only to business decisions made by Merricourt.²²

19. Regarding Merricourt's showing of steps it is taking to bring the Project online by December 31, 2016, MISO argues that MISO's analysis shows either that no progress has been made in five years on these items, and/or that the evidence was no more than unsecured promises of things that would happen in the future if MISO would grant additional extensions of time for the Project. MISO states that it found the evidence unconvincing. For example, MISO states that, rather than demonstrate that Merricourt had procured and installed the required transformer, or even taken delivery, or perhaps even purchased the transformer, Merricourt provided an unexercised purchase option to purchase a transformer at an undefined future date. MISO argues that it is left to speculate as to whether the transformer will ever be procured.²³

20. Regarding Merricourt's claim that Vesta is prepared to deliver turbines for the Project in June 2017, MISO states that the evidence Merricourt presented in its protest was created after MISO filed to terminate the Project, so MISO did not originally rely on it. However, MISO argues that at best, this newly created evidence suggests what might happen in the future, and not what Merricourt is contractually obligated to do in the future. MISO further asserts that Merricourt's claim that it has ten percent of the required turbines in its inventory begs the question why, three years after it agreed to reach Commercial Operation, Merricourt has failed to install a single turbine.²⁴

21. MISO also disputes that other evidence proffered by Merricourt shows significant progress. MISO argues that the new site permit which is valid through 2019 to replace the site permit that was about to expire does not provide evidence of the Project moving forward and instead demonstrates a project that has lagged without progress. MISO also states that while Merricourt told this Commission it planned to finish construction and achieve Commercial Operation by December 2016, Merricourt indicated to the North Dakota Commission that it intended to begin construction by the end of 2016. MISO asserts that since Merricourt failed to construct any generating facilities during its first permitted period, MISO can only speculate whether Merricourt can or will build in an extended period.²⁵ MISO also argues that Merricourt has only an undated, unexecuted

²² MISO Answer at 4-5.

²³ *Id.* at 5-6.

²⁴ *Id.* at 6.

²⁵ *Id.* at 6-7.

draft of a PPA, which MISO argues is not enough to show that the Project is not speculative.²⁶

22. MISO states that, in the Merricourt Complaint, Merricourt also argued that it was entitled to the same treatment as Mankato and South Fork, but those cases are distinguishable from the instant case.

23. MISO distinguishes Merricourt's Project from Mankato's, stating that Mankato had an unqualified three-year suspension provision in its GIA which it elected to utilize, and Mankato was not subject to the limitations of the current Generator Interconnection Procedures (GIP). According to MISO, before Mankato's allowed three-year period after its initial COD passed, Mankato notified MISO of its desire to proceed and thus MISO, consistent with Commission precedent, followed its process to restudy the project, taking into account the state of the queue at the time. MISO states that the change in Mankato's COD was due to the change in in-service date for the Multi-Value Project that Mankato was conditioned upon. MISO states that it could not force Mankato to come online sooner than the in-service date of that facility. Thus, it states, Mankato's COD was adjusted, but no similar reasons apply to Merricourt.²⁷ MISO argues that Merricourt's Project, in contrast, has not been built and is subject to the restrictions of Section 4.4.4 of the GIP.²⁸ MISO states that Section 4.4.4 of the GIP limits extensions to a COD, and

²⁶ *Id.* at 7.

²⁷ MISO Answer at 10-11.

²⁸ Section 4.4.4 of MISO's *pro forma* Generator Interconnection Procedures (GIP) under "Modifications" provides as follows:

....After entering the Definitive Planning Phase any extension by Interconnection Customer to the In-Service Date or [COD] of the Generating Facility shall be deemed a Material Modification except that the Transmission Provider will not unreasonably withhold approval of an Interconnection Customer's proposed change in the In-Service Date or [COD] of the Generating Facility if that change is the result of either (a) a change in milestones by another party to the GIA or (b) a change in a higher-queued Interconnection Request, provided that in either case, these changes do not exceed three years beyond the original [COD] or In Service Date. A change to either of these dates that exceeds three years from the date in the original Interconnection Request is a Material Modification.

further that MISO has no obligation to renegotiate the Merricourt GIA milestones, which are initially selected by the interconnection customer.

24. MISO disputes Merricourt's reliance on the case involving South Fork, which was resolved after the parties engaged in the Commission's dispute resolution process. MISO argues that while the withdrawal of a notice of termination in that case is a matter of public record, Merricourt should not be allowed to opine here as to why MISO took, or did not take, any particular action in that case. Nor should the Commission allow Merricourt to leverage the results of a confidential dispute resolution against a party to that dispute resolution, according to MISO.²⁹ MISO also distinguishes South Fork's project from Merricourt's Project, stating that South Fork had a signed PPA and a signed transformer supply agreement, whereas Merricourt simply plans to get those documents. Further, unlike Merricourt, South Fork was subject to a number of restudies and was required to build additional network upgrades, which caused South Fork's delay in construction, according to MISO.³⁰

25. MISO disputes Merricourt's claim that its Project is distinguishable from the *New Era* and *Ellerth Wind* cases in which the Commission upheld termination. MISO states that in *New Era*, New Era had failed to meet a required milestone under its GIA in 90 days while Merricourt failed to meet its COD milestone after three years without even beginning construction. MISO states that in *Ellerth Wind*, the Commission held that Ellerth Wind would not qualify to change its COD even if a viable COD had been proposed, as Section 4.4.4 of the GIP only allowed changes to the COD under narrow circumstances that were not present in that case – i.e., (a) a change in milestones of another party to the GIA or (b) a change in a higher-queued interconnection request, provided in either case these changes do not exceed three years beyond the original COD. MISO argues that neither of the exceptions applies here. Additionally, MISO states that Merricourt's request for a change in its COD exceeding three years beyond the original COD is explicitly forbidden under Section 4.4.4 of the GIP.³¹

26. MISO argues that Merricourt's situation is distinguishable from *Lakeswind I*. MISO acknowledges that *Lakeswind I* did not rely on a showing of finalized business arrangements to demonstrate project viability. However, MISO argues that, unlike

²⁹ MISO Answer at 3-4.

³⁰ *Id.* at 11.

³¹ *Id.* at 7-8.

Merricourt, Lakeswind was not a project that failed to meet its COD, or failed to cure such breach within three additional years.³²

27. MISO contends that there is no merit to Merricourt's argument that the three year rule applies only to projects that have ceased operation, and not projects that have never achieved Commercial Operation, citing the Commission's interpretation of Article 2.3.1 in *Mankato*.³³

28. MISO also reiterates its argument that allowing Merricourt to linger in the queue harms transmission planning, wastes resources, and impacts other projects. Finally, MISO states that if the Project intends to eventually build, the instant termination does not prevent Merricourt from continuing with its plans.

C. Merricourt's Answer

29. With respect to MISO's argument that Merricourt has not begun construction of its Project, Merricourt asserts that there is no basis in Article 2.3.1 of the Merricourt GIA, Commission precedent, or MISO's recent actions that provides that MISO's permissive termination right in Article 2.3.1 turns on whether construction of any portion of the Project has occurred. Merricourt asserts that the Commission should examine whether progress has been made to develop the generating facility, not whether there has been actual construction of the generating facility.³⁴

30. Merricourt disputes MISO's characterization of Merricourt's offer of milestones to be included in an amended GIA as unsecured promises. Rather, Merricourt describes them as milestone commitments, which it asserts no project has offered or been required to offer in order to obtain a COD extension. Merricourt further states that it cannot expend hundreds of millions in funds, risk stranded investment, enter into a PPA, and risk exposure to potential damages for failure to deliver energy from this specific generating facility if interconnection is not assured.³⁵

31. With respect to MISO's suggestion that Merricourt is not bound to purchase turbines from Vesta, Merricourt states that South Fork had explained that it intended to

³² *Id.* at 8-9.

³³ *Id.* at 9-10.

³⁴ Merricourt Answer at 7-9.

³⁵ *Id.* at 10-11.

enter into a turbine supply agreement after interconnection service was assured, but that did not deter MISO from extending South Fork's COD. Regarding MISO's assertion that no one can predict what Merricourt will eventually do, Merricourt argues that the same could be said for Mankato and South Fork, each of which were granted COD extensions. Merricourt argues that the cases involving New Era and Ellerth Wind are distinguishable as neither of those projects had taken concrete actions to bring its generating facility online. Regarding Lakeswind's project, Merricourt argues that Lakeswind took actions to cure its breach and, on this basis, the Commission rejected MISO's attempted GIA termination. Merricourt reiterates that it has systematically made progress every year to bring the Project online.³⁶

32. Merricourt reiterates its argument that there will be no harm to the queue and that MISO's concerns in that regard are only theoretical. Merricourt also reiterates its argument that MISO's termination of the Merricourt GIA is discriminatory and preferential compared to MISO's recent treatment of the Mankato and South Fork projects.³⁷ Finally, regarding MISO's suggestion that Merricourt may re-enter the queue and, at its election, enter into a provisional GIA, Merricourt argues that there is no reason why it should have to be subjected to the risks and delay of that path. It also notes that Mankato and South Fork were not forced into a provisional GIA.³⁸

IV. Discussion

A. Procedural Matters

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), Merricourt's timely, unopposed motion to intervene serves to make it a party to this proceeding.

34. 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 and answer unless otherwise ordered by the decisional authority. We will accept MISO's answer and Merricourt's answer because they have provided information that assisted us in our decision-making process.

³⁶ *Id.* at 13-15.

³⁷ *Id.* at 16-22.

³⁸ *Id.* at 22-23.

B. Substantive Matters

35. We accept MISO's notice of termination of the Merricourt GIA effective March 3, 2016, as requested. With regard to the Merricourt GIA, we find that Section 4.4.4 of the GIP expressly precludes an extension of Merricourt's COD beyond three years of the original COD.³⁹ While Section 4.4.4 allows an extension of the COD, it does so only if the change is the result of (a) a change in milestones by another party to the GIA or (b) a change in a higher-queued interconnection request, and provided that in either case these changes do not exceed three years beyond the original COD. No such circumstances are presented here, and, even if such circumstances were present, Merricourt could not extend its COD beyond three years beyond the original COD. Thus, Merricourt is similar to *Ellerth Wind*, where the Commission stated, among other things, that termination of the Ellerth GIA is supported as "[t]here has been no record support that Ellerth . . . would qualify to change its [COD] or In-Service Date even if a viable [COD] had been proposed, as [section 4.4.4 of] the GIP only allows changes in the [COD] or In-Service Date under narrow circumstances which are not present here."⁴⁰

36. Further we are not persuaded by Merricourt's reliance on the *Mankato* and *South Fork* cases. Our decision to give effect to Section 4.4.4 of the GIP with regard to the Merricourt GIA is not inconsistent with our decision in *Mankato*, as Merricourt contends, because the *Mankato* GIA was not subject to Section 4.4.4. of the GIP. We agree with MISO's reasoning in its answer (discussed above) that Section 4.4.4 of the GIP did not apply to Mankato because Mankato notified MISO of its desire to proceed prior to the end of the three-year suspension period, and thus MISO, consistent with Commission precedent, followed its process to restudy the project, taking into account the state of the queue at the time.⁴¹ Moreover, in *Mankato*, the Commission stated that it "previously found that Mankato would not be subject to MISO's revised GIP when the revised GIP was adopted."⁴² With regard to the *South Fork* case, we note that MISO withdrew its proposed termination of the South Fork GIA. Last, we reiterate that unless a

³⁹ We note that Merricourt does not argue that Section 4.4.4 of the GIP does not apply to the Merricourt GIA.

⁴⁰ *Ellerth Wind*, 143 FERC ¶ 61,114 at n.20 (citing Section 4.4.4 of the GIP).

⁴¹ *Mankato*, 150 FERC ¶ 61,180 at P 20.

⁴² *Id.* P 22 (citing, among other things, Queue Reform III Rehearing Order, 139 FERC ¶ 61,253 at P 36). We note that Section 4.4.4 of the GIP was adopted in the Queue Reform III Order. *See* Queue Reform III Order, 138 FERC ¶ 61,233 at P 225; Queue Reform III Rehearing Order, 139 FERC ¶ 61,253 at PP 120-123.

GIA is exempt from Section 4.4.4 of the GIP,⁴³ a COD extension may not exceed three years beyond the original COD.

The Commission orders:

MISO's notice of termination is hereby accepted, effective March 3, 2016, as discussed in the body of the order.

By the Commission. Commissioner LaFleur is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴³ See Queue Reform III Order, 138 FERC ¶ 61,233 at PP 100-107; Queue Reform III Rehearing Order, 139 FERC ¶ 61,253 at PP 32-42 (a GIA may be exempt from Section 4.4.4 if it was not required to transition to the revised GIP, because it was not an "outstanding interconnection request").

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.

Docket No. ER16-471-000

(Issued March 4, 2016)

LaFLEUR, Commissioner *dissenting*:

Today's order accepts a notice of termination filed by the Midcontinent Independent System Operator, Inc. (MISO) for the generator interconnection agreement (GIA) entered into by enXco Development Corporation (subsequently assigned to Merricourt Power Partners, LLC (Merricourt)), Montana-Dakota Utilities Company (Montana-Dakota) and MISO (Merricourt GIA). I dissent because I believe today's order increases uncertainty regarding the Commission's standard for reviewing notices of termination and incorrectly denies Merricourt an extension of its Commercial Operation Date (COD).

In prior cases addressing notices of termination of individual GIAs, the Commission has stated:

Commission precedent supports acceptance of a notice of termination if the applicant demonstrates that the proposed termination is not unjust, unreasonable, unduly discriminatory, or preferential, or if it is consistent with the public interest. When considering whether to extend milestones or to grant or extend a suspension, the Commission takes into account many factors, including whether the extension would harm generators lower in the interconnection queue and any uncertainty that speculative projects may present to other projects in the queue.¹

Therefore, in evaluating these requests, the Commission considers both the justness and reasonableness of the requested termination, and equitable factors. In so doing, the Commission has considered a broad range of factors, including whether other customers in the queue would be harmed by an extension, whether the interconnection customer's failure to meet particular deadlines or payment obligations was within its control, whether an extension was expressly authorized or prohibited by the MISO generator

¹ *E.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114, at P 23 (2013) (citations omitted) (*Ellerth Wind*); *see also* *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008, at P 25 (2011) (*Lakeswind I*).

interconnection procedures (GIP) or the interconnection customer's GIA, and the progress made by an interconnection customer towards commercial operation.²

Today's order, however, fails even to acknowledge this established standard or Commission precedent considering equitable factors that might warrant granting an extension. Instead, the order simply concludes that a COD extension beyond three years is expressly precluded by Section 4.4.4 of MISO's GIP, which was approved by the Commission in 2012, and ends its inquiry there. I disagree with this approach for reviewing extension requests. In numerous orders addressing notices of termination filed after the approval of Section 4.4.4, the Commission has specifically considered whether equitable factors would warrant an extension.³ If the Commission intends to change its policy and no longer consider equitable factors, it fails to explain the basis for that choice; if it intends to preserve its equitable authority, it fails to evaluate the facts of this case. In either event, today's order unnecessarily muddles Commission precedent addressing notices of termination, thereby providing less clarity going forward.

In my view, our precedent provides the Commission with clear authority to determine whether a COD extension is appropriate in a given case.⁴ Here, I believe that Merricourt has both demonstrated meaningful progress towards reaching commercial operation in a reasonable timeframe (i.e., by its requested extension date of September 30, 2017), and effectively rebutted concerns expressed by MISO that the Merricourt project is speculative and potentially harmful to other customers in the queue.

MISO does not identify particular customers that might be harmed by allowing Merricourt to remain in the queue and extend its COD. Instead, MISO asserts that any extension of Merricourt's COD would harm lower-queued customers or create uncertainty because a speculative project would remain in the queue, creating the potential for "cascading" restudies if the project fails to reach commercial operation. MISO's argument, however, begs the question of whether the Merricourt project should be considered speculative. Based on the evidence in the record, I believe that Merricourt

² See, e.g., *Lakeswind I*, 137 FERC ¶ 61,008 at PP 26-29; *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198, at PP 29-32 (2014) (*New Era*); *Ellerth Wind*, 143 FERC ¶ 61,114 at PP 26-27.

³ E.g., *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,053, at PP 29-31 (2014); *New Era*, 147 FERC ¶ 61,198 at PP 29-32; *Ellerth Wind*, 143 FERC ¶ 61,114 at PP 26-27.

⁴ I also note that MISO acknowledges that the Commission has such authority. MISO Answer to Merricourt Complaint, Docket No. EL15-90-000, at 10 (Sep. 1, 2015).

has shown substantial progress towards achieving commercial operation, which mitigates the potential harm to other customers in the queue.

First, Merricourt has fully paid for the construction of approximately \$17.8 million in network upgrades required for its interconnection, and upon which the studies for lower-queued customers might rely. Second, Merricourt provides evidence that it has secured a letter of intent for a PPA, as well as agreements for the main power transformer and turbines necessary to construct its project.⁵ In addition, Merricourt has secured an extension of its site permit from the North Dakota Public Service Commission and states that it has the funds available and ready to be deployed to construct the project. I also note that Montana-Dakota, the Transmission Owner to which the project would interconnect, does not object to a COD extension. Given the record, I would therefore reject MISO's notice of termination and grant Merricourt's request to extend its COD.

I note that this is the latest in a series of dissents in which I have expressed concern about the Commission's refusal to exercise its discretion in individual cases addressing infrastructure development.⁶ Building generation resources and transmission lines is a difficult, complex enterprise, and the Commission should be careful not to erect unnecessary barriers to their development in individual cases where there is no credible showing of harm to other parties. Unfortunately, today's order may have the effect of doing just that, as it will likely result in the cancellation of a project in an advanced – though admittedly delayed – state of development, while bringing little, if any, benefit to the MISO queue process or to the clarity of the Commission's precedent. I do not believe that this outcome is just and reasonable based on the record presented.

Accordingly, I respectfully dissent.

Cheryl A. LaFleur
Commissioner

⁵ Merricourt states that it has already taken possession of 10 percent of the wind turbines for the project.

⁶ *Nevada Power Co.*, 153 FERC ¶ 61,227 (2015) (LaFleur, Comm'r, dissenting); *Kenai Hydro, LLC*, 151 FERC ¶ 61,243 (2015) (LaFleur, Comm'r, dissenting).