

125 FERC ¶ 61,166
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, Inc.

Docket No. EL07-79-000

ORDER ON PAPER HEARING
AND REQUIRING COMPLIANCE FILING

(Issued November 13, 2008)

1. This order presents the findings of our investigation into the justness and reasonableness of section 1.7 of Appendix C (section 1.7) of the Large Generator Interconnection Agreement (Interconnection Agreement) between Endeavor Power Partners, LLC (Endeavor), Interstate Power and Light Company (Interstate), and the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). The Interconnection Agreement governs interconnection of Endeavor's generating facility, Project G426, to Interstate's transmission system. The Commission instituted this investigation¹ under section 206 of the Federal Power Act (FPA).² Section 1.7 of the Interconnection Agreement can be read to cap Endeavor's costs for constructing network upgrades on the affected transmission system (Affected System) of Northern States Power Company (Northern States)³ at the amount that would be required to fund a 30 Megawatt volt-ampere reactive (MVAR) static var compensator (SVC).

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 120 FERC ¶ 61,066 (2007) (Investigation Order). The order also addressed Docket Nos. ER07-577-000 and ER07-577-001 and conditionally accepted the Facilities Construction Agreement (Construction Agreement) for the interconnection.

² 16 U.S.C. § 824e (2006).

³ Northern States is a transmission subsidiary of Xcel Energy, Inc. (Xcel). For convenience, we will refer to both Xcel and Northern States as "Northern States."

2. We find that insofar as Section 1.7 imposes a cost cap, such a limit on Endeavor's obligation to fund network upgrades on the Affected System is unjust and unreasonable. We will require Midwest ISO to modify the section to remove all references to such a limit and to provide instead that these network upgrades are to be funded in accordance with the terms of the Construction Agreement⁴ between Endeavor, Northern States, and Midwest ISO, which the Commission conditionally accepted in the Investigation Order.

I. Background

3. On October 12, 2005, Midwest ISO filed an unexecuted Interconnection Agreement between itself, Endeavor, and Interstate governing interconnection of Endeavor's wind farm Project G426 to Interstate's transmission system.⁵ No entity intervened in those proceedings. No party raised an issue regarding Section 1.7, and the Commission did not discuss it when conditionally accepting the Interconnection Agreement.⁶ Section 1.7 states, under the heading "General Interconnection and Operating Guidelines":

Unit Stability Requirements. Per the Interconnection Studies performed by Transmission Provider, Interconnection Customer is responsible to fund up to 30 MVARs of incremental dynamic reactive [static var] compensation

⁴ Article 3, "Construction of Network Upgrades," of the Construction Agreement provides for the Transmission Owner (Northern States) to construct all Network Upgrades identified in Appendix A, and for the Interconnection Customer (Endeavor) to pay the costs of the upgrades, and to be subsequently reimbursed, consistent with section 3.2, "Interconnection Costs and Credits." Appendix A identifies a 30 MVAR SVC and related equipment, to be located at Northern States' proposed Hazel Creek Substation, and estimates their cost as \$4,803,000 in 2005 dollars. Appendix A states that the indicated costs are only estimates, and that the Interconnection Customer shall reimburse the Transmission Owner for all actual costs determined pursuant to section 3.2.

The revised Construction Agreement, filed by Midwest ISO in compliance with the Investigation Order, was accepted. *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER07-577-004 (October 29, 2007) (unpublished letter order).

⁵ Docket No. ER06-22-000.

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61,155 (2006) (Interconnection Order). We address the compliance filing of the revised Interconnection Agreement in an order issued concurrently with this order. *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,172 (2008).

(SVC) to be installed . . . on the transmission system of an adjacent transmission-owning member of the Transmission Provider. The exact size, location and date for this SVC will be determined in future Interconnection Facilities Studies and this requirement will be amended accordingly. In the event that the Interconnection Studies performed by the Transmission Provider require Network Requirements beyond dynamic reactive compensation, the Interconnection Customer will be responsible to fund these Network Upgrades in proportion to the size of the Generating Facility but not to exceed the amount required to fund a 30 MVAR SVC. Failure by the Interconnection Customer to fund the installation of these Network Upgrades by their required service date will result in suspension of interconnection service under this Agreement.⁷

4. After the filing of the Interconnection Agreement, Midwest ISO performed interconnection studies on which it based the Construction Agreement, which it filed unexecuted on February 8, 2007. Endeavor protested the Construction Agreement, arguing that it unjustifiably proposed to change Endeavor's existing Interconnection Agreement by failing to include the "cap" provision, section 1.7.⁸

5. In the Investigation Order, the Commission found that the Interconnection Agreement had contemplated a separate agreement, the Construction Agreement, to provide for network upgrades on the Affected System. The Commission stated that the Interconnection Agreement could not bind an entity that was not a party to that agreement, and that Northern States, not being a party to the Interconnection Agreement, therefore could not be bound by it. Thus, because the Interconnection Agreement could be read to improperly limit the costs of any network upgrades required on the Affected System, the Commission instituted a paper hearing into the justness and reasonableness of Section 1.7.⁹

⁷ The text is identical in the Interconnection Agreement as originally filed and as filed, on January 18, 2007, to comply with the conditions in the Interconnection Order. *See* note 6, *supra*.

⁸ Endeavor's March 21, 2007 Protest, filed in Docket No. ER07-577-000.

⁹ The Commission also directed that the effective refund date, established under section 206(b) of the FPA, 16 U.S.C. 824e(b) (2006), be the *Federal Register* publication date of the notice of the proceeding. Investigation Order at P 30-33.

II. Notice and Responsive Filings

6. Notice of the Commission's institution of the paper hearing was published in the *Federal Register*, 72 Fed. Reg. 41,719 (2007), with initial comments to be filed within 90 days of the issue date of the Investigation Order, and reply comments to be filed within 30 days of the date on which initial comments are filed.

7. Northern States and Midwest ISO intervened and filed comments. Endeavor made no filing. No reply comments were filed.

III. Discussion

A. Procedural Matter

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Paper Hearing Process

1. Northern States' Arguments

9. Northern States argues that because it is not a party to the Interconnection Agreement, the Agreement cannot limit its rights. Northern States argues also that capping the amount that Endeavor must pay for its share of the actual costs of the Affected System's network upgrades would be unduly discriminatory. Endeavor might then pay a preferential, lower charge for the same generator interconnection service than do other generators. Any provision of the Interconnection Agreement that conflicts with the Tariff is presumably unjust and unreasonable unless demonstrated otherwise. Northern States asks the Commission to determine the just and reasonable rate and to revise the Interconnection Agreement to eliminate the cost cap.

2. Midwest ISO's Arguments

10. Midwest ISO argues first that the language in Section 1.7 is not a cost cap, but was merely an estimate of Endeavor's cost responsibility, subject to then-pending studies. At Endeavor's request, Midwest ISO studied the Endeavor project out of queue order when interconnection studies on the Northern Power system and a second system were still

incomplete.¹⁰ Thus, Endeavor knew, during the summer of 2005 when the parties negotiated the Interconnection Agreement, that the full extent of the upgrades could only be estimated.¹¹

11. Midwest ISO cites other sections in the Interconnection Agreement as showing that the costs of network upgrades are estimates, subject to possible revision.¹² It also points to Order No. 2003's determination that when an interconnection creates the need for upgrades on an Affected System, the interconnection customer is required to pay up front for these network upgrades and must enter into an agreement with the Affected System operator unless the payments are incorporated into the interconnection agreement that the customer signs with the Transmission Provider.¹³ Midwest ISO often enters into three-party facilities construction agreements to govern network upgrades on Affected Systems. The additional costs for network upgrades that arise from these agreements are

¹⁰ Midwest ISO's filing repeats its earlier statement, that it had studied Endeavor's G426 project out-of-queue-order and that no one knew the extent of the upgrades needed to accommodate the interconnection, which it made in Attachment 1 of its May 22, 2007 filing in Docket No. ER07-577-002.

¹¹ *Id.* at 13-14.

¹² *Id.* at 11-12. Section 11.3.1, "Contingencies Affecting Network Upgrades, System Protection Facilities and Distribution Upgrades," states, "Network Upgrades . . . that are required to accommodate the Generating Facility may be modified. . . . [E]stimates of the costs associated with such required Network Upgrades . . . are provided in Appendix A [Interconnection Facilities, Network Upgrades, System Protection Facilities, Generator Upgrades and Distribution Upgrades]." Section 11.3.2, "Agreement to Restudy," provides for the parties to enter into re-studies upon the happening of completed events for higher-queued projects, and states, "The Parties agree to amend Appendix A to this LGIA . . . to reflect the results of any restudy required under this [a]rticle." Section 12.2, "Final Invoice," provides for Midwest ISO to set forth the costs of a final invoice "to enable Interconnection Customer to compare the actual costs with the estimates and to ascertain deviations, if any, from the cost estimates." Lastly, section 30.5, "No Third Party Beneficiaries," states, "the obligations herein assumed are solely for the use and benefit of the Parties," which, Midwest ISO states, shows that no obligations are imposed on non-parties.

¹³ *Id.* at 9, *citing* Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 738-39 (2003).

foreseeable business risks, even though their extent cannot be fully predicted at the time each interconnection agreement is negotiated.¹⁴

12. Midwest ISO refers to Order No. 2003's statement that costs stated in Interconnection Agreements are estimates.¹⁵ It refers also to Order No. 2003's statement that the interconnection agreement cannot protect the interconnection customer from all uncertainty, and the cited examples, e.g., changed circumstances on an Affected System may increase or decrease the need for network upgrades, and future events may require restudies.¹⁶

13. Alternatively, should the Commission read Section 1.7 as indeed imposing a cap on Endeavor's cost responsibility, Midwest ISO argues that the section is not just and reasonable. It asks the Commission to replace Section 1.7 with the following text:

The Interconnection Customer, in accordance with the interconnection studies and Facilities Construction Agreement with Northern States Power, is responsible for funding the needed Affected Systems Network Upgrades in its Facility Construction Agreement with Northern States Power in accordance with the provisions of that Facilities Construction Agreement. Failure by the Interconnection Customer to fund the installation of these Network Upgrades by their required service date will result in suspension of interconnection service under this Agreement.¹⁷

¹⁴ *Id.* at 9-10. Midwest ISO also cites Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at P 320 (2004), for the Commission's holding that the interconnection customer is responsible (and later may receive credits) for funding the costs of various network upgrades if they are necessary to support interconnection.

¹⁵ *Id.* at 10, *citing* Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 409 (prices quoted for interconnection in the Interconnection Agreement are estimates based on the results of studies conducted during the Large Generator Interconnection Procedures phase of the interconnection process, and parties should negotiate for known contingencies).

¹⁶ *Id.*, *citing* Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 320 (the paragraph also states that the interconnection customer's responsibility for potential network upgrades creates uncertainty; however, to help the interconnection customer manage the uncertainty, the transmission provider shall estimate the costs of network upgrades, assumed in the interconnection studies, that have not yet been constructed).

¹⁷ Midwest ISO's October 17, 2007 comments at 7, 15.

14. Lastly, Midwest ISO states that originally Project G426 was thought to require only 20 MVARs of reactive compensation. However, preliminary study results during negotiation of the Interconnection Agreement changed the estimate to 30 MVARs. Milestone 21, which refers to 20 MVAR of reactive compensation, was not corrected, as it should have been. Midwest ISO asks that the correction be made now because reference at Milestone 21 to a 30 MVAR SVC is just and reasonable.¹⁸

3. Commission Determination

15. We find that the Interconnection Agreement, taken as a whole, is unclear as to whether Endeavor's costs for network upgrades on the Affected System are capped. However, we need not decide how to construe the Agreement. Our decision is that, insofar as Section 1.7 caps those costs, it is not just and reasonable. We find, based on the record, that when Endeavor, Interstate, and Midwest ISO negotiated the Interconnection Agreement, during the summer of 2005, the full extent of the upgrades needed to accommodate Endeavor's interconnection could only be estimated, consistent with Endeavor's request to be studied out-of-queue-order. Further, as the Commission found in the Investigation Order, the Interconnection Agreement contemplated a separate agreement, the Construction Agreement, to provide for construction of necessary network upgrades on the Affected System.¹⁹ As the Commission stated, in Order No. 2003-A, in reply to a request that the cost estimate provided in the Interconnection Study report include the cost of network upgrades on Affected Systems, "[I]t is unreasonable to expect the Transmission Provider to develop a cost estimate for Network Upgrades on an Affected System because the information required to develop the estimate is not readily available to the Transmission Provider."²⁰

16. Therefore, because the costs of the network upgrades on Northern States' transmission system could only be estimated at the time of the Interconnection Agreement, if Section 1.7 purports to limit Endeavor's financial responsibility for upgrades on the Affected System, the section is not just and reasonable. Moreover, because Northern States was not a party to the Interconnection Agreement, it is not bound

¹⁸ *Id.* at 17. Milestone 21 states, "Provide 20 MVAR of reactive compensation on Transmission System pursuant to future facility studies under a separate facilities construction agreement. These network upgrades to be funded by Interconnection Customer. Note: Interconnection Service may be discontinued or reduced if facilities are not in service when needed." The due date of this milestone is "To be determined by Interconnection Facilities Study."

¹⁹ Investigation Order at P 23.

²⁰ Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 152.

by that agreement.²¹ For clarity, we will adopt the revisions to Section 1.7 that Midwest ISO proposes²² and require Midwest ISO to submit a compliance filing with these revisions within 15 days of the date of issuance of this order.

17. Because we are requiring revision of Section 1.7, we need not address Northern States' argument that a limit on Endeavor's share of the costs for network upgrades may discriminate unfairly to Endeavor's advantage vis-à-vis Northern States' other interconnection customers.

18. We decline, in this proceeding investigating Section 1.7, to revise Milestone 21 of the Interconnection Agreement, as Midwest ISO has requested. The milestone itself, as well as its due date, "To be determined by Interconnection Facilities Study," contemplate determination of the characteristics of the Affected System's SVC after future facilities studies and under a separate facilities construction agreement. Milestone 21's estimate of 20 MVAR of reactive power does not limit the actual determination by the future facilities studies nor the ultimate Construction Agreement. Revision of Milestone 21 is therefore unnecessary.²³

The Commission orders:

(A) Midwest ISO is hereby directed to file a revised Interconnection Agreement, within 15 days of the date of issuance of this order, as discussed in the body of this order.

²¹ See *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("it goes without saying that a contract cannot bind a nonparty"). See also *Trunkline Gas Co.*, 65 FERC ¶ 61,355 (1993), *order on reh'g*, 67 FERC ¶ 61,013, at 62,898 (1994) (Trunkline cannot be expected to adjust for Plant Value Reduction resulting from a contract to which it is not a party); *National Fuel Gas Supply Corp.*, 96 FERC ¶ 62,182, at 61,809 (2001) (Unacceptable to attempt to change the rates of a party who is not a party to the contract).

²² See P 13, *supra*.

²³ Our decision here does not forestall Midwest ISO from seeking revision of Milestone 21 through a filing under section 205 of the FPA, 16 U.S.C. § 824d (2006).

(B) The investigation in Docket No. EL07-79-000 is hereby terminated, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.