138 FERC ¶ 61,149
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Jeffers South, LLC

v. Docket No. EL10-86-001

Midwest Independent Transmission
System Operator, Inc.

ORDER ON REHEARING

(Issued February 29, 2012)

1. On January 7, 2011, the Commission issued an order denying, in part, the relief requested in a complaint filed by Jeffers South, LLC (Jeffers South), and setting the complaint for hearing and settlement judge procedures.[1] Jeffers South alleged that Midwest Independent Transmission System Operator, Inc. (Midwest ISO) had violated its obligation with respect to the study of network upgrades, and it requested that the Commission require Midwest ISO to waive the fees associated with a restudy. In this order, the Commission addresses a request for rehearing filed by Jeffers South.

I. Background

2. Jeffers South is a Minnesota limited liability company owned by a group of 57 local landowners and farmers and Outland Renewable Energy, LLC, a Minnesota-based firm focused on developing, owning, operating, and maintaining commercial renewable energy projects in partnership with landowners, rural communities, and municipalities.

3. In May 2005, Summit Wind LLC (Summit Wind), the predecessor in interest to Jeffers South, submitted an interconnection request to Midwest ISO. In its request, Summit Wind sought to interconnect its 130 megawatt (MW) wind powered generation

[1] *Jeffers South, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 134 FERC ¶ 61,013 (2011) (January 7 Order).

facility (Generating Facility) to transmission facilities that were then owned by Interstate Power and Light Company (IP&L).[2]

4. On September 14, 2007, following the completion of the required interconnection studies and extensive negotiations, Midwest ISO filed an unexecuted Large Generator Interconnection Agreement (LGIA) in Docket No. ER07-1375-000 among Summit Wind as interconnection customer, IP&L as transmission owner, and Midwest ISO as transmission provider. The LGIA identified network upgrades designed to provide two outlets for the Generating Facility.

5. In addition, on December 10, 2007, Midwest ISO filed an unexecuted Facilities Construction Agreement among Summit Wind, Great River Energy (Great River), and Midwest ISO in Docket No. ER08-320-000. The Facilities Construction Agreement provided for the construction of certain network upgrades on Great River's system to accommodate the requested interconnection of the Generating Facility.

6. The LGIA and Facilities Construction Agreement were filed unexecuted because Summit Wind contested its responsibility for the cost of network upgrades identified in the LGIA. Specifically, Summit Wind argued that the network upgrades to the IP&L system identified by the LGIA were designed to provide general system benefits and were not required to interconnect the Generating Facility within the meaning of the "but for" standard, i.e., that the proposed network upgrades would not be needed "but for" the interconnection of the Summit Wind generating resource. Midwest ISO contended that the identified upgrades were needed not only to connect the Summit Wind facility, but also to ensure regional reliability once such facilities are connected, and that Summit Wind had agreed to the construction of the upgrades contained in the LGIA. On February 8, 2008, the Commission issued an order consolidating Docket Nos. ER07-1375-000 and ER08-320-000 and setting the LGIA and Facilities Construction Agreement for hearing and settlement judge procedures.[3]

7. On May 22, 2009, Summit Wind, ITC Midwest, Great River, and Midwest ISO jointly filed a settlement agreement (Settlement Agreement) to resolve all issues in dispute in the consolidated proceeding. On August 3, 2009, the Commission issued an order approving the uncontested Settlement Agreement.[4] Among other things, the Settlement Agreement provides that: (1) Summit Wind will be entitled to 100 percent reimbursement for the network upgrade costs it funds under the LGIA; (2) revised

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[2] On December 20, 2007, ITC Midwest LLC (ITC Midwest) acquired the transmission facilities of IP&L. *ITC Holdings Corp.*, 121 FERC ¶ 61,229 (2007).

[3] *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,113 (2008).

[4] *Midwest Indep. Transmission Sys. Operator, Inc.*, 128 FERC ¶ 61,121 (2009).

suspension procedures shall not be applied to the project, and Summit Wind shall be deemed to have exercised its suspension right on the dates the LGIA and Facilities Construction Agreement were filed; (3) Summit Wind shall notify ITC Midwest and Midwest ISO of its desire to end the suspension period, after which Summit Wind will update the parties on the projected in-service date and any modifications to the Generating Facility, and Midwest ISO will use the information to determine whether additional system impact and facilities studies are required for interconnection, with Summit Wind bearing the costs of any additional studies; and (4) the LGIA and Facilities Construction Agreement will be revised to reflect changes described in the Settlement Agreement, as well as any changes to the currently identified network upgrades required for interconnection.

8. On July 1, 2009, Summit Wind transferred all of its interests in the underlying generation project to Jeffers South. Soon thereafter, on September 18, 2009, Great River announced that it no longer intended to construct the Dotson-New Ulm Line, to which Summit Wind intended to interconnect. Following Great River's announcement, two restudies of the Generating Facility were performed by Excel Engineering, Inc., one commissioned by Midwest ISO (July 2010 Restudy) and the other commissioned by Jeffers South.

9. On September 1, 2010, Jeffers South filed a complaint alleging that Midwest ISO violated its obligation with respect to the study of network upgrades required to accommodate Jeffers South's project. Specifically, Jeffers South argued that Midwest ISO violated its obligation under the "but for" standard as interpreted by *Community Wind*[5] to identify and quantify the least-cost option when determining what network upgrades are required to interconnect the generating facility. Jeffers South explained that Great River's decision not to construct the Dotson-New Ulm Line prompted restudy of the Generating Facility. Jeffers South stated that the study that it commissioned to evaluate upgrades that do not involve the construction of the Dotson-New Ulm Line identified a number of alternative options costing approximately $14 million or less that could be used to accommodate the interconnection of the Generating Facility. Jeffers South explained that the July 2010 Restudy, however, retains the previous two-outlet interconnection plan and assigns the costs of the Dotson-New Ulm Line (approximately $43 million) to Jeffers South, raising Jeffers South's total cost responsibility for network upgrades to approximately $81 million. Jeffers South argued that Midwest ISO was not necessarily required to select the least-cost option when determining what network upgrades should be constructed to accommodate a requested interconnection, but that the least-cost option must nevertheless be identified and quantified during the study process

[5] *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,019 (2009) (Community Wind I), *order on reh'g*, 131 FERC ¶ 61,165 (Community Wind II), *order on reh'g*, 133 FERC ¶ 61,011 (2010) (together, Community Wind).

to establish the maximum amount of costs that may be allocated to the interconnection customer.

10. On January 7, 2011, the Commission issued an order finding that Midwest ISO had not violated the "but for" standard, as explained by *Community Wind*, by failing to identify and quantify the least-cost option to interconnect Jeffers South during the study process. The Commission stated that while the Commission clarified in *Community Wind II* that, in the context of Midwest ISO's tariff, the "but for" standard is a cost allocation principle that limits the cost responsibility of an interconnection customer, the Commission had never stated that Midwest ISO was required to identify and quantify the least-cost option during the study process. The Commission found that Jeffers South's complaint otherwise raised issues of material fact and established hearing and settlement judge procedures.[6]

II. Request for Rehearing

11. Jeffers South requests rehearing of two aspects of the January 7 Order. First, Jeffers South requests that the Commission clarify its interpretation of the "but for" standard in the January 7 Order. Jeffers South explains that the January 7 Order can be interpreted as disagreeing with Jeffers South's use of the term "least-cost option" as somehow being inconsistent with the idea that network upgrades should facilitate interconnections while also promoting reliability and efficiency. Jeffers South states that, to the extent that was the basis for the Commission's decision, that was not Jeffers South's intent. Jeffers South notes that it fully agrees that network upgrades should be designed with reliability and efficiency in mind and its use of the term "least-cost option" was intended to refer to the lowest-cost interconnection option that is also determined to meet all applicable reliability and efficiency criteria. Jeffers South states that, for example, in this case, the restudy performed by Midwest ISO identified three different interconnection options, all of which were found to be satisfactory under the reliability and efficiency criteria used by Midwest ISO. Assuming that there are only three satisfactory interconnection options available, then Jeffers South contends that the least-cost option would be the satisfactory interconnection option with the lowest cost.[7]

12. Jeffers South requests rehearing, however, to the extent that the Commission rejected Jeffers South's complaint because the Commission intended for Midwest ISO to have broad discretion in deciding what network upgrades should be constructed to accommodate generator interconnection requests, and for the costs of whatever alternatives are selected to be allocated to interconnection customers so long as upgrades are useful to some degree in interconnecting new generation resources. Jeffers South

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[6] January 7 Order, 134 FERC ¶ 61,013 at P 33-34.

[7] Jeffers South Request for Rehearing at 5-8.

maintains that interpreting the "but for" standard as permitting the costs of any and/or all such upgrades to be allocated to interconnection customers is inconsistent with Commission policy and would render the standard largely meaningless.[8] According to Jeffers South, in order for the "but for" standard to be meaningful, Midwest ISO must have some obligation to identify only those network upgrades that are truly needed to accommodate a requested interconnection and to limit cost allocation on that basis. Jeffers South states that interpreting the "but for" standard as including a least-cost requirement recognizes that network upgrades are not required for an interconnection if suitable lower cost alternatives are available. Jeffers South further states that such an interpretation is consistent with the understanding that any network upgrades that Midwest ISO may elect to build that are more expansive than those comprising the least-cost options are likely designed to provide system benefits that are unrelated to the interconnection. In such instances, Jeffers South contends, it is appropriate only to allocate a portion of the network upgrade costs to the interconnection customer.[9]

13. Second, Jeffers South requests that the Commission clarify, or, in the alternative, grant rehearing with respect to Jeffers South's suspension status. Jeffers South explains that Midwest ISO has taken the position that Jeffers South returned to a state of suspension as of September 30, 2010, and that Jeffers South has one year of suspension left. Jeffers South notes that the Commission summarized Midwest ISO's position in the January 7 Order, but did not otherwise address the merits of Midwest ISO's interpretation of Jeffers South's suspension rights. Jeffers South asks the Commission to clarify that Jeffers South's suspension rights are tolled while Jeffers South's complaint is pending, or to grant rehearing to the extent that the Commission intended a different result. Jeffers South asserts that it should not be penalized for filing its complaint seeking to protect its rights. Moreover, Jeffers South states that Midwest ISO has failed to identify any tariff provisions or any Commission rule or policy specifying that an interconnection customer exercises its suspension rights upon filing a complaint and that Midwest ISO's position is contrary to section 27.1 of Midwest ISO's *pro forma* Generator Interconnection Agreement (GIA) and Attachment HH (Dispute Resolution Procedures) of the Midwest ISO Tariff. Jeffers South adds that it properly notified Midwest ISO that it was no longer in suspension and there is nothing in the GIA or the tariff that gives Midwest ISO the right to effectively cause a party to renew exercise of its suspension rights under the GIA.[10]

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[8] *Id.* at 7, 8-9.

[9] *Id.* at 9-10.

[10] *Id.* at 10-12.

III. Responsive Pleadings

14. On February 22, 2011, and March 9, 2011, respectively, Midwest ISO and Edison Mission Energy (Edison) filed answers to Jeffers South's rehearing request. On March 24, 2011, Midwest ISO filed an answer to Edison's answer. On March 25, 2011, Jeffers South filed a motion requesting expedited action on its request for rehearing.

IV. Discussion

A. Procedural Matters

15. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2011), prohibits answers to rehearing requests. We will therefore reject the answers of Midwest ISO and Edison to Jeffers South's rehearing request.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Midwest ISO's answer to Edison's answer and will, therefore, reject it.

B. Substantive Matters

17. We will deny Jeffers South's request for rehearing or clarification to the extent that Jeffers South seeks further clarification of the "but for" standard. Neither the January 7 Order nor *Community Wind* suggests that Midwest ISO has unfettered discretion when determining what upgrades should be built and when assigning the costs of the chosen upgrades to the interconnection customer. In the January 7 Order, the Commission rejected Jeffers South's assertion that *Community Wind* had imposed an obligation on Midwest ISO to identify and quantify the least-cost option when determining what network upgrades are required to interconnect an interconnection customer or group of interconnection customers.[11] Instead, *Community Wind* held that Midwest ISO has some discretion under its tariff when choosing what facilities to *construct*.[12]

18. *Community Wind* further found that the "but for" standard, in the context of Midwest ISO's Tariff, limits an interconnection customer's cost responsibility to that portion of the chosen upgrade that would not be needed but for the interconnection of the interconnection customer or, in the case of group studies, a reasonably constituted group of interconnection customers.[13] However, we note that what is necessary for the

[11] January 7 Order, 134 FERC ¶ 61,013 at P 33.

[12] *Community Wind II*, 131 FERC ¶ 61,165 at P 21.

[13] *Id.* P 20.

interconnection of a customer is ultimately a factual question. In this case, given the complex history of this project, the numerous studies conducted, and the various agreements between the parties, the application of the "but for" standard depends in part upon when cost responsibility should be determined, and what facilities would have been necessary for the interconnection at that time. The Commission did not opine on the specific application of the "but for" standard because the record did not provide an adequate factual foundation to determine the point in time at which cost responsibility should be applied, or what facilities were necessary for the interconnection of Jeffers South's project at that time;[14] instead, the Commission set the application of the "but for" standard for hearing.

19. We will grant clarification with regard to Jeffers South's current suspension rights, although for slightly different reasons than those raised by Jeffers South.[15] Based on the record evidence, we find that Jeffers South's project is not in suspension under the terms of its LGIA and Midwest ISO's Tariff. While Midwest ISO asserted that placing Jeffers South's project into suspension for failing to fund a restudy is consistent with Midwest ISO practice, it does not appear that this practice is in accord with the terms of Midwest ISO's tariff or Jeffers South's LGIA. Section 5.16.1 of Jeffers South's LGIA gives Jeffers South the right to suspend its project by submitting written notice to Midwest ISO and the relevant Transmission Owner. It does not provide for the suspension of a project for failure to pay study costs; on the contrary, suspension is left to Jeffers South's discretion. In addition, the provisions of Midwest ISO's tariff concerning an interconnection customer's obligation for study costs do not indicate that failure to provide funding for a study or restudy will result in the suspension of a project.[16] If Jeffers South has failed to provide funding for a restudy and Midwest ISO believes that Jeffers South is obligated to provide such funding, Midwest ISO should proceed in accordance with the provisions of its Tariff and Jeffers South's LGIA governing the failure to pay amounts due.[17] The Commission finds no support for placing Jeffers South into suspension based on its failure to pay for the restudy.

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[14] *See supra* P 4-8.

[15] In particular, we note that the record evidence indicates that Midwest ISO has placed Jeffers South's project in suspension for failing to fund an additional restudy by September 30, 2010—not, as Jeffers South maintains, for filing the complaint. *See* Midwest ISO Answer, Docket No. EL10-86-000, at 36 (filed Sept. 21, 2010).

[16] *See, e.g.*, Midwest ISO, FERC Electric Tariff, Attachment X, section 13.3; Jeffers South LGIA, sections 12.1-12.4.

[17] *See, e.g.,* Jeffers South LGIA, section 12.4 ("Transmission Provider may . . . provide notice to Interconnection Customer of a Default pursuant to Article 17").

<u>The Commission orders:</u>

Jeffers South's request for rehearing and clarification is hereby denied in part and granted in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.