

138 FERC ¶ 61,248
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER11-2550-001

ORDER DENYING LATE INTERVENTION AND DISMISSING REQUEST FOR
REHEARING

(Issued March 30, 2012)

1. This order denies EcoEnergy LLC's (EcoEnergy) motion to intervene out-of time, finding that EcoEnergy failed to meet the higher burden of demonstrating good cause to intervene after issuance of a dispositive order in the above-captioned proceeding.¹ Because the Commission denies EcoEnergy's motion for late intervention, it therefore also dismisses, for lack of standing, EcoEnergy's request for rehearing of the Commission's February 3, 2011 letter order that accepted revisions to Midwest Independent Transmission System Operator, Inc.'s (MISO) Amended and Restated Large Generator Interconnection Agreement (Amended Restated Agreement) among MISO, Trimont Wind I LLC (Trimont), and Northern States Power (NSP).²

I. Background

A. Original Filing

2. On July 15, 2005, in Docket No. ER05-1018-000, the Commission conditionally accepted a Large Generator Interconnection Agreement (Original Agreement) among MISO, NSP, and PPM Energy, Inc. (PPM or Interconnection Customer).³ Specifically,

¹ March 4, 2011 Motion for Leave to Intervene Out-of-Time and Request for Rehearing of EcoEnergy LLC, Docket No. ER11-2550-000 (Motion).

² *Midwest Indep. Trans. Sys. Operator, Inc.*, Docket No. ER11-2550-000, at 1 (Feb. 3, 2011) (delegated order) (February 3 Order).

³ *Midwest Indep. Trans. Sys. Operator, Inc.*, 112 FERC ¶ 61,067 (2005) (July 15 Order).

the Commission conditionally accepted the Original Agreement subject to MISO either: (1) re-filing the agreement, within 30 days of the issuance of the order, to conform with its Order No. 2003 *pro forma* Large Generator Interconnection Agreement (LGIA)⁴ that was in effect on the day the Original Agreement was executed; or (2) withdrawing the Original Agreement and re-filing it with sufficient justification for the non-conforming provisions within 30 days of the date of the order.⁵

B. Restated Agreement and Amended Restated Agreement

3. On September 13, 2005, in Docket Nos. ER05-1018-001 and ER05-1018-002, MISO filed an unexecuted restated version of the Original Agreement (Restated Agreement) that conformed to the then-effective *pro forma* LGIA. On February 10, 2006, the Commission accepted the Restated Agreement by delegated letter order.⁶

4. On December 29, 2010, in Docket No. ER11-2550-000, MISO submitted an executed Amended Restated Agreement among MISO, Trimont, and NSP (MISO, Trimont, and NSP are referred to collectively as the Parties).⁷ In their filing, the Parties explained that they entered into the Restated Agreement to interconnect the Interconnection Customer's Generating Facility with NSP's transmission system. Specifically, the Parties stated that Appendix A, section 4(b)(2) of the Restated Agreement originally limited the operation of the Generating Facility so that the total output from the Generating Facility and the Great River Energy (Great River) combustion turbines that are also connected at the Lakefield Generation Substation could not exceed 550 MW. Additional studies MISO performed to evaluate transmission service requests identified transmission improvements that needed to be made before an increased transmission service level of 750 MW of total output could be permitted for the Generating Facility and the combustion turbines.

⁴ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *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 Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

⁵ July 15 Order, 112 FERC ¶ 61,067 at P 11.

⁶ *Midwest Indep. Trans. Sys. Operator, Inc.*, Docket No. ER05-1018-002, at 1 (Feb. 10, 2006) (delegated order).

⁷ The filing states that Trimont is now the Interconnection Customer as successor to PPM. MISO December 29, 2010 Filing of Amended and Restated Large Generator Interconnection Agreement, Docket No. ER11-2550, at 1.

5. In their filing, the Parties explained that since these formerly-identified transmission improvements are currently in service, they revised the Restated Agreement to remove the total output limitation on the Generating Facility and the combustion turbines. Specifically, Section 4(b)(2) in Appendix A of the Restated Agreement was amended to increase the limits on the total output of the Generating Facility and the combustion turbines interconnected at Lakefield Generation Substation from a maximum of 550 MW to a maximum of 650 MW, reflecting the fact that a special protection scheme has been installed on the transmission system. In addition, Appendix A was amended to revise the 550 MW total output limitation to a 650 MW limitation on simultaneous operation of the Generating Facility and the combustion turbines interconnected at the Lakefield Generation Substation whenever certain transmission service requests, which grant firm delivery service from the Generating Facility, are active and total at least 100 MW. Significantly, the total generation capacity was not changed from the original LGIA, but rather generator output limitations were removed because of transmission improvements, i.e., a special protection system had been installed on the transmission system.⁸

6. On February 3, 2011, by delegated letter order, the Commission accepted the Amended Restated Agreement, effective December 30, 2010, as requested.⁹

II. Motion for Leave to Intervene Out-of-Time and Request for Rehearing

7. On March 4, 2011, EcoEnergy LLC (EcoEnergy) filed a motion for leave to intervene out-of-time and request for rehearing of the February 3 Order. EcoEnergy argues that good cause exists to grant the motion to intervene out-of-time because the only staff member of EcoEnergy qualified to evaluate the potential impact of the Amended Restated Agreement was on active duty in the military when the filing was made, and the title and contents of the MISO filing do not readily reveal the true nature of the filing.

8. EcoEnergy asserts that it is aware that the Commission does not ordinarily allow a party to intervene for the purpose of requesting rehearing after a substantive order has been issued in the proceeding. However, citing *Duke Energy Hinds, LLC*¹⁰ and *North Baja Pipeline, LLC*,¹¹ EcoEnergy argues that the Commission has permitted late

⁸ See March 21, 2011 Answer of Great River Energy (Great River), Docket No. ER11-2550-000, at 3 & n.6.

⁹ February 3 Order, Docket No. ER11-2550, at 1.

¹⁰ 117 FERC ¶ 61,210 (2006) (*Duke Hinds*).

¹¹ 105 FERC ¶ 61,374 (2003) (*North Baja*).

intervention to allow a party to seek rehearing of an order that has been issued where exceptional circumstances exist that precluded timely intervention by that party.¹² EcoEnergy claims that such exceptional circumstances exist here, and establish good cause for the Commission to grant EcoEnergy's motion to intervene out-of-time and consider its request for rehearing.

9. Specifically, EcoEnergy states that it is a commercial scale wind development company with three full-time and two part-time employees. EcoEnergy asserts that its President is the only staff member with the necessary background and experience to evaluate the potential impacts of the Amended Restated Agreement. EcoEnergy explains that its President was deployed on active duty for the United States Air Force to the Persian Gulf area on December 27, 2010 (two days before the Amended Restated Agreement was filed), returned to the United States on February 4, 2011 (the day after the agreement was accepted by delegated authority), and was released from active duty on February 10, 2011. EcoEnergy claims that upon returning from active duty, its President realized the implications of the filing were much broader than the document title and contents reflected, and that the filing impacted all queued interconnection requests in Minnesota and Northern Iowa.¹³

10. In addition, EcoEnergy requests rehearing of the February 3 Order, contending that the increase in the combined facilities' output allowed under Appendix A, Section 4(b)(2) of the Amended Restated Agreement is inconsistent with MISO's tariff and unfairly impacts generators in MISO's queue. EcoEnergy also maintains that the Commission's acceptance of the Amended Restated Agreement was erroneous because the studies cited in the filing do not support the conclusions made, and, in some cases, the studies do not exist.

III. Answers

11. On March 21, 2011, MISO, Great River and Iberdrola Renewables, Inc. (Iberdrola) filed answers to the motion, asking the Commission to deny EcoEnergy's late-filed intervention, and find that as a non-party, EcoEnergy does not have standing to seek rehearing of the Commission's order in this proceeding.¹⁴ Specifically, MISO

¹² Motion, Docket No. ER11-2550-000, at 3.

¹³ *Id.*

¹⁴ March 21, 2011 Answer to Motion to Intervene Out-of-Time and Motion for Leave to Answer and Answer to Request for Rehearing of MISO, Docket No. ER11-2550-000, at 8 & n. 20 (citing *Duke Energy Moss Landing, LLC, et al.*, 134 FERC ¶ 61,151, at P 16 (2011); *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003)); March 21, 2011 Answer of Great River, Docket

argues that EcoEnergy's late intervention fails to meet the burden for intervention under Rule 214(b) and the higher burden for late intervention under Rule 214(d) because EcoEnergy is not a party to the Amended Restated Agreement and does not clearly state its interest or how it is affected by the Commission's acceptance of the agreement.¹⁵ MISO claims that EcoEnergy's late intervention substantially disrupts the interests of the parties to the Amended Restated Agreement by raising speculative concerns of a non-party. Accordingly, MISO asks the Commission to reject the late intervention and rehearing request to prevent disruption of the administrative process and undue burden on the Parties to the Amended Restated Agreement.¹⁶ Similarly, Great Energy argues that EcoEnergy has not satisfied the higher burden to demonstrate good cause for granting late intervention, and seeks intervention solely to request rehearing of the February 3 Order, which, if granted, would cause undue prejudice to existing parties that participated in the proceeding. Great Energy asserts that, while EcoEnergy generally alleges that the order will unfairly impact other generators in MISO's interconnection queue, no other market participant has raised any concerns with respect to the Amended Restated Agreement.

12. MISO and Great River argue that, if the Commission nevertheless finds that EcoEnergy should be granted its request for late intervention, the Commission should reject EcoEnergy's rehearing request on the merits. They assert that EcoEnergy's claim that the Amended Restated Agreement unlawfully permits Trimont and Great Energy to increase the capacity of their respective interconnected generation facilities from 550 MW to 650 MW lacks merit and reflects a fundamental misunderstanding of the facts. Great Energy asserts that the premise underlying EcoEnergy's claims is fundamentally flawed and is based on the mistaken assumption that: (1) the transmission service requests do not support the lifting of the output restriction set forth in the Trimont LGIA; and (2) a new interconnection request and associated study processes were necessary to lift the restriction.

13. Iberdrola states that it supports the answers submitted by MISO and Great River opposing EcoEnergy's late intervention and rehearing requests.

14. On March 25, 2011, EcoEnergy filed a motion to respond to answers and a response. On April 11, 2011, MISO filed a motion for leave to file a limited answer to clarify factual assertions in EcoEnergy's response. On April 15, 2011, EcoEnergy filed a motion for leave to respond to the limited answer of MISO and response. On August 18,

No. ER11-2550-000, at 2 & n.3; March 21, 2011 Answer of Iberdrola, Docket No. ER11-2550-000, at 1-2.

¹⁵ 18 C.F.R. §§ 385.214(b) and (d) (2011).

¹⁶ *New York Indep. Sys. Operator, Inc*, 125 FERC ¶ 61,299, at P 34 (2008).

2011, EcoEnergy filed a revised affidavit to include updated references to MISO's website. EcoEnergy states that the substantive portions of its initial filing have not been changed.

IV. Discussion

A. EcoEnergy's Motion for Leave to Intervene Out-of-Time

15. The Commission's regulations provide for consideration of the following factors when evaluating whether to grant a motion for late intervention: (1) whether the movant had good cause for failing to file its motion within the time prescribed; (2) any disruption of the proceeding that might result from permitting intervention; (3) whether the movant's interest is or is not adequately represented by other parties in the proceeding; (4) any prejudice to, or additional burdens upon, the existing parties that might result from permitting the intervention; and (5) whether the motion describes in adequate detail the movant's interest in and right to participate in the proceeding.¹⁷ When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial.¹⁸ Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. The Commission sympathizes with the difficulties that EcoEnergy had in timely filing its request for intervention because of its President's active duty military service. However, we are unable to find that EcoEnergy has met this higher burden of justifying its late intervention.

16. EcoEnergy also states that its staff endeavored to monitor relevant filings with the Commission, but that MISO's filing in this proceeding did not reveal the true nature of the issues raised by the filing. We do not agree with this characterization. The filing in Docket No. ER11-2550-000 was noticed by the Commission and published in the *Federal Register* on January 10, 2011 (76 Fed. Reg. 1426).¹⁹ Renewable Energy Systems Americas Inc., a developer of wind projects in MISO's region, filed a timely motion to intervene, and was in the position to represent the interests of wind developers

¹⁷ 18 C.F.R. § 385.214(d) (2011).

¹⁸ See, e.g., *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 137 FERC ¶ 61,047 (2011); *Duke Energy Carolinas*, 136 FERC ¶ 61,199 (2011); *ISO New England*, 124 FERC ¶ 61,096, at P 7 (2008); *Midwest Indep. Trans. Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹⁹ *Southern Co. Servs., Inc.*, 92 FERC ¶ 61,167, at 61,565 (2000) (finding that published notice provided sufficient notice to interested parties that particular tariffs were being amended and that those entities who timely intervened were able to discern the filing's purpose).

like EcoEnergy. Thus, we find that the Commission provided sufficient notice to interested parties of what was at issue, i.e., amendment of the Restated Agreement, with reasonable opportunity to intervene.²⁰

17. Moreover, we find that the cases EcoEnergy cites do not support its request for late intervention. In *Duke Hinds*, the Commission permitted two entities to intervene out-of-time when the Commission made the outcome of their previously unrelated case subject to the outcome of *Duke Hinds*. Those entities could not have foreseen a need to intervene in *Duke Hinds* until the Commission made their case contingent on the outcome of *Duke Hinds*, after the deadline to intervene in *Duke Hinds* had passed. This is not the factual scenario presented by EcoEnergy.²¹ We also note that in *Duke Hinds*, the Commission rejected a late intervention by another movant because it did not meet the higher burden required to justify late intervention because it had not demonstrated how it could be harmed by lack of party status. In *North Baja*, the Commission rejected late filed requests for rehearing while granting clarification on a matter of importance to the pipeline industry as a whole.²²

18. We note, however, that EcoEnergy has intervened in support of a complaint concerning MISO's processing of certain interconnection requests,²³ and also intervened in MISO's queue reform proceeding.²⁴ These are appropriate proceedings for addressing EcoEnergy's general concerns.

19. Consequently, pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), although we sympathize with EcoEnergy's difficulties in timely filing its motion to intervention, we are unable to find that it met the

²⁰ *Id.* See *Black Marlin Pipeline Co.*, 67 FERC ¶ 61,205, at 61,638 (1994) (notice of the proceeding was published in the *Federal Register* . . . which constituted constructive notice of the proceedings).

²¹ *Midwest Indep. Trans. Sys. Operator, Inc.*, 118 FERC ¶ 61,212, at P 11 (2007).

²² *North Baja*, 105 FERC ¶ 61,374 at PP 12, 18-19.

²³ *Shetek Wind Inc. v. MISO*, Docket No. EL11-53-000. EcoEnergy filed a timely motion to intervene in Docket No. EL11-53 on August 2, 2011.

²⁴ *Midwest Indep. Trans. Sys. Operator, Inc. Section 205 Filing to Revise Attachment X of its Tariff*, Docket No. ER12-309-000. EcoEnergy's motion to intervene in this proceeding was filed on November 30, 2011.

higher burden of demonstrating good cause warranting late intervention after the issuance of a dispositive order.²⁵

B. EcoEnergy's Request for Rehearing

20. In light of our decision to deny EcoEnergy's late motion to intervene, we will dismiss EcoEnergy's request for rehearing. Because EcoEnergy is not a party to this proceeding, it lacks standing to seek rehearing of the February 3 Order under the Federal Power Act and the Commission's regulations.²⁶ Consequently, we also find that the answers to rehearing filed by MISO, Great River, Iberdrola, and EcoEnergy in this docket are now moot, as well as rejected under our rules.²⁷

21. Nevertheless, even if we were to consider the merits of EcoEnergy's rehearing request, we would deny it. As we explain in the order on *Shetek Wind Inc., et al. v. Midwest Independent Transmission System Operator, Inc.*, Docket No. EL11-53, issued concurrently with this order, Trimont Wind Project's original request for service predated Order No. 2003,²⁸ and the Trimont Wind Project was appropriately studied based on MISO's procedures in effect at the time.²⁹ Furthermore, a study for Trimont Wind was not needed in 2010 at the time the output limitation was lifted because this limitation was contingent upon Trimont Wind addressing the upgrades and conditions found in its Group Facilities Study; these upgrades were placed into service by 2010.³⁰

²⁵ See, e.g., *Midwest Indep. Trans. Sys. Operator, Inc.*, 102 FERC ¶ 61,250 at P 7.

²⁶ See 16 U.S.C. § 825(a) (1994); 18 C.F.R. § 385.713(b) (2011); and *Southern Co. Servs., Inc.*, 92 FERC ¶ 61,167 (2000).

²⁷ 18 C.F.R. § 385.713(d)(1) (2011); see, e.g., *Southern Illinois Power Coop. v. Midwest Indep. Trans. Sys. Operator, Inc.*, 116 FERC ¶ 61,117 (2006) ("Rule 713(d) of the Commission's Rules of Practice and Procedure ... prohibits an answer to a request for rehearing.").

²⁸ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *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 Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

²⁹ See *Shetek Wind Inc., et al. v. Midwest Independent Transmission System Operator, Inc.*, xxx FERC ¶ xx,xxx, at P 79 (2012). Further, Trimont Wind had the necessary upgrades in place for its level of service.

³⁰ *Id.*

The Commission orders:

(A) EcoEnergy's motion for late intervention is hereby denied, as discussed in the body of this order.

(B) EcoEnergy's request for rehearing is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.