

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System
Operator, Inc.

Docket Nos. ER08-1301-000
ER08-1302-000

(Issued September 29, 2008)

Attached are the statements by Commissioner Kelly concurring with a separate statement and Commissioner Moeller dissenting with a separate statement, to an order issued on September 22, 2008, in the above-referenced proceeding, *Midwest Independent Transmission System Operator, Inc.*, 124 FERC ¶ 61,277 (2008).

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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KELLY, Commissioner, *concurring*:

This order addresses the submission of an unexecuted Large Generator Interconnection Agreement and an unexecuted Amended and Restated Generator Interconnection Agreement by Midwest Independent Transmission System Operator, Inc. (Midwest ISO). Midwest ISO, Michigan Electric Transmission Company, LLC and Consumers Energy Company (Consumers Energy) are parties to these agreements. Midwest ISO submitted this filing based on its understanding that any increase in generation capacity from an existing generator requires a new Large Generator Interconnection Agreement (LGIA) conforming to the transmission provider's current *pro forma* LGIA. Consumers Energy stated that the increase in generation capacity (0.7 MW) is a *de minimis* increase and should not require a new LGIA.

Consumers Energy asserts that this increase in capacity did not require system or interconnection upgrades or any formal System Impact or Facilities Studies. Consumers Energy further argues that the increase will be "essentially undetectable" in operating the transmission system. While I concur with the outcome of the order, I believe that Consumers Energy raises an important issue: whether there should be a *de minimis* exception to interconnection procedures with respect to the filing of a new LGIA. The record in this proceeding is insufficient to determine, among other things, whether the benefits of establishing a *de minimis* exception would be greater than any costs. I encourage Midwest ISO, Consumers Energy and other interested parties to examine the need for such an exception in the stakeholder process.

For this reason, I respectfully concur with this order.

Suede G. Kelly

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MOELLER, Commissioner, *dissenting*:

At a time when this nation cannot afford to discourage efforts to improve the efficiency of our electricity grid, this order discourages the interconnection of wind resources, renewable resources, and demand resources. Adding small amounts of generation can be just as important as adding large generating plants to the grid, as many small efforts can substantially increase the amount of low-cost power available to consumers. It is uncontested that the 0.7 MW increase in capacity at the Hardy hydroelectric plant will have no impact on the transmission system. Despite having no impact, technical staff and lawyers for the participants in this case were required to incur numerous hours drafting and negotiating a new interconnection agreement. All of that time would have been better spent in studying how to bring more wind farms, renewables, and demand resources onto the Midwest ISO transmission grid. This Commission is well aware that waiting lists to interconnect new generation to the grid are severely backlogged precisely because of our nation's interest in renewable resources. The Commission should not have issued an order that will result in even greater backlog.

In this case, one of the three generators at the Hardy plant is being upgraded from 10.8 MW to 11.5 MW. Until this decision, the interconnection of that plant was governed by an interconnection agreement which covers more than 5,000 MW of capacity. Thus, because Consumers Energy decided to improve the capacity covered under its interconnection agreement by less than one five-thousandth of its total capacity, it must now separate the Hardy plant from its existing arrangements and enter an entirely new agreement for that plant.

The majority's order in this case is based on their interpretation of the Midwest ISO's tariff, which states that a new interconnection request is a request "to increase the capacity of ... an existing Generating Facility." The drafters of this tariff language surely did not include an implicit requirement that vanishingly small increases in capacity are included, regardless of whether or not the capacity increase has any impact on the transmission system. A tariff should not be understood to require an absurd result, especially during a time when this nation needs to reduce obstacles and further encourage resource development.

As pointed out by Consumers Energy in its protest, no system or interconnection upgrades are needed to accommodate the increase in generation at the Hardy Plant, and the Midwest ISO was able to reach this conclusion without any formal System Impact or Facilities Studies. For operational purposes, the capacity increase is so small that it is basically not detectable in real time. (Consumers Protest at p. 3 and pp. 13-16.)

No party to this proceeding objected to treatment of this capacity increase as *de minimis*. The Midwest ISO and the transmission owner only asserted their belief that Commission policy does not permit a *de minimis* exception. Moreover, the Midwest ISO states that “it does not object to the idea of a *de minimis* exception from a technical standpoint.” (Transmittal Letter at p. 4.)

According to the courts, a *de minimis* exception under the Federal Power Act is a matter of “common sense”. *Pacific Gas & Elec. Co. v. F.E.R.C.*, 720 F.2d 778, 89 (D.C. Cir. 1983); *Fall River Rural Elec. Coop. v. F.E.R.C.*, 2008 U.S. App. LEXIS 19240 (9th Cir. 2008). Section 6 of the Power Act allows the alteration of a hydroelectric license only upon mutual agreement of the licensee and the Commission, without any exception for small changes in generating capacity. Nevertheless, the courts recognize a *de minimis* exception for such changes. A common sense approach to *de minimis* changes in capacity should apply to the Midwest ISO tariff just like it applies to the Power Act.

If we had granted a *de minimis* exception in this case, we would not have needed to decide issues not yet before us. That is, the Commission did not need to adopt a rule of general applicability in this proceeding. The record in this case lacked evidence that would have allowed us to decide future disputes related to the interconnection of small amounts of additional generation, including disputes over interpretation of particular parts of the LGIP interconnection procedures. Yet not having evidence to decide a future dispute is no reason to create an unbendable rule that discourages efficient outcomes.

This order could have served as a signal to the Midwest ISO and its stakeholders to stop wasting the time of their engineers and lawyers with interconnection issues that nobody believes have any impact on the transmission system. The Midwest ISO needs to move its interconnection queue forward, and the nation will soon need new generation capacity. We should not discourage either.

For these reasons, I respectfully dissent.

Philip D. Moeller
Commissioner