

127 FERC ¶ 61,294
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER08-1169-001

ORDER ON REHEARING

(Issued June 25, 2009)

1. American Municipal Power – Ohio, Inc. (AMP-Ohio) requests rehearing of the Commission’s order¹ that conditionally accepted revisions to Attachment X, “Generator Interconnection Procedures,” of the Open Access Transmission and Energy Markets Tariff² of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). The revisions concern the procedures by which Midwest ISO manages the queue of generating projects seeking to interconnect with the transmission system it operates. For the reasons described below, we will grant rehearing in part, dismiss rehearing in part, and deny rehearing in part.

Background

2. In response to concerns about the delays and backlogs in processing interconnection queues, and after a technical conference on interconnection queuing practices,³ the Commission required Midwest ISO and other Regional Transmission Organizations and Independent System Operators to improve their queue processing

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183 (2008) (Queue Reform Order).

² As of January 6, 2009, Midwest ISO’s Open Access Transmission and Energy Markets Tariff (TEMT) became the Open Access Transmission, Energy, and Operating Reserve Markets Tariff (ASM Tariff). *See Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,321 (2008). This order uses “Tariff” to mean the TEMT or the ASM Tariff, whichever is in effect at the time written about.

³ *See Interconnection Queuing Practices*, 122 FERC ¶ 61,252 (2008).

procedures and advance the goals of Order No. 2003.⁴ To that end, on June 26, 2008, Midwest ISO filed proposed revisions to Attachment X (June 26 Filing).

3. The Commission conditionally accepted the proposed tariff revisions in the Queue Reform Order.⁵ Among other things, the revisions changed the “first-come, first-served” approach to processing interconnection applications to an approach based on the progress that the generation project is making towards coming on-line. Essentially, the approach became “first-ready, first-to-proceed.” Midwest ISO divided the generator interconnection process into four phases: a Pre-Queue Phase, an Application Review Phase, a System Planning and Analysis Phase, and a Definitive Planning Phase.

4. Of concern to this rehearing proceeding are the revisions changing the amounts, timing, and refund conditions of the monetary deposits required to enter the Definitive Planning Phase,⁶ and the elements of the milestones that a generation project must fulfill to enter the System Planning and Analysis Review Phase.⁷

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).

⁵ In compliance with the Commission’s directives, Midwest ISO filed revisions to its proposed tariff provisions on September 24, 2008 (September 24 Filing). The Commission’s companion order on this filing is being issued concurrently. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,295 (2009).

⁶ Subsection 8.1, “Purpose of the Definitive Planning Phase” states that the Definitive Planning Phase is designed to identify Network Upgrades that will reliably and efficiently integrate proposed generation into the Transmission Provider’s Transmission System.

⁷ The System Planning and Analysis Phase means the phase of the Generator Interconnection Procedure process that consists of an Interconnection System Impact Study for those Interconnection Requests being studied in this phase. *See* Section 1, “Definitions.”

Discussion

A. Refund of Unused Study Deposits

5. In the Queue Reform Order the Commission accepted proposed changes to the monetary amounts that an Interconnection Customer must deposit for its project to proceed towards interconnection. Revised subsection 3.3.1, “Initiating an Interconnection Request,” requires the Interconnection Customer to deposit, in addition to a non-refundable \$5,000 fee, amounts ranging from \$10,000 to \$120,000, based on the proposed project’s nameplate rating or, for an existing project, its increase in capacity. These deposits are used to fund Interconnection Studies. At the end of the System Planning and Analysis Phase, any remaining funds are applied to the additional deposit amounts required to enter the Definitive Planning Phase or refunded if the Interconnection Customer has withdrawn its Interconnection Request. To enter the Definitive Planning Phase, revised subsection 8.2, “Eligibility for the Definitive Planning Phase,” requires additional deposit amounts that range from \$40,000 for projects less than 6 MW to \$520,000 for projects of 1,000 MW or more.

6. In the Queue Reform Order, the Commission also accepted proposed increases to the exceptions to when Midwest ISO will refund deposit money once projects have entered the Definitive Planning Phase. Subsection 13.3, “Obligation for Study Costs,” was changed to provide that for projects that withdraw before Midwest ISO conducts an Interconnection Facilities Study,⁸ the Interconnection Customer will be refunded the difference between the deposit and twice the amount of actual expenditures. For projects that withdraw after Midwest ISO has begun the Interconnection Facilities Study, the Interconnection Customer may see no refund. Midwest ISO makes refunds only if the cost estimate from the Interconnection Facilities Study exceeds the cost estimate from the System Planning and Analysis Review by greater than twenty-five percent. The refund for projects that meet this condition would be the difference between the deposit and twice the amount of actual expenditures. The non-refunded portions of the deposits will be applied to the restudies caused by the withdrawal of the Interconnection Request. Additionally, subsection 13.3 provides that unused amounts of study deposits that the Interconnection Customer deposited to enter the Definitive Planning Phase will be refunded upon Commercial Operation. However, these amounts are forfeited, under the terms and conditions in the Generator Interconnection Agreement, if the Interconnection Customer terminates or suspends the project.⁹

⁸ The Interconnection Facilities Study is performed during the Definitive Planning Phase. *See* revised subsection 8.1

⁹ *See* subsection 13.3 at Original Sheet No. 1714Z.07a.

7. On rehearing, AMP-Ohio repeats its earlier criticism of subsection 13.3.¹⁰ When an interconnection customer withdraws its project from the interconnection process, AMP-Ohio does not object to Midwest ISO keeping the study deposit made to enter the Definitive Planning Phase *if* the deposit is used to fund additional studies or restudies made necessary by the project's withdrawal. It does object, however, to Midwest ISO keeping the entire deposit where no restudies are needed or the restudies cost less than the deposit. AMP-Ohio asks the Commission to modify subsection 13.3 so that any deposit balance, after Midwest ISO has performed any necessary studies or restudies, will be refunded to the interconnection customer who withdrew its project from the interconnection process.

8. In support, AMP-Ohio refers to Midwest ISO's policy on the treatment of security deposits for network upgrades when a project withdraws: the security deposit is used to build the expected network upgrades, and if no lower-queued projects are affected, Midwest ISO refunds the money.¹¹ Also, AMP-Ohio points out that Midwest ISO did not address AMP-Ohio's criticism directly. Midwest ISO stated only that the proposed deposits are not unjust, unreasonable, or unduly discriminatory, and that it would not collect an amount far above actual costs.¹² Nor did the Commission mention AMP-Ohio's objection when it discussed deposit-related comments in the Queue Reform Order.¹³

9. AMP-Ohio offers that the Commission may have misunderstood Midwest ISO's proposal. AMP-Ohio points out that the Commission referred to proposed deposit refund provisions at subsection 3.3.1, which concerns initiating an Interconnection Request, when discussing the proposed deposit refund provisions of subsection 13.3, which

¹⁰ AMP-Ohio July 17, 2008 Protest in Docket No. ER08-1169-000 at 3-4 (AMP-Ohio July 2008 Protest).

¹¹ Rehearing Request at 6, *citing* Testimony of Eric Lavery at 55-56, Tab F in the June 26 Filing; *see also* subsection 2.4.1 of the Generator Interconnection Agreement, Appendix 6 of the Generator Interconnection Procedures, (in cases of Termination and with respect to Network Upgrades, to the extent that Interconnection Customer has already paid Transmission Owner for materials or equipment, Transmission Owner shall refund such amounts to Interconnection Customer less costs to cancel pending orders or return materials, equipment, or contracts).

¹² Midwest ISO August 4, 2008 Answer to Protests in Docket No. ER08-1169-000 at 14-15 (Midwest ISO August 2008 Answer).

¹³ Rehearing Request at 7, *citing* Queue Reform Order, 124 FERC ¶ 61,183 at P 49-52.

concerns obligations for study costs.¹⁴ AMP-Ohio explains that the provisions cited by the Commission do not apply to the circumstances presented in the AMP-Ohio Protest, i.e., when deposit money paid by a withdrawn project is not required to pay for necessary restudies of other projects caused by the withdrawal. AMP-Ohio suggests that this misunderstanding may have produced the Commission's conclusion, "that Midwest ISO's proposal [discussing subsection 13.3] is acceptable because it does not place any undue financial burden on customers."¹⁵ To the contrary, AMP-Ohio contends that retaining the unused deposit funds in these circumstances does place an unwarranted financial burden on interconnection customers who are entitled to the return of their deposit money not used for restudies; Midwest ISO has not justified keeping the money. Additionally, because the Commission appears not to have considered the circumstances raised by AMP-Ohio, it is unclear whether the Commission's conclusion is intended to apply to these circumstances.

10. In the June 26 Filing, Midwest ISO explained that basing deposits on the size of the Interconnection Request would more accurately match the costs of necessary studies or restudies. In addition, the higher deposit amounts would address a problem in the interconnection queue: "Under the current process, when a project withdraws from the queue, any lower-queued project whose study result and associated Network Upgrades were based upon assumptions regarding the withdrawn, higher-queued request must bear the cost of any restudies necessitated by the withdrawal."¹⁶ To follow cost causation principles and assign increased study costs to the entity that caused those costs to be incurred, Midwest ISO proposed deposits to enter the Definitive Planning Phase that are approximately twice the expected actual study cost. It stated that it would use this deposit to cover the actual study costs of the Interconnection Customer's project and any cost incurred for restudy, thus mitigating the impacts of withdrawal on the later-queued generators.¹⁷

11. In the June 26 Filing, Midwest ISO justified the proposed tariff revision to subsection 13.3, concerning deposit forfeiture, by stating that the revised deposit amounts will cause customers to diligently review their projects prior to entering the Definitive Planning Stage, and that only projects that are likely to achieve commercial operation

¹⁴ *Id.*, citing Queue Reform Order, 124 FERC ¶ 61,183 at P 58.

¹⁵ *Id.*, citing Queue Reform Order, 124 FERC ¶ 61,183 at P 61.

¹⁶ June 26 Filing, cover letter at 11-12.

¹⁷ *Id.*

will enter this phase. Midwest ISO could thus focus its resources on projects that are more likely to go into service and the costs of restudies will be more fairly apportioned.¹⁸

12. Midwest ISO's answer to the comments and protests on the June 26 Filing stated that Midwest ISO does not seek to collect amounts far above actual costs of restudies.¹⁹ It did not address directly the question of forfeiture of unused study deposit amount should a project withdraw after having entered the Definitive Planning Phase. Rather, it focused on covering the costs of required restudies, stating, "Requiring projects to fund the restudy if they withdraw from the queue corrects the unjust and unduly discriminatory practice of passing that cost on to those who have remained in the queue. . . . This revision is not punitive in nature, but merely applies traditional cost-causation principles and seeks to provide more certainty to those projects proceeding in the Definitive Planning Phase."²⁰ Midwest ISO added that it was amenable to modifying the restudy component of the deposit from the estimated one-time study cost to the actual restudy costs incurred, based on actual costs incurred over time.²¹

13. After reconsideration of the filings in this proceeding, we will grant rehearing on this issue. We find that it is not just and reasonable for Midwest ISO to retain deposit money beyond that which is necessary to conduct studies for the project and any necessary restudies caused by project withdrawal. We find that refund to the customer of the balance is consistent with our traditional cost causation policy -- that costs are borne by those who cause them.²² Subsection 13.3, "Obligations for Study Costs," is a cost-covering provision, not a punitive provision. It should correspond with Midwest ISO's stated purpose of the Definitive Planning Phase, which is to identify needed network upgrades.²³

¹⁸ *Id.*, cover letter at 12-13.

¹⁹ Midwest ISO August 2008 Answer at 15.

²⁰ *Id.* at 17.

²¹ *Id.*

²² *See, e.g., ISO New England, Inc.*, 115 FERC ¶ 61,145, at P 13 (2006) (under cost causation principles, costs are allocated to the parties who cause the incurrence of such costs).

²³ Subsection 8.1, "Purpose of the Definitive Planning Phase," states that the phase is designed to identify Network Upgrades that will reliably and efficiently integrate proposed generation into the Transmission Provider's Transmission System.

14. We will require Midwest ISO to revise subsection 13.3 in a compliance filing within 30 days of the date of issuance of this order (30-day Compliance Filing). Subsection 13.3 must be revised to provide for refund to the customer of any unused portion of the study deposit paid to enter the Definitive Planning Phase after Midwest ISO has accounted for study costs associated with the withdrawing project and restudy costs associated with any affected lower-queued customers. We will require that this refund of study deposits not used for studies or restudies apply also to the situation where the Interconnection Customer terminates or suspends the project. The 30-day Compliance Filing must state the time period and the procedures whereby Midwest ISO will refund the unused portion of a study deposit.

B. Entrance to System Planning and Analysis Review Phase

15. As accepted by the Queue Reform Order, subsection 8.2, “Eligibility for the Definitive Planning Phase,” provides a list of four data elements²⁴ from which the Interconnection Customer must provide the data in two elements in order to begin the System Planning and Analysis Review. Midwest ISO had justified its use of these elements as providing an objective measure of a project’s readiness to proceed through the interconnection process. Customers who demonstrate the greatest ability to move forward with project development are processed first, and Midwest ISO’s resources are focused on well-defined projects.²⁵

16. Regarding element (b), “approval of the facility by a state utility regulatory commission,” AMP-Ohio asks, on rehearing, that we add “or a documented statement with appropriate legal references that such approval is not necessary.” In the initial proceeding, AMP-Ohio had protested that this element overly restricts public entities, such as itself and its members.²⁶ Midwest ISO answered that it had included multiple alternative elements to address the needs of all parties and various business models.²⁷

²⁴ These four data elements are: “(a) documentation of application for state or local air, water, land, or federal nuclear permits and that the application is proceeding per regulations; (b) approval of the facility by a state utility regulatory commission; (c) approval from an independent board of directors of the Interconnection Customer’s company; and (d) security reasonably acceptable to the Transmission Provider equal to [a specified calculation]. Additional security reasonably acceptable to the Transmission Provider equal to [a specified calculation] may be provided in lieu of items (a), (b), or (c) above.”

²⁵ June 26 Filing cover letter at 16-17.

²⁶ AMP-Ohio July 2008 Protest at 5.

²⁷ Midwest ISO August 2008 Answer at 31.

The Commission held that Midwest ISO's proposed elements allowed enough customer flexibility and that they struck a reasonable balance between discouraging speculative projects from remaining in the queue and ensuring that projects ready to proceed can do so. However, the Commission also directed Midwest ISO to continue to work with its stakeholders to identify impediments to fulfilling milestones and, if necessary, to submit revised tariff language or seek tariff waivers where appropriate.²⁸

17. On rehearing, AMP-Ohio criticizes Midwest ISO's answer as not justifying shrinking the possibilities open to joint action agencies²⁹ and thus making it more difficult for them to meet two elements. It faults the Commission for recognizing AMP-Ohio's concern over the narrowness of the state regulatory approval element³⁰ but not addressing directly whether to expand this element as AMP-Ohio had requested. AMP-Ohio asks the Commission to address proposed changes mentioned specifically in the record, to mandate those changes that it finds to be reasonable, and not to leave them to chance and delay.³¹

18. We will deny rehearing on this point. The reason for requiring project developers to fulfill at least two of these elements is so that only projects that are actively progressing towards power generation will be eligible to enter the System Analysis and Planning Review Phase.³² Concerning AMP-Ohio's proposed addition, a showing that a project developer does not need state utility commission approval does not demonstrate that the project developer is progressing towards power generation.

19. Furthermore, in compliance with the Commission's directive, the September 24 Filing adds a fifth element to the list of elements from which two elements must be satisfied before a project is eligible to enter the System Analysis and Planning Review Phase.³³ We are satisfied that the now five elements offer sufficient flexibility for

²⁸ Queue Reform Order, 124 FERC ¶ 61,183 at P 77, 80.

²⁹ A joint action agency is a group of municipal utilities that collectively acquire generation and transmission resources, and generally do not own transmission facilities.

³⁰ See Queue Reform Order, 124 FERC ¶ 61,183 at P 69.

³¹ Rehearing Request at 4.

³² See Queue Reform Order, 124 FERC ¶ 61,183 at P 79 (Midwest ISO needs milestones that require interconnection customers to demonstrate that their projects are increasingly prepared to move forward).

³³ See *id.* P 80 n.72. The fifth element is "demonstration that generation turbines have been ordered for the Generating Facility."

interconnection customers, including joint action agencies like AMP-Ohio.³⁴ If Midwest ISO finds otherwise, it may apply for further revisions to Attachment X.³⁵

20. Concerning element (c), “approval from an independent board of directors of the Interconnection Company’s company,” AMP-Ohio asks us to revise this element so that it is satisfied, in the case of a municipal joint action agency or its equivalent, when the company’s board of directors or trustees or their equivalent consists of representatives of the member public utilities.

21. We note that Midwest ISO has revised element (c) in the September 24 Filing to read, “approval to proceed with the project from Interconnection Customer’s board of directors or its highest level of approval authority as determined by its governance structure.” In our companion order on the September 24 Filing, we accept this revision. We are satisfied that the revised text accommodates AMP-Ohio’s and other municipal joint action agencies’ situations. Thus, we will dismiss AMP-Ohio’s rehearing request on this point as moot.

The Commission orders:

(A) The rehearing request filed by AMP-Ohio in this proceeding is hereby granted in part, dismissed in part, and denied in part, as discussed in the body of this order.

(B) Midwest ISO is hereby directed to make a compliance filing, within 30 days of the date of issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁴ *See id.* P 80 (“Not every milestone should apply to every interconnection customer in every instance.”).

³⁵ *See id.* (“[W]e direct Midwest ISO to work with its stakeholders to identify impediments to fulfilling milestones and, if necessary, to submit revised tariff language or seek tariff waivers on a case-by-case basis where appropriate.”) .