

145 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Midcontinent Independent System Operator, Inc.

Docket No. ER13-1074-001

ORDER DENYING REHEARING

(Issued October 15, 2013)

1. On June 10, 2013, Ellerth Wind LLC (Ellerth) filed a request for rehearing of the Commission's May 10, 2013 order accepting Midwest Independent Transmission System Operator, Inc.'s (MISO's)¹ notice of termination of the Generator Interconnection Agreement (GIA)² among Otter Tail Power Company (Otter Tail) as Transmission Owner, Ellerth as Interconnection Customer, and MISO as Transmission Provider (collectively, Parties).³ As discussed below, we deny Ellerth's rehearing request.

I. Background

2. The GIA provided the Ellerth Wind Project with up to 98.9 MW of Energy Resource Interconnection Service, and 19.8 MW of Network Resource Interconnection Service, with a point of interconnection at a new switching station to be constructed along Otter Tail's Karlstad – Viking 115 kV transmission line near Newfolden, Minnesota.

¹ Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

² The Parties executed the GIA on January 18, 2011. MISO designated the Agreement as Original Service Agreement No. 2300 under its FERC Electric Tariff, Fourth Revised Vol. No. 1 (Tariff) and reported it in its Electric Quarterly Report.

³ *Midwest Independent Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114 (2013) (May 10 Order).

3. In the May 10 Order, the Commission found that the notice of termination was not unjust, unreasonable, unduly discriminatory, or preferential.⁴ Specifically, the Commission stated that Ellerth failed to meet a required milestone under the GIA and that MISO followed the procedures in its tariff by submitting to Ellerth a notice of breach, a notice of default, and a notice of termination.⁵ Further, the Commission did not find evidence in the pleadings that Ellerth cured the breach at issue. The Commission also found that the facts in this case differed from the facts in *Lakeswind I*,⁶ where the interconnection customer showed good faith efforts to cure its breach and paid security that was sufficient to the transmission owner.⁷

4. In the May 10 Order, the Commission also stated that, under the particular facts of the case, the extension of milestones, without further evidence of an intent to cure, may present harm to lower queued interconnection customers in the form of uncertainty, cascading restudies, and shifted costs necessitated if the project is removed from the queue at a later date.⁸ Further, in response to Ellerth's argument that there would be no potential cost shift because the network upgrade at issue was not being relied upon by other interconnection customers, the Commission stated that the potential still existed for future reliance on this network upgrade by lower queued interconnection customers, and resultant harm.⁹ The Commission again distinguished *Lakeswind I* from this case because, in *Lakeswind I*, the interconnection customer requested that its milestones be amended to reflect its revised cost responsibility, while Ellerth was seeking an extension of time to make its progress payments.¹⁰ Further, the Commission found *Jeffers South* to

⁴ *Id.* P 28.

⁵ Under Article 17.1.1 of the GIA, the failure of the breaching party to cure a breach within 30 calendar days of receiving a notice of breach shall result in a default, but the interconnection customer shall have up to 90 calendar days to cure the breach where such breach cannot be cured in the 30-day period.

⁶ *Lakeswind I*, 137 FERC ¶ 61,008 (2011) (*Lakeswind I*), *order on reh'g and clarification*, 141 FERC ¶ 61,097 (2012) (*Lakeswind II*).

⁷ May 10 Order, 143 FERC ¶ 61,114 at P 24 (citing *Lakeswind I*, 137 FERC ¶ 61,008 at P 24).

⁸ *Id.* P 27.

⁹ *Id.*

¹⁰ *Id.*

be inapplicable given that the Commission had not ruled on MISO's proposed termination in that case.¹¹

5. On rehearing, Ellerth raises two main issues. First, Ellerth argues that it was arbitrary and capricious for the Commission to determine that speculative harm to unidentifiable future customers was sufficiently specific to deny Ellerth's request for an extension to its milestones under the GIA.¹² Ellerth states that the Commission utilized a standard for determining harm in the May 10 Order that departs from the Commission's long-standing precedent where the Commission granted milestone extensions to interconnection customers when the transmission provider failed to show that termination will prevent a specific harm.¹³ Second, Ellerth states that the Commission did not address facts regarding Ellerth's good faith efforts to both avoid an impending breach and to cure the breach once it occurred.¹⁴

II. Discussion

6. We will deny Ellerth's rehearing request. Ellerth has not presented any argument on rehearing that persuades us that our determinations in the May 10 Order were in error. In contrast to Ellerth's claims, the Commission did not employ a "new standard"¹⁵ when accepting MISO's notice of termination in the May 10 Order. Instead, the Commission followed its prior precedent which supports acceptance of a notice of termination if the applicant demonstrates that the proposed termination is not unjust, unreasonable, unduly discriminatory, or preferential,¹⁶ or if it is consistent with the public interest.¹⁷ In this

¹¹ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,171 (2013) (*Jeffers South*)).

¹² Ellerth Rehearing Request at 2-7.

¹³ *Id.* at 2-3 (citing *Jeffers South*, 142 FERC ¶ 61,171; *Lakeswind I*, 137 FERC ¶ 61,008; *Lakeswind II*, 141 FERC ¶ 61,097; *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,124 (2010) (*Pomeroy Wind*); *Midwest Indep. Transmission Sys. Operator, Inc.* 130 FERC ¶ 61,172 (2010); *Illinois Power Co.*, 120 FERC ¶ 61,237 (2007) (*Illinois Power*)).

¹⁴ *Id.* at 3, 7-9.

¹⁵ *Id.* at 4.

¹⁶ *See, e.g., Allegheny Power System, Inc.*, 102 FERC ¶ 61,318, at P 9 (2003).

¹⁷ *See, e.g., Duke Energy Moss Landing LLC, et al.*, 83 FERC ¶ 61,318, at 62,306 (1998), *order on reh'g*, 86 FERC ¶ 61,227 (1999).

case, MISO met its burden to demonstrate that the proposed termination was not unjust, unreasonable, unduly discriminatory, or preferential.¹⁸

7. We disagree with Ellerth's statement that "the standard that the Commission employed in the May 10 Order without basis, i.e., the potential for future reliance on an upgrade, is a new standard that amounts to nothing more than a showing of generic harm."¹⁹ The basis for our decision was fact-specific. We found that MISO met its burden under its Tariff to demonstrate that the notice of termination was not unjust, unreasonable, unduly discriminatory, or preferential based on a variety of factors, including Ellerth's failure to meet a required milestone, Ellerth's failure to cure the breach at issue, Ellerth's failure to propose a new viable Commercial Operation Date,²⁰ and MISO's demonstration of harm to lower queued interconnection customers in the form of uncertainty, cascading restudies, and shifted costs necessitated if the project were to be removed from the queue at a later date.²¹

8. The Commission's finding in the May 10 Order applies MISO's Tariff and is consistent with the order adopting MISO's Generator Interconnection Procedure (GIP) queue reforms in 2012.²² As we stated in that order, "MISO [has] provided compelling evidence that the ability of customers to wait for long lead times to almost expire before

¹⁸ May 10 Order, 143 FERC ¶ 61,114 at P 24.

¹⁹ Ellerth Rehearing Request at 4.

²⁰ There has been no record support that Ellerth proposed a new viable Commercial Operation Date or that Ellerth would qualify to change its Commercial Operation Date or In-Service Date even if a viable Commercial Operation Date had been proposed, as the GIP only allows changes in the Commercial Operation Date or In-Service Date of a GIA under narrow circumstances which are not present here. Specifically, Section 4.4.4 of the GIP provides that the Transmission Provider will not unreasonably withhold approval of an Interconnection Customer's proposed change in the In-Service Date or Commercial Operation Date of the Generating Facility if that change is the result of either (a) a change in milestones by another party to the GIA or (b) a change in a higher-queued Interconnection Request, provided that in either case, these changes do not exceed three years beyond the original Commercial Operation Date or In-Service Date. Midcontinent Independent System Operator Tariff, FERC Electric Tariff, Modules, Attachment X, Generator Interconnection Procedures (GIP), 7.0.0.

²¹ May 10 Order, 143 FERC ¶ 61,114 at P 27.

²² *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233 (2012) (Queue Reform Order), *order on reh'g*, 139 FERC ¶ 61,253 (2012) (Queue Reform Rehearing Order).

terminating their GIA has caused a significant number of restudies to be necessary and that these restudies adversely impacted other customers that are trying to reach commercial operation.”²³ In fact, MISO’s queue reforms and the more stringent tariff standards adopted under it were intended to meet the Commission’s goals of “discouraging speculative or unviable projects from entering the queue [and] getting projects that are not making progress toward commercial operation out of the queue.”²⁴ The Commission’s May 10 Order is consistent with this precedent.

9. While Ellerth cites to various cases to support its claims that the Commission employed a new standard in the May 10 Order, each of these cases is distinguishable from the present case. In *Lakeswind I*, the interconnection customer showed good faith efforts to cure its breach and paid security that was sufficient to the transmission owner.²⁵ Moreover, unlike this case, there were no issues regarding an indefinite Commercial Operation Date. As we stated previously, in *Jeffers South*, the Commission delayed ruling on MISO’s proposed termination of Jeffers South LLC pending the resolution of matters before the Commission in a hearing in Docket No. EL10-86.²⁶ As explained in our Order on Initial Decision in Docket No. EL10-86, MISO failed to meet the “but for” standard prescribed in the MISO Tariff when determining the network upgrades to interconnect the project at issue.²⁷ However, in this case, Ellerth does not claim that actions taken by another party to the agreement are inconsistent with the Tariff. Rather, it is Ellerth, the interconnection customer, who has not fulfilled its obligations under the GIA.

10. Further, in *Pomeroy Wind*, there were “unusual circumstances” in which no Commercial Operation Date was included in the original large generator interconnection agreement.²⁸ In contrast to this case, the Commission noted that “Pomeroy Wind does not now seek an indefinite extension but rather seeks to establish a commercial operation date of December 31, 2011,” and the Commission accepted this proposal as consistent with the requirements of Order No. 2003.²⁹ Finally, while the Commission did reject a

²³ Queue Reform Order, 138 FERC ¶ 61,233 at P 181.

²⁴ *Id.* P 30.

²⁵ *Lakeswind I*, 137 FERC ¶ 61,008 at P 24.

²⁶ *Jeffers South*, 142 FERC ¶ 61,171 at P 30.

²⁷ *Jeffers South, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 144 FERC ¶ 61,033, at PP 47, 56, 67 (2013).

²⁸ *Pomeroy Wind*, 130 FERC ¶ 61,124 at P 25.

²⁹ *Id.*

notice of termination in *Illinois Power Co.*, the basis for such rejection was that Illinois Power had not shown that allowing the agreement to remain suspended would harm generators lower in the queue and that the interconnection customer had made and was actively seeking to continue to make progress toward construction of its proposed generating plant.³⁰ In fact, the only thing preventing the interconnection customer from going forward in that case was a federal injunction related to environmental litigation.³¹ These facts are inapposite from the present case.

11. As to Ellerth's claims that the Commission did not address facts regarding Ellerth's good faith efforts to both avoid an impending breach and to cure the breach once it occurred, we continue to find nothing in the record that persuades us that the determinations in the May 10 Order were in error. Ellerth states that, following the breach, it discussed with Otter Tail making a goodwill payment at an amount less than the full first progress payment due under the GIA, but that, unlike in *Lakeswind I*, "the Transmission Owner was not willing to proceed over MISO's objection to any posting short of a full cure and would not have accepted such posting had it been attempted."³² As we stated previously, in *Lakeswind I*, the interconnection customer requested that its milestones be amended to reflect its revised cost responsibility where the transmission owner conceded that Lakeswind would be responsible for a significantly lower network upgrade cost as a result of MISO's ongoing restudy.³³ That contrasts with this case where Ellerth is seeking an extension of time to make its progress payments. The Commission does not find Ellerth's arguments to be sufficiently compelling to show that the notice of termination in this case was inappropriate.

12. Notwithstanding Ellerth's arguments regarding harm and Ellerth's characterization of its good faith efforts, the prevailing determinant here is the application of the post-queue reform tariff provisions.³⁴ The facts in this case clearly demonstrate that Ellerth failed to meet a required milestone by not submitting its required progress payment. Further, MISO followed the procedures under its post-queue reform tariff provisions in

³⁰ *Illinois Power Co.*, 120 FERC ¶ 61,237 at P 17.

³¹ *Id.* P 24.

³² Ellerth Rehearing Request at 9.

³³ May 10 Order, 143 FERC ¶ 61,114 at P 27.

³⁴ We note that, even though the GIA was executed on January 18, 2011, MISO's revised GIP was applicable to the project under MISO's queue reform transition procedures, given that Ellerth had not begun commercial operation as of the effective date of MISO's revised GIP. See Queue Reform Order, 138 FERC ¶ 61,233 at PP 15, 74, 102.

submitting to Ellerth a notice of breach, a notice of default, and notice of termination. Under the revised GIP, MISO was not required to renegotiate Ellerth's milestones. In fact, there were no circumstances in this case to indicate that an extension would have been appropriate, even if a viable Commercial Operation Date had been proposed.

13. MISO's queue reform has led to more stringent tariff provisions under the MISO Tariff, and Ellerth must abide by these requirements and meet the milestones specified in its GIA or risk termination of its project.³⁵ Accordingly, we will dismiss Ellerth's rehearing request and affirm our decision that the notice of termination was not unjust, unreasonable, unduly discriminatory, or preferential.

The Commission orders:

Ellerth's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁵ MISO explains, on page 15 of the March 12, 2013 transmittal letter in this proceeding, that termination of this GIA does not necessarily terminate the project for all time and may, in fact, benefit the project by permitting it to continue at a later time when it is ready to proceed.