

149 FERC ¶ 61,053
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Midcontinent Independent System Operator, Inc. Docket No. ER14-2681-000

ORDER ACCEPTING NOTICE OF TERMINATION

(Issued October 17, 2014)

1. In this order, we accept Midcontinent Independent System Operator, Inc.'s (MISO) notice of termination of the Large Generator Interconnection Agreement (GIA)¹ among Shetek Wind, Inc. (Shetek Wind), as the interconnection customer, Northern States Power Company, a Minnesota corporation (Northern States), as the transmission owner, and MISO, as the transmission provider (collectively, Parties),² effective October 19, 2014, as requested.

I. Background

2. On August 20, 2014, pursuant to section 205 of the Federal Power Act,³ MISO filed a notice of termination of the GIA relating to the Shetek Wind Project (Project), designated as Project No. G520 in MISO's interconnection queue. The GIA provides the Project with up to 146.4 MW net of conditional Energy Resource Interconnection Service upon completion of all network upgrades. The GIA also provides for a point of interconnection to Northern States' new interconnection substation near Garvin,

¹ MISO's *pro forma* GIA is contained in Appendix 6 of Generator Interconnection Procedures (GIP) in Attachment X of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff). [ATTACHMENT X, Generator Interconnection Procedures \(GIP\) \(31.0.0\)](#).

² The Parties executed the GIA on December 6, 2007. MISO designated the GIA as Original Service Agreement No. 1921 under its Tariff and reported it in its Electric Quarterly Reports. On October 17, 2011, the Parties amended the GIA.

³ 16 U.S.C. § 824d (2012).

Minnesota. The Project's interconnection is the interconnection for a group of community based energy development projects.

3. MISO makes several arguments in support of its notice of termination. First, MISO maintains that Shetek Wind is in breach of its obligations under the GIA by failing to meet required milestones that are material terms of the GIA.⁴ MISO states that it provided Shetek Wind a notice of breach, notice of default, and notice of termination in accordance with the terms of the GIA.⁵ MISO further states that, to its knowledge, Shetek Wind has neither taken steps to fulfill its obligation and cure the breach or default, nor placed any disputed amount in escrow as required by Article 12.4 of the GIA. Second, MISO argues that termination of the GIA is just and reasonable, is not unduly discriminatory, and is consistent with the public interest and Commission precedent.⁶

4. MISO notes that Shetek Wind's alleged uncured default demonstrates that the Project is speculative and that the Commission has found that such a project is at a greater risk of not proceeding to commercial operation, even though it has progressed to the GIA stage of the interconnection process.⁷ MISO states that its most recent queue

⁴ MISO Notice of Termination at 2. Details related to the breach are addressed in Exhibit 1 to the notice of termination, which was filed confidentially. Among other things, Appendix B of the GIA requires Shetek Wind to make progress payments to Northern States by specified deadlines; *see also id.* at 2-3 (citing to Article 1 of the GIA and indicating that material terms or conditions may include, among other things, milestone payments).

⁵ *Id.* at 3-4. MISO cites the following GIA provisions as support for terminating the agreement: (1) Articles 2.3.2 and 2.3.3 (providing that any non-breaching party may terminate the GIA upon the default of a breaching party); (2) Article 1 (providing the definition of "default" as the failure of a breaching party to cure its breach in accordance with Article 17); and (3) Article 17.1.1 (providing that the failure of a breaching party to cure a breach within 30 calendar days of receiving such notice shall result in a default, but the interconnection customer shall have up to 90 calendar days to cure the breach where such breach is not capable of cure within 30 days).

⁶ MISO bases its argument on *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008 (2011) (*Lakeswind I*), *order on reh'g and clarification*, 141 FERC ¶ 61,097 (2012) (*Lakeswind II*).

⁷ MISO Notice of Termination at 6-7 (citing *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)).

reforms responded to the ongoing challenges created by the “late-stage terminations” that result from the decisions by interconnection customers who have executed a GIA to terminate their projects at that late stage of the interconnection process.⁸ MISO further states that the Commission emphasized the goals of “getting projects that are not making progress toward commercial operation out of the queue, and helping viable projects achieve commercial operation as soon as possible.”⁹ MISO affirms that termination of the GIA would further these goals.

5. MISO notes, among other things, that the Commission clarified in *Lakeswind II* that key factors in that determination not to accept a notice of termination are: (1) whether any other projects were relying on network upgrades the interconnection customer was to build; and (2) whether the interconnection customer made good faith efforts to cure its default, including payment of security sufficient for the transmission owner. MISO maintains that Shetek Wind’s default has not been cured; thus, it cannot permit Shetek Wind to avoid its obligations or alter its milestones until its current default is cured.¹⁰

6. MISO states that the Commission acknowledged that requiring a project to meet obligations to demonstrate its readiness to proceed in order to remain in the queue would reduce the risk of cost shifting from late-stage terminations. Here, MISO states that Shetek Wind has demonstrated that its Project is not prepared to proceed at this time and is at increased risk for late-stage termination, a risk that harms other projects in the queue.¹¹

7. Finally, MISO points out that, although termination will remove the Project from the queue, Shetek Wind may submit a new interconnection request and re-enter the queue at any time, if it seeks to pursue the Project.¹²

⁸ *Id.* at 6 (citing Queue Reform Order, 138 FERC ¶ 61,233 at P 68).

⁹ *Id.* (citing Queue Reform Order, 138 FERC ¶ 61,233 at P 30).

¹⁰ *Id.* at 5 (quoting *Lakeswind II*, 139 FERC ¶ 61,253 at P 34 (citations omitted)).

¹¹ *Id.* at 6-7.

¹² *Id.* at 15.

II. Notice of Filing and Responsive Pleadings

8. Notice of MISO's filing was published in the *Federal Register*, 79 Fed. Reg. 51,149 (2014), with interventions and protests due on or before September 10, 2014. On September 5, 2014, Xcel Energy Services Inc. (Xcel Energy), on behalf of its utility operating company affiliates, Northern States and Northern States Power Company, a Wisconsin corporation, filed a timely motion to intervene in the proceeding. On September 8, 2014, Shetek Wind filed a timely motion to intervene and protest, and a request to permit discovery. On September 23, 2014, MISO and Xcel Energy, on behalf of Northern States, filed motions for leave to answer and answers to Shetek Wind's protest.

9. In its protest, Shetek Wind claims that the notice of termination is unjustified because MISO has not shown that termination of the GIA would not be unjust, unreasonable, unduly discriminatory, or that termination is in the public interest.¹³

10. In response to MISO's assertion that other projects in the queue may be harmed due to uncertainty if the Project remains in the queue, Shetek Wind argues that there cannot be harm to any other project in the queue that justifies a termination of the GIA. According to Shetek Wind, no other project in the affected group¹⁴ or queue is relying on the improvements that will be built by the Project because the network upgrades are needed solely for the Project, do not benefit any other party, and are not "shared network upgrades" qualifying for reimbursement from another generator. Shetek Wind suggests that, if MISO had an example of a lower-queued project that would be affected if the new substation were not built, MISO would have stated so in its filing.¹⁵

11. Shetek Wind also addresses assertions by MISO that the potential for cascading restudies exists if the Project remains in the queue. Shetek Wind claims that MISO's allegations are speculative and unsupported by the facts in the case. Shetek Wind claims that termination of the Project will have no effect on the timing or costs of any other project nor cause any restudies. Shetek Wind argues that MISO has failed to present any facts to support its concern for the potential of cascading restudies.¹⁶

¹³ Shetek Wind Protest at 2.

¹⁴ Project No. G520 is a MISO Group 4 project.

¹⁵ Shetek Wind Protest at 3.

¹⁶ *Id.*

12. Shetek Wind asserts that even if there were some additional costs to lower-queued projects (which MISO has not attempted to show), Shetek Wind should be given the option to compensate that project for the additional cost. Shetek Wind also argues that Article 5.16.2 of the GIA allows for milestones in Appendix B to be revised in consideration of all relevant circumstances and consistent with reasonable efforts.¹⁷ Shetek Wind argues that there is no reasonable basis to refuse revisions to the milestones in order to have the earlier milestones better “sync up” with the actual Commercial Operation Date, which is August 31, 2017. According to Shetek Wind, the revision of these dates to better match the actual commercial operation date would result in no current breach.¹⁸

13. Finally, Shetek Wind asks the Commission to permit discovery in this proceeding pursuant to Rule 401 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.401 (2014). Shetek Wind believes that the action taken to terminate the GIA may stem from ongoing litigation in Minnesota state court between Shetek Wind and Northern States. Shetek Wind alleges that Northern States may have acted in bad faith because it took action for the missed milestone payment just one day after Shetek Wind filed a writ for certiorari with the Minnesota Court of Appeals. Shetek Wind avers that the Commission’s acceptance of the GIA termination could moot the issue to be considered by the state court. Shetek Wind therefore requests discovery in order to determine if Northern States acted in bad faith and in retaliation against Shetek Wind for seeking appeal of the state issue.¹⁹

14. In its answer, MISO disputes Shetek Wind’s claim that any harm resulting from the Project remaining in the queue is speculative. MISO points to Non-Public Exhibit 1 of MISO’s notice of termination which includes a declaration of harm to other projects. MISO reiterates that delay in terminating the Project will increase the impact on other projects through delayed restudies. MISO argues that the Commission has accepted

¹⁷ The relevant Article of the GIA states: “Depending on the consequences of the Breach and effectiveness of the cure . . . , the Transmission Owners’ Milestones may be revised, following consultation with the Interconnection Customer, consistent with Reasonable Efforts, and in consideration of all relevant circumstances.” GIA at Art. 5.16.2.

¹⁸ Shetek Wind Protest at 3-4.

¹⁹ Shetek Wind Protest at 4.

termination of other GIAs based on the potential cost shifting to lower-queued projects.²⁰ Further, MISO claims that the Commission has accepted notices of termination where other state proceedings were the alleged cause of the delay.²¹

15. In response to Shetek Wind's argument that there was no reasonable basis to refuse revisions to the milestones in order to have the earlier milestones better "sync up" with the actual commercial operation date, MISO contends that revising milestones to delay is not an appropriate remedy. MISO reiterates that Shetek Wind failed to make milestone payments and was sent notices of breach and default prior to the termination of the filing. MISO argues that Shetek Wind should have, at a minimum, responded to the notices by placing disputed funds in escrow. MISO maintains that failure to abide by the terms of the GIA does not warrant a revision of previously agreed to milestone dates.²²

16. MISO avers that termination is the appropriate remedy in this case. MISO contends that Shetek Wind's failure to meet milestones, respond to notices, and place disputed amounts in escrow under the GIA is evidence that the Project is not financially ready to proceed, even if the pending state case is resolved in Shetek Wind's favor. MISO also reiterates that Shetek Wind may submit a new Interconnection Request when it is ready to proceed and its litigation is resolved.²³

17. Regarding Shetek Wind's request for discovery, MISO argues that the Commission should reject the request for three reasons: (1) the Commission has not set this matter for hearing; (2) there is no factual issue in dispute; and (3) the Commission

²⁰ MISO Answer at 3 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114, at P 27, *reh'g denied*, 145 FERC ¶ 61,038 (2013) (*Ellerth Wind*) (accepting termination of GIA)).

²¹ MISO Answer at 3 (citing *Ellerth Wind*, 143 FERC ¶ 61,114 at PP 12-13 & 23 (accepting notice of termination as just and reasonable despite arguments by Ellerth Wind that it worked with the Minnesota Public Utilities Commission on permitting issues and pursued related agreements); *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,186, at PP 10 & 25 (2014) (accepting termination of the Multi-Party Facilities Construction Agreement despite protest that the wind farm's failure to obtain siting and environmental permits had delayed the project)).

²² MISO Answer at 4.

²³ *Id.* at 5.

can decide this proceeding on the facts.²⁴ MISO argues that the Commission has found that Rule 401 applies only to proceedings that have been set for formal hearing and that discovery is not necessary when the written evidentiary record is sufficient.²⁵ MISO describes the timing of the notice of termination as a coincidence that does not provide a factual or legal basis to support a motion for pre-hearing discovery.²⁶

18. In its answer, Xcel Energy, on behalf of Northern States, also argues that termination would be proper in this case because Shetek Wind's breach of the GIA and failure to cure its breach are sufficient reasons alone for the Commission to accept the notice of termination pursuant to the terms of the GIA.

19. Xcel Energy disputes Shetek Wind's position that no harm will accrue to lower-queued projects, that terminating the Project will have no effect on the timing or costs of any other project nor cause restudies, and denies the allegation that Northern States is seeking termination to moot the pending state appeal. Xcel Energy states that the network upgrades required for the Project are contingent upgrades for other lower-queued projects and, therefore, there would be harm to lower-queued projects if the Commission does not accept the notice of termination. Xcel Energy also argues that the mere existence of the need to construct network upgrades for the Project is sufficient to find harm to lower-queued projects.²⁷

20. Furthermore, Xcel Energy contends that the Project has had an interconnection agreement in place since 2007, has made no progress toward development, and there were no milestone payments made. Xcel Energy argues that the lack of progress on the Project causes the potential for cascading studies.²⁸

21. Xcel Energy also states that the timing of the issuance of the notice of breach to Shetek Wind was a coincidence. Xcel Energy asserts that personnel were preparing to issue the notice of breach before they had any knowledge of the appeal to the Minnesota Court of Appeals and that there was no management directive given to Xcel Energy

²⁴ *Id.* at 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Xcel Energy Answer at 4-5.

²⁸ *Id.* at 5.

personnel to issue the notice of breach upon Shetek Wind's appeal to the Minnesota Court of Appeals.²⁹ Xcel Energy submits an affidavit of a Transmission Account Representative for Xcel Energy attesting that there is no nexus between the state appeal and the notice of breach to Shetek Wind regarding the GIA.³⁰

22. Xcel Energy argues that Shetek Wind's alternative remedies to termination are inappropriate. Xcel Energy states that, since Shetek Wind has made no effort to cure its breach, the Commission should reject its proposal to have the option to compensate lower-queued projects. In addition, Xcel Energy contends that Article 5.16.12 of the GIA does not permit Shetek Wind's milestones to be revised, but instead is intended to modify Northern States' responsibilities in the event that Shetek Wind does not make a milestone payment and thereafter cures such breach; therefore, it is not applicable in this case. Xcel Energy explains that the progress payments were necessary on the agreed-upon dates in order for Northern States to fund the route permitting, design, engineering, and construction of the required facilities so Northern States could meet the back feed date requested by Shetek Wind.³¹

23. Finally, Xcel Energy argues that Shetek Wind's motion for discovery should be denied because Rule 401 only allows for discovery in proceedings set for hearing by the Commission except in limited circumstances, and that there is nothing in this proceeding that would warrant that discovery be permitted. Xcel Energy states that there is a sufficient written evidentiary record that provides a sufficient basis for resolving the relevant issues in this proceeding.³²

III. Discussion

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

²⁹ *Id.* at 4.

³⁰ *Id.* at Attachment A.

³¹ *Id.* at 6-8.

³² *Id.* at 8-9.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept MISO's and Xcel Energy's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

26. Commission precedent supports acceptance of a notice of termination if the applicant demonstrates that the proposed termination is not unjust, unreasonable, unduly discriminatory, or preferential,³³ or if it is consistent with the public interest.³⁴ When considering whether to extend milestones, the Commission takes into account many factors, including whether the extension would harm generators lower in the interconnection queue and any uncertainty that speculative projects may present to other projects in the queue.³⁵

27. In the instant case, we find that Shetek Wind failed to meet a required milestone under the GIA.³⁶ MISO followed the procedures in its Tariff by submitting to Shetek Wind a notice of breach, a notice of default, and a notice of termination. Shetek Wind does not dispute the fact that MISO submitted a notice of breach, a notice of default, and a notice of termination. 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. We do not find evidence in the record before us that Shetek Wind cured the breach at issue. The facts in this case differ from the facts in *Lakeswind I*, where the interconnection customer showed

³³ See, e.g., *Allegheny Power System, Inc.*, 102 FERC ¶ 61,318, at P 9 (2003).

³⁴ See, e.g., *Duke Energy Moss Landing LLC*, 83 FERC ¶ 61,318, at 62,306 (1998), *order on reh'g*, 86 FERC ¶ 61,227 (1999).

³⁵ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,124 (2010); *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,172 (2010); *Illinois Power Co.*, 120 FERC ¶ 61,237 (2007).

³⁶ MISO provides specific details in support of its allegations in an exhibit to its notice of termination that it has designated as privileged. However, Shetek Wind provides information on MISO's allegations in its protest. We find that this information, along with the other public filings in the proceeding, is sufficient to allow us to rule on MISO's proposal without recourse to any material that has been designated privileged.

good faith efforts to cure its breach and posted security that was sufficient to the transmission owner.³⁷

28. With regard to Shetek Wind's argument that MISO failed to provide an option to move its milestone dates to better sync up with the Commercial Operation Date, the milestone dates were negotiated and agreed to by the Parties, and MISO has no obligation under the terms of the GIA to renegotiate Shetek Wind's milestones. Shetek Wind's reliance on Article 5.16.2 of the GIA for permitting revisions to milestones does not apply here because that provision contemplates that revisions to milestones may be considered upon the effectiveness of a cure to a breach. The Commission has stated that an interconnection customer that fails to meet its requirements may be in breach and subject to the termination provisions of the GIA.³⁸

29. As the Parties recognize, the Commission, in considering whether to extend milestones, takes into account certain factors, including whether the extension would harm generators lower in the interconnection queue and any uncertainty that speculative projects may present to other projects in the queue. We find no record to support that Shetek Wind would qualify to change its milestones. While the GIP allows changes in the Commercial Operation Date under narrow circumstances, Shetek Wind is not requesting a revised Commercial Operation Date.³⁹

30. Under the particular facts of this case, we find that the extension of milestones, without further evidence of 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. Although Shetek Wind argues that there is no harm to any other project in the queue that justifies a

³⁷ Compare *Lakeswind I*, 137 FERC ¶ 61,008 at PP 24, 29, with *Ellerth Wind*, 143 FERC ¶ 61,114 at P 24.

³⁸ See *Lakeswind II*, 141 FERC ¶ 61,097 at P 41; *Ellerth Wind*, 143 FERC ¶ 61,114 at P 9; *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198, at P 13 (2014).

³⁹ Section 4.4.4 of the GIP provides that the transmission provider will not unreasonably withhold approval of an interconnection customer's proposed change to the Commercial Operation Date if that change is the result of (a) a change in milestones of another party to the GIA or (b) a change in a higher queued interconnection request, provided in either case these changes do not exceed three years beyond the original Commercial Operation Date.

termination of the GIA, potential harm exists for interconnection customers that will not know whether the Project will proceed and for transmission owners that must account for the Project for planning purposes. Furthermore, despite Shetek Wind's request that the Commission require MISO to amend the milestones in the GIA, this case can be distinguished from *Lakeswind I* because, in that case, the interconnection customer requested that its milestones be amended to reflect its revised cost responsibility, while Shetek Wind is seeking an extension of time to make its progress payments. An interconnection customer's difficulties in securing funding do not exempt it from meeting the obligations that it agreed to when it executed the GIA. Nor does Shetek Wind's ongoing litigation in state court excuse its obligations to meet its milestone payments under the GIA.

31. Furthermore, the Commission has previously stated that "MISO [has] provided compelling evidence that the ability of customers to wait for long lead times to almost expire before 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."⁴⁰ 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."⁴¹

32. We reject Shetek Wind's request for discovery in this proceeding. Rule 401 of the Commission's Rules of Practice and Procedure makes clear that our discovery procedures apply only to proceedings set for hearing under Part 385, subpart E "and to such other proceedings as the Commission may order."⁴² We do not set this proceeding for an evidentiary hearing. While the Commission has in rare circumstances directed discovery in proceedings not set for hearing, discovery is not necessary here because the written evidentiary record provides a sufficient basis for resolving the issues relevant to this proceeding. If Shetek Wind suspects wrongdoing by Northern States or MISO for which the Commission has jurisdiction, it may file a formal complaint with the Commission.⁴³

⁴⁰ Queue Reform Order, 138 FERC ¶ 61,233 at P 181.

⁴¹ *Id.* P 30.

⁴² 18 C.F.R. § 385.401(a) (2014).

⁴³ *See* 18 C.F.R. § 385.206 (2014).

33. Accordingly, based on the particular circumstances presented in this case, we find that the notice of termination is not unjust, unreasonable, unduly discriminatory or preferential, and we will therefore accept MISO's filing.

The Commission orders:

MISO's notice of termination is hereby accepted, effective October 19, 2014, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.