

152 FERC ¶ 61,085
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System
Operator, Inc.

Docket No. ER14-2681-001

ORDER DENYING REHEARING

(Issued July 29, 2015)

1. On November 17, 2014, Shetek Wind, Inc. (Shetek Wind) filed a request for rehearing of the Commission's October 17, 2014 order accepting Midcontinent Independent System Operator, Inc.'s (MISO's) notice of termination of the Generator Interconnection Agreement (GIA)¹ among Northern States Power Company, a Minnesota corporation (Northern States)² as the transmission owner, Shetek Wind as the interconnection customer, and MISO as the transmission provider (collectively, Parties).³ In this order, we deny Shetek Wind's rehearing request.

I. Background

2. On August 20, 2014, MISO filed a notice of termination of the GIA relating to the Shetek Wind Project (Project), designated as Project No. G520 in MISO's

¹ MISO's *pro forma* GIA is contained in Appendix 6 of Generator Interconnection Procedures 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 Northern States is a utility operating company affiliate of Xcel Energy Services Inc. (Xcel Energy).

³ *Midcontinent Indep. Sys. Operator Inc.*, 149 FERC ¶ 61,053 (2014) (October 17 Order).

interconnection queue.⁴ On October 17, 2011, the parties executed an amendment to the GIA after the interconnection customer came out of suspension.⁵

3. The GIA provided the Project with up to 146.4 MW net of conditional Energy Resource Interconnection Service upon completion of all network upgrades.⁶ The GIA also provided for a point of interconnection to Northern States' new interconnection substation near Garvin, Minnesota. On August 20, 2014, MISO filed to terminate the agreement, which was accepted by the Commission in its October 17 Order.⁷

4. In the October 17 Order, the Commission accepted the notice of termination. The Commission found that the notice of termination was not unjust, unreasonable, unduly discriminatory, or preferential.⁸ Specifically, the Commission found that Shetek Wind failed to meet a required milestone under the GIA and that MISO had followed the procedures in its Tariff by submitting to Shetek Wind a notice of breach, a notice of default, and a notice of termination.⁹ Further, the Commission did not find evidence in the pleadings that Shetek Wind cured the breach at issue. The Commission also found that the facts in this case differed from the facts in *Lakeswind I*,¹⁰ where the interconnection customer showed good faith efforts to cure its breach and paid security that was sufficient to the transmission owner.¹¹

5. In the October 17 Order, the Commission also stated that, under the particular facts of the case, the extension of milestones, without further evidence of intent to cure,

⁴ Because the agreement conformed to the MISO *pro forma* Large Generator Interconnection Agreement, it was not filed at the Commission but was reported in MISO's Electric Quarterly Reports.

⁵ Xcel Energy September 23, 2014 Answer at Attachment A, Affidavit of Gregory E. Gorski.

⁶ The Project provided for interconnection service to a group of community-based energy development projects.

⁷ See October 17 Order, 149 FERC ¶ 61,053 (2014).

⁸ *Id.* P 33.

⁹ *Id.* P 27.

¹⁰ *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008 (2011) (*Lakeswind I*), order on reh'g and clarification, 141 FERC ¶ 61,097 (2012).

¹¹ October 17 Order, 149 FERC ¶ 61,053 at P 27.

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.¹² In response to Shetek Wind's argument that there would be no harm to any other projects in the queue that justifies a termination of the GIA, the Commission stated that 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.¹³ 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 Shetek Wind was seeking an extension of time to make its progress payments.¹⁴ Further, the Commission stated that an interconnection customer's difficulties in securing funding do not exempt it from meeting obligations agreed to when it executed the GIA, and that Shetek Wind's ongoing litigation in state court similarly does not excuse its obligations to meet its milestone payments under the GIA.¹⁵

6. On rehearing, Shetek Wind raises four issues. First, Shetek Wind argues that the Commission erred by concluding that Shetek Wind was in default under the GIA. Shetek Wind argues that Minnesota state law provides the governing law for the GIA, and that Minnesota state law requires that every contract include an implied covenant of good faith and fair dealing. Shetek Wind contends that Northern States breached its duty of good faith and fair dealing by unjustifiably hindering Shetek Wind's performance under the GIA. Shetek Wind argues that Northern States was aware that Shetek Wind could not provide the levels of required milestone deposits without receiving financing from a commercial financing entity because the Project was a community-based energy project, and that Northern States breached its obligations to Shetek Wind by failing to adhere to the requirements of Minnesota law with respect to the entitlement to a power purchase agreement for the Project.¹⁶ Shetek Wind contends that its obligations under

¹² *Id.* P 30.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Shetek Wind Request for Rehearing at 2-3; *see also* Shetek Wind Protest, Docket No. ER14-2681-000, at 2 (filed Sept. 8, 2014) (stating that “[Northern States] is obligated to enter into power purchase agreements with the Shetek [Wind] under Minnesota Law, but has unlawfully refused to do so.”).

the GIA were suspended due to Northern States' unjustifiable hindrance, and therefore Shetek Wind was not in default under the GIA.¹⁷

7. Second, Shetek Wind argues that the Commission erred by concluding that MISO demonstrated that the termination of the GIA was not unjust, unreasonable, and unduly discriminatory and that the termination was consistent with the public interest. Shetek Wind states that progress under the GIA is integrally related to Shetek Wind's ability to obtain a power purchase agreement, which is the matter presently under consideration in Minnesota courts. Shetek Wind claims that the Commission's public interest analysis must take into account the public interest as determined by the governing law of Minnesota and that the Minnesota public interest will not be served by Northern States' and MISO's actions or by the termination of the GIA. Shetek Wind argues that the termination of the GIA is inconsistent with the public interest in two ways: (1) the termination would frustrate Minnesota's public interest of supporting community-based projects; and (2) the termination is inconsistent with the public interest that parties receive due process before the Minnesota courts.¹⁸

8. Third, Shetek Wind argues that the Commission erred by concluding that there was sufficient evidence to support MISO's assertions of harm to other projects. Shetek Wind argues that MISO alleged harm by describing factual circumstances that do not apply in the present case. Shetek Wind contends that no other project in its study group,¹⁹ nor any other project in the queue, is relying on the improvement that will be built by the Project. Shetek Wind states that the network upgrades associated with the Project are a new substation and the lines needed to connect the Project to Northern States' nearby existing 115kv line. Shetek Wind contends that the 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 also argues that there is no potential harm for cascading restudies because the termination of the Project will have no effect on the timing of, or the costs of, any other project nor will it cause any restudies. Shetek Wind contends that the Commission's findings in the October 17 Order were unsupported by the facts specific to the present case.²⁰

9. Fourth, Shetek Wind argues that the Commission erred by concluding that section 5.16.2 of the GIA did not impose any obligation on Northern States or MISO to

¹⁷ Shetek Wind Request for Rehearing at 2-3.

¹⁸ *Id.* at 3-4.

¹⁹ Project No. G520 is a MISO Group 4 project.

²⁰ Shetek Wind Request for Rehearing at 4-6.

adjust the milestones in the GIA. Shetek Wind argues that section 5.16.2 provides Northern States and MISO with the discretionary power to revise the milestone dates and that Northern States and MISO are required to exercise that discretionary power in accordance with their obligation to act in good faith and engage in fair dealing. Shetek Wind contends that there was no reasonable basis not to push out the earlier milestones in order to better match up with the actual commercial operation date (August 31, 2017), which would push the dates out by at least 20 months resulting in no breach. Shetek Wind also argues that there is an existing dispute between Shetek Wind and Northern States currently before the Minnesota Court of Appeals, and that a successful outcome from that dispute would allow Shetek Wind to obtain the necessary financing to make the required milestone payments under the GIA and that MISO should have waited at least until the Minnesota courts issued their judgment before initiating the termination of the agreement. Shetek Wind argues that failure to do so by MISO is unjust, unreasonable, and unduly discriminatory, and a breach of MISO's obligations under Minnesota law.²¹

10. On December 2, 2014, MISO and Xcel Energy²² both filed answers to Shetek Wind's request for rehearing.

11. On February 25, 2015, Xcel Energy filed a motion to lodge, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2014), a Minnesota Court of Appeals decision affirming a Minnesota Public Utilities Commission (Minnesota Commission) finding that Northern States had no affirmative legal duty under Minnesota Law to enter into a power purchase agreement for the Shetek Wind project at issue in this proceeding.

II. Discussion

A. Procedural Matters

12. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2014), prohibits an answer to a request for rehearing. Accordingly, we will reject MISO's and Xcel Energy's answers to Shetek Wind's rehearing request.

²¹ *Id.* at 6-7.

²² Xcel Energy submitted its answer on behalf of its utility operating company affiliate, Northern States.

13. We deny Xcel Energy's motion to lodge. We take administrative notice of the Minnesota Court of Appeals decision,²³ and therefore, Xcel Energy's motion to lodge is unnecessary.²⁴

B. Substantive Matters

14. We will deny Shetek Wind's request for rehearing. Shetek Wind has not presented any argument on rehearing that persuades us that the determinations in the October 17 Order were in error. In reaching its initial decision, the Commission followed its prior precedent which supports acceptance of a notice of termination if the applicant demonstrated that the proposed termination is not unjust, unreasonable, unduly discriminatory, or preferential,²⁵ or if it is consistent with the public interest.²⁶ In this case, MISO met its burden to demonstrate that the proposed termination was not unjust, unreasonable, unduly discriminatory, or preferential.²⁷

15. Regarding Shetek Wind's first argument that Northern States breached its obligation to act in good faith and engage in fair dealing because Northern States unjustifiably hindered Shetek Wind's performance under the GIA, Shetek Wind raises this argument for the first time on rehearing. Regarding Shetek Wind's fourth argument that Northern States and MISO breached its obligation to act in good faith and engage in fair dealing because Northern States and MISO did not exercise their discretionary power to revise the milestone dates, Shetek Wind also raises this argument for the first time on rehearing. Since these good faith and fair dealing contract claims are new arguments not raised previously, we need not address Shetek Wind's arguments on this issue.²⁸

²³ See *In re Xcel Energy*, Nos. A14-0438, A14-0439, 2015 WL 506416 (Minn. Ct. App. Feb. 9, 2015).

²⁴ *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,205, at P 7 (2004) ("This Commission and the courts can take official notice of any judicial decision at any time, so there is no need to reopen the record for this purpose.").

²⁵ See, e.g., *Allegheny Power System, Inc.*, 102 FERC ¶ 61,318, at P 9 (2003).

²⁶ See, e.g., *Duke Energy Moss Landing LLC*, 83 FERC ¶ 61,318, at 62,306 (1998).

²⁷ October 17 Order, 149 FERC ¶ 61,053 at P 33.

²⁸ See, e.g., *W. Grid Dev., LLC*, 133 FERC ¶ 61,029, at P 14 (2010) ("It is well established that a request for rehearing is not the appropriate procedural vehicle for raising issues for the first time because it is disruptive to the administrative process and denies the parties the opportunity to respond.") (citation omitted).

16. We disagree with Shetek Wind's argument that the Commission erred by concluding that MISO demonstrated that the termination of the GIA was not unjust, unreasonable, or unduly discriminatory and that the termination was consistent with the public interest. In support of its argument, Shetek Wind relies on the previously ongoing litigation before the Minnesota Court of Appeals for the position that termination of the GIA was unjust, unreasonable, unduly discriminatory, and against the public interest. However, on February 9, 2015, after Shetek Wind filed its request for rehearing with the Commission, the Minnesota Court of Appeals issued a decision upholding the Minnesota Commission's approval of Northern States' petitions to acquire wind-powered electricity, and the Court rejected Shetek Wind's claims that it was entitled to a contested-case hearing and that the Minnesota Commission's approval is inconsistent with Xcel Energy's statutory obligation to make reasonable efforts to fulfill its renewable-energy requirements using community-based energy-development projects. Although we are not basing our decision in this order on the Minnesota Court of Appeals decision, the state court decision is not inconsistent with the Commission's initial decision to accept MISO's notice of termination of the GIA. As stated above, the Commission determined that Shetek Wind failed to meet a required milestone under the GIA and that MISO had followed the procedures in its Tariff by submitting to Shetek Wind a notice of breach, a notice of default, and a notice of termination. Further, the Commission did not find evidence in the pleadings that Shetek Wind cured the breach at issue. Therefore, the Commission determined that MISO sufficiently demonstrated that the notice of termination was not unjust, unreasonable, unduly discriminatory, or preferential.

17. Regarding Shetek Wind's argument that the Commission's decision was not in the public interest because the termination would frustrate Minnesota's public interest of supporting community-based projects, we note that both the Minnesota Commission and the Minnesota Court of Appeals found that Xcel Energy was not required to choose or give special consideration to the Project, and did not otherwise improperly exclude the Project.²⁹ Shetek Wind's argument that termination was not in the public interest because the parties did not receive due process before the Minnesota courts is now moot because the proceedings Shetek Wind referenced have concluded. Additionally, allowing state proceedings to delay acceptance of the notice of termination would encourage litigation

²⁹ *In re Xcel Energy*, Nos. A14-0438, A14-0439, 2015 WL 506416, at 8-13 (Minn. Ct. App. Feb. 9, 2015).

in similar situations; therefore, we reject this argument. The Commission has rejected similar arguments in the past where state proceedings were cited as the reason for delay.³⁰

18. With regard to Shetek Wind's assertions that MISO did not present sufficient evidence of harm to other projects in the queue, the Commission previously found that it is not necessary to find specific harm for termination of a GIA to be deemed not unjust, unreasonable, or unduly discriminatory.³¹ The Commission's finding in the October 17 Order applies MISO's Tariff and is consistent with the order adopting MISO's Generator Interconnection Procedures queue reforms in 2012.³² As the Commission stated in that order, "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."³³ 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."³⁴ The Commission's October 17 Order is consistent with this precedent.

³⁰ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,186, at PP 10, 25 (2014) (accepting termination of the Multi-Party Facilities Construction Agreement notwithstanding protest citing unforeseen public opposition and inability to obtain siting and environmental permits as reason for delay).

³¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 145 FERC ¶ 61,038, at P 7 (2013) (denying request for rehearing in a similar situation involving failure to make milestone payments, and finding that MISO demonstrated "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").

³² *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233 (2012) (Queue Reform Order), *order on reh'g*, 139 FERC ¶ 61,253 (2012).

³³ Queue Reform Order, 138 FERC ¶ 61,233 at P 181.

³⁴ *Id.* P 30.

19. The facts in this case clearly demonstrate that Shetek Wind failed to meet a required milestone by not submitting its required progress payments.³⁵ MISO then followed the procedures under its post-queue reform tariff provisions in submitting to Shetek Wind a notice of breach, a notice of default, and notice of termination. MISO's queue reform has led to more stringent tariff provisions under the MISO Tariff, and Shetek Wind must abide by these requirements and meet milestones specified in its GIA or risk termination of its project.³⁶ Accordingly, we deny Shetek Wind's rehearing request and affirm the decision that the notice of termination was not unjust, unreasonable, unduly discriminatory, or preferential.

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁵ As was stated in the October 17 Order, MISO provided specific details in support of its allegations in an exhibit to its notice of termination that it has designated as privileged. However, Shetek Wind provided information on MISO's allegations in its protest. The Commission found that this information, along with the other public filings in the proceeding, was sufficient to allow it to rule on MISO's proposal without recourse to any material that has been designated privileged. October 17 Order, 149 FERC ¶ 61,053 at n.36.

³⁶ MISO explains, on page 15 of the August 20, 2014 Transmittal Letter in this proceeding, that although the termination of the GIA will remove the Project from the queue, Shetek Wind may submit a new interconnection request and re-enter the queue at any time under MISO's new Generator Interconnection Procedures.