

153 FERC ¶ 61,082
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.

Merricourt Power Partners, LLC

v.

Docket No. EL15-90-000

Midcontinent Independent System Operator, Inc.

ORDER DENYING COMPLAINT

(Issued October 23, 2015)

1. On August 19, 2015, Merricourt Power Partners, LLC (Merricourt), pursuant to sections 206 and 306 of the Federal Power Act (FPA)¹ and Article 30.11 of its Generator Interconnection Agreement (Merricourt GIA), filed a complaint (Complaint) against Midcontinent Independent System Operator, Inc. (MISO). Merricourt alleges that MISO has unreasonably and unduly discriminatorily refused to let Merricourt know that MISO will not terminate the GIA after December 1, 2015 and refused to amend the Merricourt GIA to extend the commercial operation date (COD) to December 31, 2016. As discussed below, we deny the Complaint as premature.

I. Background

2. The Merricourt GIA addresses Merricourt's 150 MW wind farm located in Dickey and McIntosh Counties, North Dakota (Project). The parties to the Merricourt GIA are: Merricourt, the interconnection customer; Montana-Dakota Utilities Company (Montana-Dakota), the transmission owner; and MISO, the transmission provider.² The

¹ 16 U.S.C. §§ 824e, 825e (2012).

² Article 30.11 of the GIA, among other things, gives Merricourt the right to make a unilateral filing with the Commission to modify the GIA under section 206 of the FPA or any other applicable provision of the FPA.

Merricourt GIA lists an original COD of December 1, 2012. As of the date Merricourt filed the Complaint, the Project had not yet achieved commercial operation.

3. The following language in the MISO Open Access Transmission, Energy and Operating Reserve Tariff (Tariff) and the Merricourt GIA addresses extensions of a COD. Section 4.4.4 of MISO's *pro forma* Generator Interconnection Procedures (GIP) under "Modifications" provides as follows:

....After entering the Definitive Planning Phase any extension by Interconnection Customer to the In-Service Date or [COD] of the Generating Facility shall be deemed a Material Modification except that the Transmission Provider will not unreasonably withhold approval of an Interconnection Customer's proposed change in the In-Service Date or [COD] 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 [COD] or In Service Date. A change to either of these dates that exceeds three years from the date in the original Interconnection Request is a Material Modification.

Article 2.3.1 under the Merricourt GIA, "Written Notice", provides as follows:

This GIA may be terminated by Transmission Provider if the Generating Facility has ceased Commercial Operation for three (3) consecutive years, beginning with the last date of Commercial Operation for the Generating Facility, after giving Interconnection Customer ninety (90) Calendar Days advance written notice. The Generating Facility will not be deemed to have ceased Commercial Operation for purposes of this Article 2.3.1 if Interconnection Customer can document that it has taken other significant steps to maintain or restore operational readiness of the Generating Facility for the purpose of returning the Generating Facility to Commercial Operation as soon as possible.

II. Merricourt's Complaint

4. Merricourt concedes that it will have failed to meet its original COD pursuant to its GIA of December 1, 2012 by three years as of December 1, 2015, and that therefore MISO could seek to terminate the Merricourt GIA pursuant to Article 2.3.1. However, Merricourt states that it has not breached any payment milestones under its GIA and argues that the Project is not speculative, as discussed more fully below. Merricourt states that it has asked MISO for a determination prior to December 1, 2015 as to whether MISO intends to terminate the Merricourt GIA at that time, and Merricourt states that MISO has refused to give it an early determination. Merricourt requests the Commission to find that MISO's refusal to give it an early determination on termination and amend

the GIA in order to extend the COD is unjust and unreasonable, and unduly discriminatory and preferential. Merricourt asks the Commission to order MISO to amend the GIA to extend the COD to December 31, 2016, with an effective date of August 17, 2015. Merricourt asks the Commission to direct MISO to provide such amended GIA to Merricourt within seven business days of the date of the Commission's order.

5. In support of its contention that the Project is not speculative, Merricourt states that the North Dakota Public Service Commission has re-issued the site permit for project construction, and Merricourt is close to executing a long-term power purchase agreement (PPA) for the Project's output so long as continued interconnection service is confirmed. Merricourt states that it has spent over \$20 million in developing its Project, and that all network upgrades are paid for, completed, integrated and operational. Merricourt states that all transmission owner interconnection facilities are paid for and completed, and wind turbines have been procured. Merricourt states that it has lined up a purchaser for the full output from its Project as well as all engineering, procurement and construction vendors to supply the equipment and to construct its Project. Merricourt states that it is ready to issue notices to those vendors and make a significant investment for the Project.³

6. Merricourt explains that the three-year period under the Merricourt GIA will end on December 1, 2015. Thus, MISO could seek to terminate the Merricourt GIA after December 1, 2015. Merricourt states that it sought assurance from MISO that interconnection service would be available as of December 31, 2016, when Merricourt intends to bring the Project online. Merricourt explained to MISO that, while it had the processes and resources in place to bring its Project to operational readiness by December 31, 2016, it could not prudently commit the final capital and execute a PPA and agreements with third-party vendors, and thus risk exposure to substantial financial damages, without obtaining MISO's assurance that interconnection service would be available as of December 31, 2016. Further, Merricourt states that although its Project has qualified for the Production Tax Credit (PTC) because wind turbines have been purchased and can be earmarked for the Project, unless Congress extends the PTC beyond 2016, the Project must achieve commercial operation by December 31, 2016, or the PTC benefit will be lost.⁴

7. Merricourt asserts that MISO refused to provide any assurance that it would not seek to terminate the GIA pursuant to Article 2.3.1, believing that this issue was not yet ripe and, in any event, stating that the "significant steps" language in Article 2.31

³ Merricourt Complaint at 3. The exact amount to be invested is labeled by Merricourt as confidential.

⁴ *Id.* at 2.

(regarding when termination would not be appropriate) would not apply to Merricourt when MISO did make its assessment because that opportunity applies only to projects that restore or are returning to commercial operation and not to projects that have not yet achieved commercial operation. Merricourt states that MISO also refused Merricourt's request to mutually amend its GIA to extend the COD to December 31, 2016. Merricourt represents that Montana-Dakota, the interconnecting transmission owner under the Merricourt GIA, supports extending the COD.⁵

8. Merricourt states that when a milestone extension (or GIA termination) is at issue, 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."⁶ Merricourt also states that the Commission also considers "(1) whether any other projects were relying on the network upgrades that the interconnection customer was to build, and (2) the interconnection customer's good faith efforts to cure its default."⁷ Merricourt also argues that the "Commission has found in past cases that a customer that requests an extension can protect lower queued generators by committing to fund network upgrades that lower queued generators will rely on."⁸ Merricourt states that it meets these standards because completion of the Project is not speculative; all network upgrades are built, operational and integrated; and the going forward operating and maintenance expenses for the network upgrades on the Montana-Dakota system have already been paid. Thus, Merricourt argues that there is no harm to lower-queued projects, to the extent there are any lower-queued projects even relying on Merricourt's assigned network upgrades. Merricourt states that there are benefits to be achieved for the MISO region, North Dakota and the PPA off-taker.

9. Merricourt also argues that MISO's position as to the inapplicability of the "significant steps" provision of Article 2.3.1 to a generator that has not yet reached commercial operation, like Merricourt, is contrary to the position MISO took in

⁵ *Id.* at 45.

⁶ *Id.* at 13-14 (quoting *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 *Id.* (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,171, at P 13 (2013) (citing *Lakeswind II*)).

⁸ *Id.* at 18 (quoting *Illinois Power Co.*, 120 FERC ¶ 61,237, at P 22 (2007) (*Illinois Power*)).

Mankato.⁹ Merricourt states that the Mankato GIA had the same Article 2.3.1 language as exists in the Merricourt GIA. Nevertheless, during the period after COD but before the three-year period in Article 2.3.1 was reached, Mankato apparently presented information that allowed MISO to conclude Mankato's Phase II plan was not speculative and that Mankato intended to proceed toward operational readiness. In other words, Merricourt argues that Mankato provided the equivalent to "significant steps to maintain or restore operational readiness of the Generating Facility," as provided in Article 2.3.1.¹⁰ Merricourt argues that it should be afforded the same opportunity so it could be provided with an amended GIA with an extended COD like Mankato.

10. Besides *Mankato*, Merricourt cites an instance involving South Fork Wind, LLC (South Fork), in which South Fork had not achieved commercial operation three years after the COD in its GIA. Merricourt states that MISO filed to terminate the GIA, and South Fork protested. Merricourt states that South Fork explained that it had a plan to achieve operational readiness, noting it had a signed PPA, a signed main power transformer supply agreement, all network upgrades had been paid for and were complete, and it had a work plan. Merricourt states that MISO responded that this did not amount to documented significant steps supporting operational readiness. Merricourt states that notwithstanding its position that South Fork's actions did not amount to significant steps, MISO later withdrew its notice of termination, citing an amicable resolution with South Fork as part of the Commission's Dispute Resolution process. The fact that the three-year period in Article 2.3.1 had run for South Fork, but has not yet run for Merricourt, is not a relevant or meaningful distinction, according to Merricourt. Merricourt argues that South Fork and Merricourt are similarly-situated interconnection customers on the verge of completing their new generating projects and both need a COD extension to finalize their plans.

11. Merricourt argues that MISO cannot justly and reasonably interpret Article 2.3.1 to allow it to terminate a project that never achieved commercial operation (where the language expressly applies only to terminating projects that have achieved commercial operation but then cease operation), but then interpret the "significant steps" provision to avoid GIA termination to only apply to a project that achieves but then ceases operation. Merricourt states that if MISO's position were correct, then MISO would not have a basis to terminate the Merricourt GIA after December 1, 2015, because Article 2.3.1 would not apply to generating facilities that had not yet achieved commercial operation such as Merricourt's. Merricourt states that MISO cannot pick and choose how the provisions of Article 2.3.1 apply. Moreover, Merricourt states that there is no reasonable basis to allow

⁹ *Id.* at 21 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,180, at P 19 (2015) (*Mankato*) (accepting an amended GIA for filing)).

¹⁰ *Id.* at 21-22 (citations omitted).

a project that ceased commercial operation to demonstrate significant steps to proceed with its project but deny a project that has never achieved commercial operation the same opportunity.¹¹

12. Further, Merricourt asserts, a GIA amendment to extend the COD is consistent with section 4.4.4 of MISO's GIP. Merricourt states that the Commission has explained that section 4.4.4 does not preclude extension of the COD of three or more years.¹² There is no Material Modification and no waiver of section 4.4.4 that would be required to amend the GIA and extend the COD, according to Merricourt.

III. Notice and Responsive Pleadings

13. Notice of the Complaint was published in the *Federal Register*, 80 Fed. Reg. 51,547 (2015), with answers, interventions and protests due on or before September 1, 2015. On September 1, 2015, MISO filed an answer. On September 15, 2015, Merricourt filed an answer to MISO's answer.

A. MISO's Answer

14. MISO states that it suggested to Merricourt that the Interconnection Process Task Force would consider whether a general policy should be adopted to address similarly-situated requests in the future. MISO states that Merricourt initially pursued MISO's suggestion and raised the issue to MISO's Interconnection Process Task Force. However, MISO states that, rather than awaiting the outcome of the MISO stakeholder process, Merricourt filed the instant Complaint. MISO maintains that a complaint seeking Commission review on a case-specific basis is not the most efficient means to resolve disputes. MISO states that given the number of requests MISO receives regarding termination or failure to achieve commercial operation, MISO welcomes Commission guidance in this area. However, MISO states that this proceeding is not an appropriate avenue to consider a general policy on MISO termination filings because it is a fact-specific request for an extension of milestones.

15. MISO states that Merricourt misstates the applicable standard as Article 2.3.1 of the Merricourt GIA. MISO states that the question here is not whether MISO appropriately has sought termination under Article 2.3.1. Rather, it is whether Merricourt can extend its COD for an additional year *beyond* the three year "overrun period" permitted by the GIA – four years from the COD listed in the GIA. MISO states that

¹¹ *Id.* at 22-23.

¹² *Id.* at 23-24 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,172, at P 13 (2010) (*Quilt Block*)).

Merricourt already has missed its originally-targeted COD of December 1, 2012, and has nearly used all of the three-year period post COD, as provided in its GIA. MISO states that Article 2.3.1 does not entitle Merricourt to a preemptive determination of a change in its COD milestone.¹³ Rather, a request to extend the COD by four years is governed by section 4.4.4 of MISO's GIP, which does not permit such extensions.¹⁴ MISO states that Merricourt has not met its burden of proof to show that MISO's Tariff or its treatment of Merricourt's Project is unjust and unreasonable.

16. MISO states that, because Merricourt's extension would violate section 4.4.4 of the GIP, Commission approval is necessary. MISO states that Merricourt is not entitled to such approval because it has not shown that such an extension would not harm lower queued generators or create uncertainty as a speculative project in the MISO queue. Citing the failure of Merricourt to meet its original December 1, 2012 COD, MISO argues that Merricourt does not demonstrate that continued delay would not cause uncertainty for other projects under Commission precedent, as even when network upgrades have been built, a potential harm still exists. MISO notes that in *New Era*, the Commission found that, even though network upgrades were completed and paid for and no other customers were relying on New Era's upgrades, "the potential harm still 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." Further, MISO notes that the Commission distinguished *Lakeswind I* (where milestones were amended), noting that Lakeswind requested its amendment to reflect its revised cost responsibility whereas New Era sought an extension to account for setbacks it claimed were delaying approval of construction; the Commission was not persuaded by New Era's argument. MISO states that Merricourt is similar to New Era because it seeks an extension of time "to account for setbacks . . . that stalled construction" of its Project.

17. MISO states that the "significant steps" standard in Article 2.3.1 applies to MISO's consideration of projects that are already in-service, not generating facilities that never achieved commercial operation. MISO states that this is reflected in the reference to "significant steps to *maintain or restore* operational readiness of the Generating Facility for the purpose of *returning* the Generating Facility to Commercial Operation as soon as possible."¹⁵ MISO states that further support for this interpretation is evidenced

¹³ MISO Answer at 5 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114, at P 25 (*Ellerth Wind*) (MISO has no obligation under the terms of the GIA to renegotiate an interconnection customer's milestones), *reh'g denied*, 145 FERC ¶ 61,038 (2013)).

¹⁴ *Id.* at 5-6 (citing *Midcontinent Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,198, at P 30 (2014) (*New Era*)).

¹⁵ *Id.* at 7 (emphasis supplied by MISO).

by MISO's proposed revisions to Article 2.3.1 in Docket No. ER12-56-000.¹⁶ In that proceeding, MISO specifically modified the first sentence of Article 2.3.1 of its *pro forma* GIA to add a reference to a failure to achieve commercial operation. MISO states that while it modified the first sentence of the article, MISO intentionally did not modify the language surrounding significant steps. Therefore, MISO states that the significant steps language was still intended to apply only to those generating facilities that achieved commercial operation. MISO asserts that the Commission accepted MISO's revisions as well as its intentional omission.¹⁷

18. MISO states that if unbuilt projects need only demonstrate significant steps toward completion to gain extension in the COD, MISO's limitations on suspension would be undermined. Further, MISO argues that Article 2.3.1 only applies to operational readiness of the generating facility. MISO states that while it appreciates that Merricourt has paid for network upgrades for the Project, these do not apply to the operational readiness of the Project itself, which has not yet been built. Further, MISO states that while Merricourt's agreement to purchase turbines for the Project is an important step, Merricourt does not appear to have made any progress to install turbines for the Project. Accordingly, MISO states that even if Article 2.3.1 applies, Merricourt would not meet the standard as it has not achieved a significant step toward actual construction of its Project.¹⁸

¹⁶ Specifically, MISO proposed the following revisions to Article 2.3.1:

Written Notice. This GIA may be terminated by Interconnection Customer after giving ~~the~~ Transmission Provider and Transmission Owner ninety (90) Calendar Days advance written notice or by Transmission Provider if the Generating Facility fails or a portion of the Generating Facility to achieve Commercial Operation for three (3) consecutive years following the Commercial Operation Date, or has ceased Commercial Operation for three (3) consecutive years, beginning with the last date of Commercial Operation for the Generating Facility, after giving ~~the~~ Interconnection Customer ninety (90) Calendar Days advance written notice. The Generating Facility will not be deemed to have ceased Commercial Operation for purposes of this Article 2.3.1 if ~~the~~ Interconnection Customer can document that it has taken other significant steps to maintain or restore operational readiness of the Generating Facility for the purpose of returning the Generating Facility to Commercial Operation as soon as possible.

¹⁷ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,188 (2011); *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,197 (2012)).

¹⁸ *Id.* at 8.

19. MISO states that Merricourt's Complaint shows that several steps have yet to be completed. Because these steps remain, MISO states that the Commission cannot conclude that there is not potential harm for interconnection customers regarding whether the Project will proceed and for transmission owners that must account for it for planning purposes.

20. MISO states that being close to signing a PPA does not meet Merricourt's burden to demonstrate that its Project is not speculative under *Lakeswind I*. MISO states that under the Queue Reform III Order, once an interconnection customer has executed a GIA, it should be prepared to proceed to meet those obligations if it is not speculative.¹⁹

21. MISO also argues that *Illinois Power* does not support an extension, because that 2007 case preceded queue reforms which started in 2008. In addition, MISO states that the generator in that case had invested millions of dollars, had a PPA, and still never proceeded to commercial operation. MISO states that a large investment ultimately did not prevent the generator from lingering in the queue (due to legal challenges to its project), only to withdraw later. That case, MISO argues, shows that the "wait and see" approach in *Illinois Power* does not support Merricourt's position and highlights the need to have limitations on unbuilt projects, even when they have invested heavily in development.²⁰

22. MISO states that the circumstances involving Mankato and South Fork are distinguishable from Merricourt's. First, MISO states that in both of those cases, MISO made filings with the Commission – a filing to amend the GIA for Mankato and a filing to terminate the GIA for South Fork. Here, MISO states that Merricourt filed a section 206 complaint seeking preemptive assurance and a change in COD, and therefore, the same standard does not apply to Merricourt's facts. Further, MISO states that in the case of Mankato, the project had been partially completed under an older version of the MISO GIA that provided for suspension rights, and therefore, the project exited suspension, proceeded, and was not subject to the limitations of the current GIP. In contrast, MISO states that Merricourt's Project has not been built and is subject to section 4.4.4 of the GIP. In the case of South Fork, MISO states that it filed to terminate, but later withdrew the filing. MISO states that its decision to pursue termination under Article 2.3.1 is voluntary and its withdrawal has no precedential value. Finally, MISO asserts that its action is not unreasonable and unduly discriminatory. MISO states that it is limited by

¹⁹ *Id.* at 13-14 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233, at PP 30, 179 (*Queue Reform III Order*), *order on reh'g*, 139 FERC ¶ 61,253 (2012), *order on clarification*, 150 FERC ¶ 61,035 (2015)).

²⁰ *Id.* at 14.

section 4.4.4 of the GIP and has no obligation to renegotiate GIA milestones which are initially selected by the interconnection customer.

B. Merricourt's Answer

23. Merricourt states that *New Era* is distinguishable because, in that case, the interconnection customer had failed to pay true-up costs for facilities listed in its GIA appendix (and had not cured that breach), had withdrawn permit requests from the Minnesota Public Utilities Commission to construct the generating facility, and had publicly stated it would not pursue the generating facility. Thus, Merricourt notes that the Commission found that, “without further evidence of intent to cure,” there could be harm to lower-queued interconnection customers that would not have known whether the project would proceed and for transmission customers that must account for the project for planning purposes.²¹ Merricourt argues that the Commission’s finding of potential harm did not rest on *New Era*’s setback. Rather, it rested on the lack of “evidence of intent to cure.” By contrast, Merricourt states that it has provided evidence that extending the COD in its GIA will not harm lower-queued projects and transmission owner planning.

24. Merricourt further contends that the fact that several steps have yet to be taken to complete the Project, as MISO contends, has never been a relevant factor under Commission precedent and is not indicative of potential harm. All milestone extension cases involve project steps yet to be completed, according to Merricourt. Merricourt notes that steps were yet to be undertaken to complete Mankato’s Phase II generating facility, yet MISO granted an extension of Mankato’s COD.²²

25. Merricourt argues that MISO does not discuss any of the facts that the Commission weighed in *Lakeswind I*, i.e., *Lakeswind* had cured its breach, MISO had not shown harm to other projects in the queue (because amending the project’s milestones did not change the project’s cost responsibility), and *Lakeswind* had shown that its project was not speculative (based on satisfying milestones and providing security for transmission owner facilities to be built).²³

26. Merricourt argues that MISO’s reliance on *Queue Reform III* is off point. It argues that *Lakeswind I and II* did not rest on *Queue Reform III* and the goals of queue management stated therein. Nor has the Commission rested on *Queue Reform III* in its

²¹ Merricourt Answer at 4 (citing *New Era*, 147 FERC ¶ 61,198 at P 31).

²² *Id.* at 4.

²³ *Id.* at 5-6.

prior orders granting milestone extension and denying GIA termination, according to Merricourt. Rather, the Commission has always decided those cases on a fact-specific basis.²⁴ Merricourt also disputes MISO's argument that *Illinois Power* is distinguishable because it predated the current queue reforms. Merricourt argues that *Illinois Power* is still good law because the standards the Commission applies now to assess milestone extension and GIA termination are the same as it applied before Order No. 2003²⁵ was issued in 2003 (and when it decided *Illinois Power* in 2007).²⁶

27. Merricourt contends that the fact that Merricourt filed a complaint whereas *Mankato* and *South Fork* involved MISO filings is not determinative of whether the customer classes are similar, and MISO provides no case law to support its position.

28. Merricourt disputes MISO's claim that the Complaint rests on Article 2.3.1 of the GIA. Rather, Merricourt states, its Complaint rests on Article 30.11 of its GIA, which provides it with the right to make a unilateral filing to modify the GIA pursuant to section 206 of the FPA. Merricourt explains that it discussed Articles 2.3.1, 30.9 and 30.10 of its GIA and section 4.4.4 of the GIP to demonstrate that the relief it requests is consistent with these provisions as well as Commission precedent.

29. Merricourt further contends that MISO's arguments concerning section 4.4.4 of the GIP are inconsistent with Commission precedent and its own course of dealing. It states that section 4.4.4 does not prohibit COD extension beyond three years; rather, it only provides it is a Material Modification.²⁷ In its case, Merricourt asserts, there is no impact on the cost and timing of any interconnection request. Moreover, Merricourt argues that section 4.4.4 of the GIP cannot prohibit extension of the COD beyond three years as MISO contends, because it would run afoul of Article 2.3.1 of the GIA which

²⁴ *Id.* at 7.

²⁵ *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), *cert. denied*, 552 U.S. 1230 (2008).

²⁶ Merricourt Answer at 7-9 (citing *Illinois Power*, 120 FERC ¶ 61,237 at P 20).

²⁷ *Id.* at 15 (citing *Quilt Block*, 130 FERC ¶ 61,172 at P 13).

includes a permissible right for MISO to not terminate a GIA and thus extend the COD beyond the three-year period, as the Commission confirmed in *Mankato*.²⁸

30. Merricourt also argues that it did not raise Article 2.3.1 as a direct basis for the relief it seeks. Rather, it discussed Article 2.3.1 because that was the provision upon which MISO had been acting when the “three-years beyond COD period” is about to be or has been reached. Noting that MISO had filed to terminate South Fork’s GIA pursuant to Article 2.3.1, Merricourt contends that, hence, Article 2.3.1 was germane based on MISO’s recent conduct. Further, Merricourt states that while MISO argues that Article 2.3.1 does not entitle Merricourt to a pre-emptive determination of a change in milestone, Merricourt asserts that Article 2.3.1 does not preclude such a determination either. Merricourt contends that the “significant steps” provision of Article 2.3.1 is tantamount to a pre-emptive determination.

31. Regarding MISO’s claim that the ability to utilize the “significant steps” provision only applies to projects that started but then ceased operation, Merricourt responds that MISO never made that claim when it added the “significant steps” clause to its *pro forma* GIA or when it updated Article 2.3.1 of its *pro forma* GIA to include a permissible right to terminate a GIA if a project also never achieves commercial operation. Merricourt contends that MISO provides no evidentiary support for its claim that it “intentionally” did not modify the language surrounding “significant steps.”²⁹

32. Merricourt also disputes MISO’s contention that it is circumventing the stakeholder process by filing its Complaint. Merricourt states that the Interconnection Process Task Force process is still ongoing. But Merricourt adds that neither Article 30.11 of the GIA nor section 206 of the FPA requires potential stakeholder outcomes to be completed as a prerequisite to exercise, and obtain relief by, that right.

IV. Discussion

A. Procedural Matters

33. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Merricourt’s answer to MISO’s answer because it has provided information that assisted us in our decision-making process.

²⁸ *Id.* at 16 (citing *Mankato*, 150 FERC ¶ 61,180 at P 19).

²⁹ *Id.* at 18-19.

B. Substantive Matters

34. We deny the Complaint as premature. Merricourt does not argue that section 4.4.4 of the GIP and Article 2.3.1 of the Merricourt GIA are in themselves unjust and unreasonable or unduly discriminatory or preferential. Additionally, Merricourt cites no provision of the Merricourt GIA, or any precedent, that requires MISO to make an advance determination on termination of the Merricourt GIA before the expiration of the three year period after the COD as provided in Article 2.3.1. Consequently, we agree with MISO that Merricourt's request is premature because MISO has not filed to terminate the Merricourt GIA, and we will not pre-judge the merits of either extension or termination here.³⁰

35. However, we also find that the Complaint raises the question of the extent to which MISO implements its "permissive" right to terminate GIAs pursuant to Article 2.3.1 in a not unduly discriminatory manner given MISO's recent actions to extend the COD in *Mankato* and withdraw the termination in *South Fork*, respectively. Accordingly, in considering whether to exercise its permissive right to seek to terminate the Merricourt GIA, we expect that MISO will implement its Tariff on a non-discriminatory basis. Last, we reiterate that when considering whether to accept the termination of a GIA or 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.³¹

³⁰ We remind the parties that the Commission's Dispute Resolution Division is available to parties involved in a dispute, whether pending at the Commission or not, to voluntarily pursue resolution of their dispute through settlement instead of litigation. The Dispute Resolution Division may be contacted at 1-877-FERC-ADR (1-877-337-2237). Additional information is available on the Commission's website at <http://www.ferc.gov/legal/adr.asp>.

³¹ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,053, at P 26 (2014).

The Commission orders:

The Complaint is hereby denied, as discussed in the body of this order.

By the Commission. Commissioners LaFleur and Moeller are concurring with a joint separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

Merricourt Power Partners, LLC

Docket No. EL15-90-000

v.

Midcontinent Independent System Operator, Inc.

(Issued October 23, 2015)

LaFLEUR, Commissioner, and MOELLER, Commissioner, *concurring*:

We write separately to emphasize two points about today's order denying, as premature, the complaint filed by Merricourt Power Partners, LLC (Merricourt) against the Midcontinent Independent System Operator, Inc. (MISO). While we agree with the order's observation that MISO is not required to decide, prior to December 1, 2015, whether it will seek to terminate the GIA, we also note that MISO is not prohibited from doing so. Given Merricourt's demonstrated need for clarity on whether MISO will seek to terminate its GIA, we see little reason for MISO to delay informing Merricourt of its decision.

Furthermore, as today's order notes, the Commission's Dispute Resolution Division is available to parties involved in a dispute, whether pending at the Commission or not, to voluntarily pursue resolution of their dispute through settlement rather than litigation. The Dispute Resolution Division can be of tremendous assistance to parties seeking to avoid protracted or contentious litigation before the Commission. We encourage Merricourt and MISO to avail themselves of those services and seek an amicable resolution of this dispute.

Accordingly, we respectfully concur.

Cheryl A. LaFleur
Commissioner

Philip D. Moeller
Commissioner