

156 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Internal MISO Generation

Docket Nos. EL15-99-001
EL16-12-001

v.

Midcontinent Independent System Operator, Inc.

ORDER ON REHEARING AND CLARIFICATION

(Issued October 13, 2016)

1. On March 29, 2016, the Commission issued an order granting in part and denying in part a complaint (Complaint) filed pursuant to section 206 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's Rules of Practice and Procedure² by Internal MISO Generation³ against Midcontinent Independent System Operator, Inc. (MISO).⁴ In the March Order, the Commission also instituted a proceeding in Docket No. EL16-12-000 pursuant to section 206 of the FPA to, among other things, examine MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to determine whether the M2 Milestone Payment should be applied to all classes of interconnection customers.⁵ On April 28, 2016, MISO and Internal MISO Generation separately requested rehearing, and MISO also sought clarification, of the March Order. In this

¹ 16 U.S.C. § 824e (2012).

² 18 C.F.R. § 385.206 (2016).

³ Internal MISO Generation is comprised of EDF Renewable Energy, Inc., E.ON Climate & Renewables North America LLC, and Invenergy LLC.

⁴ *Internal MISO Generation v. Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,248 (2016) (March Order).

⁵ *Id.* PP 32-34.

order, we dismiss in part, and deny in part, the requests for rehearing and grant in part, and dismiss in part, MISO's request for clarification.

I. Background

2. In the March Order, the Commission considered, among other things, the disparate application of certain generator interconnection requirements to various classes of generation customers seeking interconnection to MISO's system, including new or existing generation and generation located within and outside the MISO footprint.⁶ The Commission explained that new generation customers seeking Network Resource Interconnection Service (NRIS)⁷ or External Resource Interconnection Service (ERIS)⁸ must make a cash payment, termed the M2 Milestone Payment, when they first enter MISO's Definitive Planning Phase (DPP) interconnection study queue.⁹ The Commission further explained that MISO does not require this M2 Milestone Payment from External Network Resource Interconnection Service (E-NRIS)¹⁰ and NRIS-only¹¹

⁶ March Order, 154 FERC ¶ 61,248 at PP 30-34.

⁷ NRIS allows an interconnection customer to connect its generating facility to the transmission system or distribution system, as applicable, and integrate its facility with the transmission system in the same manner as for any generating facility being designated as a network resource. *See* MISO, FERC Electric Tariff, Attachment X (0.0.0), § 1; *see also* March Order, 154 FERC ¶ 61,248 at P 1 n.4.

⁸ ERIS allows an interconnection customer to connect its facility to the transmission system or distribution system, as applicable, and to deliver the generating facility's electric output using the existing firm or non-firm capacity of the transmission system on an as available basis. *See* MISO, FERC Electric Tariff, Attachment X (0.0.0), § 1. *See also* March Order, 154 FERC ¶ 61,248 at P 4 n.6.

⁹ March Order, 154 FERC ¶ 61,248 at P 4. The DPP "is the final phase of MISO's generator interconnection process, during which MISO conducts reliability and deliverability studies that determine whether there is available transmission capacity to accommodate the interconnection of new proposed generation facilities or whether network upgrades are needed." *Id.* P 3. A project is eligible to enter the DPP after the interconnection customer has provided the M2 Milestone Payment, technical data requirements, and DPP study deposit. *See* MISO, FERC Electric Tariff, Attachment X (0.0.0), § 8.2.

¹⁰ E-NRIS refers to an NRIS customer outside the MISO footprint.

¹¹ NRIS-only service refers to when a generating facility located within MISO with only ERIS re-enters the interconnection queue to obtain NRIS.

customers, even though MISO's Tariff is silent as to whether certain interconnection customers are exempt from the M2 Milestone Payment.¹² Because of this, the Commission found that MISO's Tariff "may be unjust and unreasonable, unduly discriminatory or preferential because it does not specify in sufficient detail which interconnection customers must make the M2 Milestone Payment."¹³ In order to resolve the issue, the Commission instituted a proceeding pursuant to section 206 of the FPA in Docket No. EL16-12-000 and ordered a paper hearing.¹⁴

3. In the March Order, the Commission also found that Internal MISO Generation met its burden under section 206 to show that MISO's Tariff is unjust, unreasonable, unduly discriminatory or preferential because the terms and conditions governing E-NRIS, including details of the Initial Payment¹⁵ and Service Agreement for E-NRIS customers, should be in the Tariff, rather than in the business practice manuals.¹⁶ Accordingly, the Commission directed MISO to file, within 60 days, appropriate revisions to its Tariff.¹⁷

II. Requests for Rehearing and Clarification

4. On rehearing, MISO contends that the March Order rests on the "mistaken assumption that it would be unduly discriminatory to exempt E-NRIS and NRIS-only customers from the M2 Milestone Payment."¹⁸ MISO argues that E-NRIS and NRIS-

¹² March Order, 154 FERC ¶ 61,248 at PP 31-32.

¹³ *Id.* P 32.

¹⁴ *Id.* P 34. An order on the paper hearing in Docket No. EL16-12-001 and accepting, subject to condition, MISO's filing made in Docket No. ER16-1817-000 in compliance with the March Order, among other things, is being issued concurrently herewith. *See, Internal MISO Generation v. Midcontinent Independent System Operator, Inc.*, 156 FERC 61,121 (2016).

¹⁵ An interconnection customer is required to either make an Initial Payment equal to 10-20 percent of the total cost of its network upgrades or provide security equal to the total cost of its network upgrades within a prescribed time period following the execution of the generator interconnection agreement (GIA) or the filing of an unexecuted GIA with the Commission. *See* MISO, FERC Electric Tariff, Attachment X (0.0.0), § 11.5.

¹⁶ March Order, 154 FERC ¶ 61,248 at P 30.

¹⁷ *Id.*

¹⁸ MISO Request for Rehearing at 9.

only customers are existing generators already interconnected to MISO, and thus are not similarly situated to customers with new generation projects. Accordingly, in MISO's view, it is appropriate to exempt these existing generators from the M2 Milestone Payment.¹⁹

5. MISO further claims that the March Order is arbitrary and capricious because it imposes impractical and unreasonable requirements.²⁰ For example, MISO contends that any M2 Milestone Payments applied to NRIS-only and E-NRIS customers would have to be immediately refunded because the Generator Interconnection Procedures provide for a refund upon execution of a GIA and the submission of an Initial Payment, which such customers already have done, either with MISO or the transmission provider to which they are interconnected. MISO further asserts that the M2 Milestone Payment formula itself – which is based on the gross megawatts added to the system – makes reasonably clear that NRIS-only and E-NRIS customers should not be subject to the M2 Milestone Payment as they add no new megawatts to the system.²¹ MISO also contends that the March Order violates section 206 of the FPA by shifting to MISO the burden of establishing that it is just and reasonable to exempt E-NRIS and NRIS-only customers from the M2 Milestone Payment.²²

6. MISO requests that the Commission clarify that it did not intend to establish a broad investigation of MISO's Generator Interconnection Procedures, and that the scope of the paper hearing is limited to whether certain categories of interconnection customers may be exempt from the M2 Milestone Payment. MISO also asks the Commission to clarify that the Initial Payment would only apply to E-NRIS customers building upgrades on the MISO transmission system.²³

7. Internal MISO Generation contends that the Commission should “find that MISO did not follow its Tariff and that MISO must subject all E-NRIS customers to the M2 Milestone and Initial Payment.”²⁴ Internal MISO Generation also claims that the Commission failed to address the “unjust and unreasonable results and treatment of

¹⁹ *Id.* at 15.

²⁰ *Id.* at 8-9.

²¹ *Id.* at 18-19.

²² *Id.* at 9.

²³ *Id.* at 23-24.

²⁴ Internal MISO Generation Request for Rehearing at 14.

(i) interconnection customers with generation located within MISO and (ii) the [seven] GW of E-NRIS and E-NRIS requests not yet studied in the DPP as of at least September 4, 2015.”²⁵ Further, Internal MISO Generation argues that the March Order is inconsistent with, and fails to reconcile, applicable precedent, including the cost causation principle and substantial evidence standard. In addition, Internal MISO Generation states that the Commission erred “by failing to set relief as of September 4, 2015, the date the Complaint was filed.”²⁶

II. Commission Determination

8. Rule 713(b) of the Commission’s Rules of Practice and Procedure permits requests for rehearing “of any final decision or other final order in a proceeding.”²⁷ A final order is one that imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.²⁸

9. MISO’s request for rehearing is focused on the proper scope of the M2 Milestone Payment, which MISO describes as “the ultimate issue at stake in the Complaint.”²⁹ For instance, MISO argues that E-NRIS and NRIS-only customers are not similarly situated to other customers to which the M2 Milestone Payment is assessed.³⁰ MISO likewise contends the practical difficulties associated with the application of the M2 Milestone Payment to E-NRIS and NRIS-only customers demonstrate that the Commission erred in the March Order.³¹ MISO also asserts that the Complaint failed to establish that MISO’s procedures applicable to E-NRIS are unjust and unreasonable because “MISO’s practices

²⁵ *Id.* at 18.

²⁶ *Id.* at 8.

²⁷ 18 C.F.R. § 385.713(b) (2016); *see also* 16 U.S.C. § 825l (a) (2012) (parties “aggrieved by an order issued by the Commission in a proceeding ... may apply for a rehearing within thirty days after the issuance of such order”).

²⁸ *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm’n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (“Final agency action ‘mark[s] the consummation of the agency’s decision making process’ and is ‘one by which rights or obligations have been determined, or from which legal consequences will flow.’”) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

²⁹ MISO Request for Rehearing at 22.

³⁰ *Id.* at 9.

³¹ *Id.* at 18-19.

are consistent with the Tariff,”³² and that the Commission inappropriately placed the burden of proof upon MISO to justify the inapplicability of the M2 Milestone Payment to E-NRIS and NRIS-only customers.³³

10. In the March Order, the Commission did not make any final determinations regarding the appropriate application of the M2 Milestone Payment. The Commission only found that it “may be unduly discriminatory” to exempt existing generators, whether they are E-NRIS and NRIS-only customers, from the M2 Milestone Payment.³⁴ Indeed, the Commission established a paper hearing to assess whether MISO’s Tariff should be revised to “make clear that the M2 Milestone Payment is assessed to all interconnection customers” or whether MISO “should not be required to do so.”³⁵ The Commission will bear the appropriate burden of proof in that proceeding. Where, as here, Commission action is to be succeeded by further Commission action, a request for rehearing may be dismissed.³⁶ Accordingly, MISO’s request for rehearing is dismissed to the extent it relates to whether certain interconnection customers should be exempt from the M2 Milestone Payment.³⁷

11. Internal MISO Generation’s request for rehearing is also focused on the question of whether certain interconnection customers should be exempt from the M2 Milestone Payment. For instance, Internal MISO Generation contends that the Commission erred by failing to find that all E-NRIS, including the seven GW of E-NRIS not yet studied in the DPP, must be subject to the M2 Milestone Payment and provide the Initial Payment

³² *Id.* at 21.

³³ *Id.* at 20-22.

³⁴ March Order, 154 FERC ¶ 61,248 at P 32.

³⁵ *Id.* P 34.

³⁶ See *Shetek Wind Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,250, at 62,185 (2012) (collecting cases); see also *Entergy Servs., Inc.*, 156 FERC ¶ 61,112, at P 4 (2016) (explaining that an order “establish[ing] procedures to consider the issue of the post-withdrawal settlement benefits ... did not reflect a final decision with respect to that issue”).

³⁷ MISO also briefly contends that “[i]t is not clear what specific elements of E-NRIS and NRIS-only protocols the Commission believes should be placed in the Tariff.” MISO Request for Rehearing at 21. MISO’s compliance filing is being addressed in a separate order issued concurrently herewith. See *Internal MISO Generation v. Midcontinent Independent System Operator, Inc.*, 156 FERC 61,121, at PP 2, 3 (2016).

were applicable. Internal MISO Generation also contends that the Commission's refusal to hold that all E-NRIS customers must be subject to the M2 Milestone Payment conflicts with applicable precedent, the cost causation principle and the substantial evidence standard.³⁸ Again, in the March Order, the Commission did not make any final determination regarding the application of the M2 Milestone Payment to certain classes of interconnection customers. Internal MISO Generation's request for rehearing in this regard is therefore dismissed.

12. Internal MISO Generation also takes issue with the Commission's final determination regarding the appropriate refund effective date. Internal MISO Generation also contends that relief should have been set as of September 4, 2015, the date the Complaint was filed.³⁹ We disagree. The Commission did not grant the Complaint regarding the proper scope of the M2 Milestone Payment obligation. Instead, the Commission instituted an investigation under section 206 in Docket No. EL16-12-000 to consider whether certain interconnection customers should be exempt from the M2 Milestone Payment. When the Commission commences a section 206 proceeding on its own motion, the earliest refund effective date that the Commission can establish is "the date of the publication by the Commission of notice of its intention to initiate such proceeding."⁴⁰ Accordingly, in order to give maximum protection to customers, the Commission established a refund effective date of April 5, 2016, the date that the notice for the section 206 proceeding established in the March Order was published in the *Federal Register*.⁴¹

13. With regard to MISO's request for clarification on the Initial Payment, we clarify that the Initial Payment should only apply to E-NRIS customers who are required to build network upgrades on MISO's system. MISO proposes in the compliance filing under Docket No. EL16-1817-000 to require an Initial Payment proportional to the customer's Network Upgrades, System Protection Facilities, Distribution Upgrades and/or Generator Upgrades.⁴² These are all defined terms in the MISO Tariff that specifically only apply to the MISO system. Thus, the Initial Payment would only exist if there are Network

³⁸ Internal MISO Generation Request for Rehearing at 13-23.

³⁹ *Id.* at 24-26.

⁴⁰ 16 U.S.C. § 824e(b) (2012).

⁴¹ *See* Notice of Institution of Section 206 Proceeding and Refund Effective Date, 81 Fed. Reg. 19,597 (2016)

⁴² As noted above, the compliance filing in Docket No. ER16-1817-000 is being accepted, subject to condition, in an order being issued concurrently herewith.

Upgrades, System Protection Facilities, Distribution Upgrades and/or Generator Upgrades required on MISO's system. We dismiss as moot MISO's request for clarification regarding the scope of the paper hearing given the concurrent order on the paper hearing.

The Commission orders:

The requests for rehearing are dismissed in part, and denied in part, and the requests for clarification are granted in part, and dismissed in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.