

137 FERC ¶ 61,008
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Midwest Independent Transmission System
Operator, Inc.

Docket No. ER11-4244-000

ORDER REJECTING NOTICE OF TERMINATION

(Issued October 4, 2011)

1. In this order, we reject Midwest Independent Transmission System Operator, Inc's (MISO's) notice of termination of the Generator Interconnection Agreement (GIA) among Great River Energy (Great River or Transmission Owner), Lakeswind Power Partners, LLC (Lakeswind or Interconnection Customer) and MISO (collectively, Parties).¹ MISO argues that Lakeswind is in default of the Agreement. As discussed below, we find that it is not just and reasonable to terminate the Agreement at this time.

Notice of Termination

2. The Lakeswind Project is a 50 MW wind facility to be located in Otter Tail County, Minnesota. It is being developed by Project Resources Corporation (Project Resources) and will be owned and operated by Lakeswind. The project, which will interconnect with Great River's transmission system, is designated as Project G619 in MISO's interconnection queue and has been included in MISO's Group 5 study cluster.

3. Pursuant to Interconnection Customer Milestone 1 of Appendix B to the GIA, Lakeswind was required to provide to Great River security in the amount of \$2,559,085 (representing 75 percent of the estimated costs of the Transmission Owner Interconnection Facilities and the Network Upgrades required by the agreement) no later than January 1, 2011. Lakeswind did not provide any security to Great River as of that

¹ The Parties executed the GIA on July 8, 2009. MISO designated the Agreement as Original Service Agreement No. 2085, under its FERC Electric Tariff, Fourth Revised Vol. No. 1 (Tariff) and reported it in its Electric Quarterly Report.

date, however. Therefore, on January 10, 2011, Great River delivered a Notice of Breach to Lakeswind.

4. MISO states that subsequent preliminary results of an ongoing Group 5 System Impact Restudy² provided in February 2011 indicated that Lakeswind may not be responsible for the portion of the original \$2,559,085 cost estimate attributable to the Network Upgrades under the GIA. However, Great River later confirmed to both MISO and Lakeswind in July 2011 that Transmission Owner Interconnection Facilities of at least \$781,569 were still required for interconnection of this project; thus, Lakeswind would owe \$586,177 (75 percent of the estimated cost of those facilities) to cure the breach.³ MISO states that Lakeswind still did not provide any security to Great River to cure the breach.

5. MISO states that Lakeswind requested that MISO either stay the GIA milestone requirements or amend them to reflect the results of the Group 5 System Impact Restudy. MISO asserts however that until the restudy process, including the resulting upcoming Facilities Restudy, is complete, the current terms of the GIA remain in force and effect. MISO notes that while it has not required Group 5 projects to proceed to a GIA, any project that has chosen to proceed and has executed a GIA must be held to its contractual obligations. MISO avers that Lakeswind has no suspension rights under its GIA, and to stay the effectiveness of an executed GIA would result in a *de facto* suspension in violation of MISO's approved queue reform measures and the terms of the GIA.⁴

6. MISO cites the following GIA terms as support for terminating the GIA: (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) definition of "default," i.e., 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, provided that the interconnection

² The Group 5 Restudy was initiated following the withdrawal of several generator interconnection projects in order to address questions in another case regarding a transmission line connecting Brookings, South Dakota, with Eastern Minnesota (the Brookings Line), as discussed in a Commission order issued on October 9, 2009. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,019 (2009), *order on reh'g*, 131 FERC ¶ 61,165, *order on reh'g*, 133 FERC ¶ 61,011 (2010).

³ MISO Notice of Termination at 2.

⁴ *Id.*

customer shall have up to 90 calendar days to cure the breach where such breach is not capable of cure within 30 days).⁵

7. MISO maintains that Lakeswind took no steps to fulfill its obligations to cure the breach and therefore is in default. Consequently, in a letter dated June 14, 2011, MISO provided notice to Lakeswind that it was in default, that a notice of termination of the agreement would be filed with the Commission, and that Lakeswind's planned generating project would be removed from MISO's generation interconnection queue.⁶ On August 5, 2011, MISO submitted to the Commission for filing, under section 205 of the Federal Power Act (FPA),⁷ a proposed notice of termination canceling the GIA. MISO seeks an effective date of October 5, 2011, for the termination.

8. As further support, MISO also alleges that the GIA should be terminated because another project in the restudy group, the higher-queued Project G555, will be harmed otherwise.⁸ Project G555 is required to upgrade a 115kv line at a cost of \$1.27 million. MISO determined through the restudy that Project G619, whose GIA was executed (a GIA has not yet been executed for Project G555), also impacts this line, but does not share any cost responsibility to upgrade the line. With the impacts from Project G619 removed from this line, the upgrade is no longer required for Project G555. However, MISO states, as a result of the delay and uncertainty caused by the breach and default of Project G619, Project G555 is forced to proceed assuming responsibility for the upgrade, including the need to immediately fund a facilities study.

Notice of Filing and Responsive Pleadings

9. Notice of MISO's Filing was published in the *Federal Register*, 76 Fed. Reg. 50,210 (2011), with interventions and protests due on or before August 26, 2011. Lakeswind and Project Resources (collectively, Lakeswind) filed a timely motion to intervene and protest. On September 12, 2011, MISO filed an answer to the protest. On September 21, 2011, Lakeswind filed an answer.

10. In its protest, Lakeswind states that it has cured the breach claimed by MISO by providing security in the amount of \$586,177 to Great River for transmission owner

⁵ *Id.* at 3.

⁶ The GIA at section 18.2 provides for termination upon the default of a party, effective after written notice by the non-defaulting party and acceptance by the Commission of a notice of termination.

⁷ 16 U.S.C. § 824d (2006).

⁸ MISO Notice of Termination at 3.

interconnection facilities and is no longer in default; thus, the request to terminate is now moot and should be dismissed. Further, Lakeswind asserts that MISO fails to demonstrate that termination of the GIA is just and reasonable. Rather, Lakeswind contends that MISO should be required to amend the obsolete interconnection milestones that it claims Lakeswind failed to satisfy.

11. Specifically, Lakeswind notes that prior to its January 1, 2011 payment deadline, it had requested MISO to amend its interconnection milestones to reflect the Group 5 Restudy and argues that MISO's refusal to amend them violated, and continues to violate, the terms of the GIA.⁹ Lakeswind points to Article 11.3 (Network Upgrades, System Protection Facilities and Distribution Upgrades) and Exhibit A-10 (Contingent Facilities) of the Lakeswind GIA as requiring the parties to amend the GIA.¹⁰ In particular, language in Article 11.3.2 states that the parties agree to amend Appendix A of the GIA (description of required interconnection facilities and upgrades, including estimated costs) to reflect the results of any restudy. Lakeswind also points to Article 11.5 of the GIA which governs security payments and requires Lakeswind to provide security to Great River for the construction of the network upgrades and transmission owner interconnection facilities necessary to interconnect the Lakeswind Project to the transmission system.¹¹ Article 11.5 provides that the security payment "shall be in an amount sufficient to cover the applicable costs and cost commitments required of the Party responsible for building the facilities pursuant to the construction schedule ..." Finally, Exhibit A-10 to the GIA states that, "[i]f any of the facilities listed in this Exhibit are not completed, or are no longer planned projects, the Transmission Provider shall apply the provisions of Section 11.3 of this GIA to determine what impact, if any, the facilities in this Exhibit have on the interconnection service, network upgrades, and cost responsibility of G619." Lakeswind notes that as MISO has admitted, several projects have withdrawn from the interconnection queue, prompting, in part, the need for the Group 5 Restudy.¹²

12. Since all parties agree that the \$2,559,085 amount is no longer appropriate, Lakeswind alleges that that amount is in violation of Article 11.5 and must be amended. Lakeswind states that MISO provides no valid justification for its refusal to amend the interconnection milestones and refutes MISO's contention that amending milestones

⁹ See Lakeswind Protest, Paul White Aff., App. A at 3, P 11.

¹⁰ Lakeswind Protest at 13-15.

¹¹ *Id.* at 15-16.

¹² *Id.* at 15 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,165 at P 28).

would result in a *de facto* suspension in violation of its queue reform measures and the terms of the GIA. Lakeswind argues that any delay is the result of the restudy, and notes that MISO has already admitted it must amend the GIA to reflect the restudy once the restudy is complete.¹³

13. Lakeswind further argues that MISO allowed other Group 5 projects to halt the development of their interconnection agreements pending the outcome of the Group 5 Restudy; however, MISO refused to allow Lakeswind similar treatment or to amend the interconnection milestones to reflect the restudy.¹⁴

14. Additionally, Lakeswind contends that MISO provides no evidence that amending the interconnection milestones will harm lower-queued projects because Project G555 is not reliant upon network upgrades that must be built by Lakeswind and therefore will not be affected by a change to the milestones.¹⁵ It states that any claimed uncertainty or delay to other lower-queued projects is caused by the restudy itself, not the Lakeswind Project. Lakeswind argues that the only harm in this proceeding is to Lakeswind since it has been forced to overcome significant hurdles in the development of the wind facility due to the system impact restudy and MISO's refusal to amend the interconnection milestones that have been rendered obsolete by the restudy.¹⁶ Lakeswind states that MISO's requiring the security for the network upgrades that are no longer required is illogical and has hampered Lakeswind's ability to obtain financing to continue development of the project.

15. Despite the fact that Lakeswind still does not agree that a breach occurred, it states that it has been working to resolve the claimed breach since January. In fact, Lakeswind was able to provide Great River with a letter of credit in the amount of \$50,000 in February 2011. However, it claims the uncertainty and MISO's repeated refusal to amend the GIA made resolution impossible until July 2011 when Great River agreed that Lakeswind did not need to provide security for the network upgrades and that security covering the transmission owner interconnection facilities would suffice to cure the breach. Prior to that, Lakeswind was concerned that if it provided the security to Great River without amending the agreement, based on MISO's strict adherence to the contract terms, Great River might be contractually obligated to begin construction of the

¹³ *Id.* at 16.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3-4.

network upgrades that were no longer required.¹⁷ Only after Great River provided this certainty was Lakeswind able to obtain the necessary financing to cure the breach.

16. In its answer to the protest, MISO states that Lakeswind has only partially cured its default. MISO addresses Lakeswind's contentions that the GIA must be amended and that MISO has not demonstrated harm. First, MISO contends that the harm is to Project G555, which is in the same group study as Project G619 and whose network upgrade requirements depend on whether or not Project G619 remains in the queue. MISO states that, although Projects G619 and G555 present an unusual circumstance in that Project G555 is higher-queued, Project G555 is still part of the same group study and upgrades in a group study can be determined by factors other than queue position.¹⁸

17. MISO states that Lakeswind applies a general standard for assessing a notice of termination and asks the Commission to consider whether the termination is unjust and unreasonable or unduly discriminatory. However, MISO avers the Commission should also consider the harm to lower-queued projects and the issues raised by speculative projects remaining in the queue when reviewing whether termination is just and reasonable.¹⁹

18. Second, MISO contends that the harm is ongoing and reiterates its assertion that amending the GIA to remove or delay existing milestones permits a *de facto* suspension of Lakeswind's obligations under the GIA that is not permitted under MISO's Tariff. Specifically, MISO explains that suspension is prohibited by the MISO Tariff absent a *force majeure* event, and a delay in meeting payment milestones should not be permitted for an executed GIA when the effect of the delay is to avoid funding upgrades relied on by other projects.²⁰ MISO does not challenge Lakeswind's statement that if the security were provided to Great River without amending the agreement, then Great River might be contractually obligated to begin construction. MISO maintains that harm to Project G555 remains because Project G555 must now fund a study to determine the cost estimates for upgrading the line that will not be needed if Project G619 does not proceed. MISO suggests that Lakeswind could have built in longer lead times in its GIA for

¹⁷ *Id.* at 12.

¹⁸ MISO Answer at 6 (citing Tariff at Attachment X, GIP Section 4.1 (explaining that for Group Studies, "the determination of cost responsibility for common facilities necessary to accommodate two or more Interconnection Requests participating in a Group Study the cost responsibility of the Parties for common facilities may depend on factors other than Queue Position.")).

¹⁹ *Id.* at 5 (citing *Illinois Power Co.*, 120 FERC ¶ 61,237 (2007)).

²⁰ *Id.* at 7.

obtaining financing, and to permit delay in meeting milestones here would undo the effectiveness of the policy behind removing the right to suspend in the first place and would permit speculative projects to remain in the queue to the detriment of others.²¹

19. Third, MISO contends that the harm cannot be cured by amending the GIA. MISO avers that amending the GIA would require Project G555 to accept a lower level of service (conditional Energy Resource Interconnection Service (ERIS), subject to curtailment) if it decided to proceed without the \$1.27 million upgrade that is required only if Project G619 proceeds. MISO states it has not requested or received any indication from Project G555 that proceeding with conditional ERIS is an acceptable alternative.²²

20. Finally, MISO notes that other solutions may be possible for Project G619. For example, Project G619 could take on the additional obligations that Project G555 incurs if the Commission orders that Project G619 is not to be withdrawn from the queue. MISO states that it understands the difficulties faced by project developers in its footprint and the issues related to Group 5 Restudy; however, MISO argues that it must consider the impact of delay on other projects in the queue and cannot permit Project G619 to effectively suspend its obligations under the GIA.²³

21. Lakeswind moves for leave to respond to MISO's answer. Lakeswind reiterates that it has fully cured the claimed breach of the GIA, in response to MISO's implication that its payment of security in the amount of \$586,177 was only a partial cure. Lakeswind argues that it seeks to amend the milestones consistent with the Group 5 Restudy, rather than to remove or delay milestones, as MISO suggests. Finally, Lakeswind repeats that MISO has failed to demonstrate any harm to Project G555. That project is not relying on any network upgrades that Lakeswind is required to build; further, there is no evidence that Project G555 is ready to interconnect, and thus is in no position to be harmed by any delay.

Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214 (2011), Lakeswind's timely, unopposed motion to intervene serves to make it a party to this proceeding.

²¹ *Id.* at 11.

²² *Id.* at 12.

²³ *Id.* at 12-13.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by MISO and Lakeswind because they have provided information that assisted us in our decision-making process.

B. Discussion

24. As discussed below, we find that extending the milestones in Lakeswind's GIA would not amount to a suspension, in contravention of MISO's Tariff. Lakeswind has cured its breach of the GIA to the satisfaction of the Transmission Owner. MISO has not shown that amending the GIA, as Lakeswind requests, would disadvantage Project G555. For these reasons, and because Lakeswind has remained and is still actively seeking to make progress toward construction of its project, we will reject the notice of termination.

25. 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,²⁴ or if it is consistent with the public interest.²⁵ When considering whether to extend milestones or to grant or extend a suspension, 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.²⁶ As discussed herein, we find that revising the milestones, as Lakeswind proposes, would not constitute a *de facto* suspension.

26. Exhibit A-10 to the GIA establishes specific conditions under which Article 11.3 of the GIA must be applied to determine if there is an impact on the interconnection service, network upgrades and cost responsibility of the interconnection customer. We agree that this language was triggered by the exiting of Group 5 projects. We believe that MISO was in the process of meeting its obligation through performance of its Group 5

²⁴ See, e.g., *Allegheny Power System, Inc.*, 102 FERC ¶ 61,318, at P 9 (2003).

²⁵ See, e.g., *Duke Energy Moss Landing LLC, et al.*, 83 FERC ¶ 61,318, at 62,306 (1998), *order on reh'g*, 86 FERC ¶ 61, 227 (1999).

²⁶ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,124 (2010) (no showing that extending commercial operation date will harm lower-queued interconnection customers); *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,172 (2010) (proposed revision to commercial operation date will not disadvantage lower-queued interconnection request or interconnection customer); *Illinois Power Co.*, 120 FERC ¶ 61,237 (2007) (finding lower-queued generator will not be harmed by additional suspension period and that interconnection customer actively seeks to continue progress).

Restudy; however, we also find that based on the language of Exhibit A-10 MISO had some responsibility to work with Lakeswind to determine the impact of the Restudy on the cost responsibility of the Lakeswind project and to reflect associated changes in the GIA. Additionally, we are not persuaded by the arguments given by MISO for its refusal to amend the GIA's milestones, as described below.²⁷ Moreover, Lakeswind has made good faith efforts to cure the breach. For these reasons, and given the specific facts in this case, we reject the proposed termination as not being just and reasonable.

27. MISO argues that delaying Lakeswind's milestones would permit a *de facto* suspension of Lakeswind's obligations under the GIA, which would be impermissible under MISO's Tariff. We disagree. We do not believe that amending the milestones, as Lakeswind requests, amounts to a suspension of the project. In order to accept MISO's argument, we would have to concur that any extension of milestones equates to a suspension which is not the case, as MISO states in its Answer.²⁸ Later, MISO describes a *de facto* suspension as "a delay in payment until faced with termination."²⁹ The record does not support a conclusion that Lakeswind chose to delay payment until faced with termination. Rather, the parties concur that Lakeswind delayed payment because of the impact of the Group 5 Restudy on its cost responsibility.³⁰ Thus, we believe that the Parties may revise the milestones in this GIA without constituting a *de facto* suspension.

28. Further, we do not agree that Lakeswind's requested amendments to the GIA will disadvantage Project G555. As stated above, when the Commission considers whether to extend milestones, it takes into account whether the extension would harm generators lower in the interconnection queue. Amending Lakeswind's milestones does not change Project G555's cost responsibility; rather, Lakeswind's existence in the queue impacts Project G555's cost responsibility.³¹ Project G555 will benefit only if Lakeswind's GIA

²⁷ We do not agree with Lakeswind's contention that MISO's refusal constitutes undue discrimination as it appears that MISO has treated interconnection customers with executed GIAs consistently, and interconnection customers that have not executed GIAs consistently.

²⁸ MISO's Answer at 7 (explaining that its Tariff permits extensions of a commercial operation date for up to three years).

²⁹ *Id.*

³⁰ See MISO Notice of Termination at 2 (stating that Lakeswind indicated on multiple occasions that its breach was intentional based on the pending Restudy).

³¹ MISO acknowledges this in its Answer, as it focuses on the facts that Project G555's network upgrade requirements depend on whether Lakeswind remains in the queue, and that the harm cannot be cured by amending the Project G619 GIA. *Id.* at 5.

is terminated or if the project is otherwise removed from the queue; if the Lakeswind project had been amended and proceeded within its original time frame, the restudy results show that Project G555 would still be responsible for the upgrades at issue.

29. Moreover, Lakeswind's project is not speculative, as Lakeswind demonstrates in its pleadings. Lakeswind has moved its project forward by satisfying Interconnection Milestones 2 and 3 in July 2009, and by posting security and providing various deposits and payments in the period during which it was considered to be in breach, including providing \$586,177 in security for transmission owner interconnection facilities required to accommodate the interconnection of the Lakeswind project.³²

30. We find that it would be reasonable to modify Lakeswind's milestones based on the results of the draft restudy, consistent with the provisions of Exhibit A-10 of the GIA. Further, there are no projects relying on network upgrades to be built by Lakeswind, and thus an extension of milestones would not harm others. In light of the complex circumstances presented in this proceeding, we find that it would not be appropriate to terminate the Lakeswind GIA. Accordingly, based on the circumstances presented in this case, it would not be just and reasonable to terminate the GIA, and we will reject MISO's Filing.

The Commission orders:

MISO's notice of termination is hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

³² Lakeswind Protest at 18-19.