

141 FERC ¶ 61,097
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER11-4244-001

ORDER ON REHEARING AND CLARIFICATION

(Issued November 5, 2012)

1. In an order issued October 4, 2011, the Commission rejected Midwest Independent Transmission System Operator, Inc.'s (MISO) notice of termination of a 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 seeks rehearing, or in the alternative, clarification, of the October 4 Order. As discussed below, we deny rehearing, and grant in part and deny in part clarification.

I. Background

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.²

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008 (2011) (October 4 Order).

² The Group 5 projects consist of interconnection requests in Southwest Minnesota, Northwest Iowa, and Eastern South Dakota. MISO conducted the generator interconnection system impact studies as a group for the Group 5 projects. The initial studies were performed in 2006 and 2007 and the study reports were posted during the summer and fall of 2007. In late 2009, MISO indicated that restudy of the Group 5 projects was necessary due to the withdrawal of higher-queued generators, including

(continued...)

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

4. Subsequent preliminary results of an ongoing Group 5 System Impact Restudy³ 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.⁴

5. MISO stated that Lakeswind did not provide any security to Great River to cure the breach, but instead requested MISO to either stay the GIA milestone requirements or amend them to reflect the results of the Group 5 System Impact Restudy. MISO maintained, however, that until the restudy process was complete, the current terms of the GIA remained in force and effect. MISO noted that while it had not required Group 5 projects to proceed to a GIA, any project that had chosen to proceed and had executed a GIA must be held to its contractual obligations. MISO asserted that Lakeswind had no suspension rights under its GIA, and argued that staying 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.⁵

6. MISO maintained that Lakeswind took no steps to fulfill its obligations to cure the breach and therefore was 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

some members of Group 5. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,165, at PP 26-28, *order on reh'g*, 133 FERC ¶ 61,011 (2010) (*Community Wind*).

³ The Group 5 Restudy was initiated following the withdrawal of several generator interconnection projects, as discussed in *Community Wind*, 131 FERC ¶ 61,165.

⁴ MISO Notice of Termination at 2.

⁵ *Id.*

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 sought an effective date of October 5, 2011, for the termination.

7. As further support, MISO also alleged that the GIA should be terminated because another project in the restudy group, the higher-queued Project G555, would be harmed otherwise.⁸ Project G555 was 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 had not yet been executed for Project G555), also impacted that line, but did not share any cost responsibility to upgrade the line. With the impacts from Project G619 removed from this line, the upgrade would no longer be 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 was forced to proceed assuming responsibility for the upgrade, including the need to immediately fund a facilities study.

8. Lakeswind protested the proposed termination, stating that it had cured the breach by providing security in the amount of \$586,177 to Great River for transmission owner interconnection facilities and was no longer in default. Thus, according to Lakeswind, the request to terminate was moot and should be dismissed. Lakeswind further asserted that MISO failed to demonstrate that termination of the GIA was just and reasonable. Rather, Lakeswind noted that the network upgrades identified in Appendix A of its GIA were no longer required to interconnect its project, and contended that MISO should be required to amend the obsolete interconnection milestones that it claimed Lakeswind failed to satisfy.⁹

9. Lakeswind noted that prior to its January 1, 2011 payment deadline, it had requested that MISO amend its interconnection milestones to reflect the Group 5 Restudy and argued that MISO's refusal to amend the GIA violated the terms of that agreement.¹⁰ Lakeswind pointed to Article 11.3 (Network Upgrades, System Protection Facilities and Distribution Upgrades) and Exhibit A-10 (Contingent Facilities) of the Lakeswind GIA

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.

⁹ Lakeswind Protest at 13-14.

¹⁰ See Lakeswind Protest, Paul White Aff., App. A at 3, P 11.

as requiring the parties to amend the GIA.¹¹ In particular, language in Article 11.3.2 stated that the parties agreed 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 pointed to Article 11.5 of the GIA, governing security payments and requiring 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.¹² Finally, Exhibit A-10 to the GIA provides 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 noted that, as MISO had admitted, several projects had withdrawn from the interconnection queue, prompting, in part, the need for the Group 5 Restudy.¹³

10. Since all the Parties agreed that the \$2,559,085 amount was no longer appropriate, Lakeswind alleged that that amount was in violation of Article 11.5 and must be amended. Lakeswind stated that MISO provided no valid justification for its refusal to amend the interconnection milestones and refuted MISO’s contention that amending milestones would result in a *de facto* suspension in violation of its queue reform measures and the terms of the GIA. Lakeswind argued that any delay in making its security payment was the result of the restudy, and noted that MISO had already admitted it must amend the GIA to reflect the restudy once the restudy is complete.¹⁴

11. Additionally, Lakeswind contended that MISO provided no evidence that amending the interconnection milestones would harm lower-queued projects because Project G555 was not reliant upon network upgrades that must be built by Lakeswind and therefore would not be affected by a change to the milestones.¹⁵ It stated that any claimed uncertainty or delay to other lower-queued projects was caused by the restudy itself, not the Lakeswind Project. Lakeswind argued that the only harm in this proceeding was to itself, since it had 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 had been rendered obsolete by the restudy.¹⁶

¹¹ Lakeswind Protest at 13-15.

¹² *Id.* at 15-16.

¹³ *Id.* at 15 (citing *Community Wind*, 131 FERC ¶ 61,165 at P 28).

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3-4.

Lakeswind stated that MISO's requirement of the security for the network upgrades that were no longer required was illogical and had hampered Lakeswind's ability to obtain financing to continue development of the project.

12. Despite the fact that Lakeswind still did not agree that a breach occurred, it stated that it had been working to resolve the claimed breach since January 2011. Specifically, Lakeswind was able to provide Great River with a letter of credit in the amount of \$50,000 in February 2011. However, Lakeswind claimed that 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. Only after Great River provided this certainty was Lakeswind able to obtain the necessary financing to cure the breach.

13. In its answer to the protest, MISO stated that Lakeswind had only partially cured its default. In response to Lakeswind's contentions that the GIA must be amended and that MISO had not demonstrated harm, MISO contended that the harm was to Project G555, which was in the same group study as Project G619 and whose network upgrade requirements depended on whether or not Project G619 remained in the queue. MISO stated that, although the two Projects presented an unusual circumstance in that Project G555 was higher-queued, Project G555 was still part of the same group study and upgrades in a group study can be determined by factors other than queue position.¹⁷ MISO maintained that harm to Project G555 remained because Project G555 would have to fund a study to determine the cost estimates for upgrading the line that would not be needed if Project G619 did not proceed.

14. Lakeswind reiterated in its answer that it had fully cured the claimed breach of the GIA. Lakeswind argued that it sought to amend the milestones consistent with the Group 5 Restudy, rather than to remove or delay milestones, as MISO suggested. Finally, Lakeswind repeated that MISO had failed to demonstrate any harm to Project G555. That project was not relying on any network upgrades that Lakeswind was required to build; there was no evidence that Project G555 was ready to interconnect, and thus it was in no position to be harmed by any delay, according to Lakeswind.

¹⁷ MISO Answer at 6 (citing Tariff at Attachment X, Generator Interconnection Procedures (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."))).

A. October 4 Order

15. In the October 4 Order, the Commission explained that 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,¹⁸ or if it is consistent with the public interest.¹⁹ The Commission also explained that, when considering whether to extend milestones or to grant or extend a suspension, it has taken 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.

16. Given the particular facts of this case, the Commission rejected the proposed termination as not being just and reasonable. The facts that the Commission considered included: (1) based on the language of Exhibit A-10, MISO had some responsibility to work with Lakeswind to determine the impact of the Group 5 Restudy on the cost responsibility of the Lakeswind project and to reflect associated changes in the GIA; (2) MISO's arguments for its refusal to amend the GIA's milestones were not persuasive; (3) Lakeswind had made good faith efforts to cure the breach;²⁰ and (4) revisions to Lakeswind's milestones would not disadvantage Project G555.²¹

17. The Commission also disagreed with MISO's argument that delaying Lakeswind's milestones would constitute a *de facto* suspension of the GIA. The Commission did not believe that amending the milestones, as Lakeswind requested, amounted to a suspension, pointing out that "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."²² The Commission noted that MISO later described a *de facto* suspension as "a delay in payment until faced with termination,"²³ and held that the record did not support a conclusion that Lakeswind chose to delay payment until faced with termination;

¹⁸ October 4 Order at P 25 (citing *Allegheny Power System, Inc.*, 102 FERC ¶ 61,318, at P 9 (2003)).

¹⁹ *Id.* (citing *Duke Energy Moss Landing LLC, et al.*, 83 FERC ¶ 61,318, at 62,306 (1998), *order on reh'g*, 86 FERC ¶ 61,227 (1999)).

²⁰ *Id.* P 26.

²¹ *Id.* P 28.

²² *Id.* P 27 (citing MISO's Answer at 7 (explaining that its Tariff permits extensions of a Commercial Operation Date for up to three years)).

²³ *Id.*

rather, the Parties had concurred that Lakeswind delayed payment because of the impact of the Group 5 Restudy on its cost responsibility.²⁴ Thus, the Commission concluded that revising the milestones in Lakeswind's GIA was not tantamount to a *de facto* suspension.

18. Further, the Commission did not agree that Lakeswind's requested amendments to the GIA would disadvantage Project G555.²⁵ The Commission explained that when it considers whether to extend milestones, it takes into account whether *the extension* would harm generators lower in the interconnection queue. Amending Lakeswind's milestones would not change Project G555's cost responsibility; rather, Lakeswind's existence in the queue would impact Project G555's cost responsibility. Project G555 would benefit only if Lakeswind's GIA was terminated or if the project was otherwise removed from the queue; if the Lakeswind project had proceeded within its original time frame, Project G555 would still have been responsible for the upgrades at issue.

19. The Commission further found that Lakeswind's project was not speculative. Lakeswind had 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, including \$586,177 in security for transmission owner interconnection facilities required to accommodate the interconnection of the Lakeswind project.

20. The Commission concluded that it would have been 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. As there had been no projects relying on network upgrades to be built by Lakeswind, an extension of milestones would not have harmed others. Recognizing the complex circumstances presented in the proceeding, the Commission found that it was not just and reasonable to terminate the Lakeswind GIA, and it rejected MISO's notice of termination.²⁶

B. Request for Rehearing

21. MISO alleges two errors in the October 4 Order. MISO requests that the Commission grant rehearing or in the alternative, clarification, of the October 4 Order with respect to these issues. First, MISO states that the order violates the FPA and is arbitrary and capricious "to the extent that it endorses breach of contract by interconnection customers who seek to delay commercial operation of their projects,

²⁴ See MISO Notice of Termination at 2 (stating that Lakeswind indicated on multiple occasions that its breach was intentional based on the pending restudy).

²⁵ October 4 Order, 137 FERC ¶ 61,008 at P 28.

²⁶ *Id.* P 30.

thereby permitting a *de facto* suspension when suspension is no longer permitted under the MISO Tariff absent an event of *force majeure*.”²⁷ MISO argues that the October 4 Order should be reversed or, in the alternative, clarified as being limited to its facts and as not permitting a *de facto* suspension that is prohibited by the Tariff.

22. Second, MISO objects that the order did not address facts regarding the impact of an interconnection customer’s default on the other parties to a GIA, namely, the transmission owner and MISO. MISO asserts that if the Commission does not reverse its holding from the October 4 Order, it should clarify that the transmission owner and MISO do not continue to be bound to their obligations under the relevant GIA in the event of a delay or default by the interconnection customer.

23. In sum, MISO requests that the Commission grant rehearing or in the alternative, clarification, of the October 4 Order with respect to these issues.

24. On November 18, 2011, Project Resources and Lakeswind filed an answer to MISO’s request for rehearing and clarification, reiterating Lakeswind’s previous arguments.

II. Discussion

A. Procedural Matters

25. Rule 713(d)(1) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2012), prohibits an answer to a request for rehearing. Accordingly, we reject Project Resources and Lakeswind’s answer to MISO’s request for rehearing and clarification.

B. Substantive Matters

26. We deny rehearing. The Commission’s rejection of the notice of termination rested on the specific facts of this proceeding, which demonstrated that such termination would not be just and reasonable. A key factor in the underlying order, and one which MISO does not challenge on rehearing, is that Lakeswind’s extension of milestones would not harm Project G555.²⁸ Additional factors considered by the Commission were that Lakeswind cured its breach of the GIA to the satisfaction of the Transmission Owner, and sought to make progress toward construction. MISO has not persuaded us to reverse our determination that termination of the GIA would be unjust and unreasonable. However, we grant clarification in part, as discussed below.

²⁷ MISO Rehearing at 3.

²⁸ See October 4 Order, 137 FERC ¶ 61,008 at PP 24, 28, 30.

1. De Facto Suspension

27. MISO requests that the Commission reverse or clarify the October 4 Order to explain that it “is not an endorsement of a delaying tactic for interconnection customers that is tantamount to a *de facto* suspension,” and specifically clarifying that the order is limited to the facts involving Lakeswind’s project and does not justify any other interconnection customer’s decision “to (1) breach its GIA, (2) be declared in default, (3) delay progress under the GIA milestone schedule, and (4) only cure the breach of the GIA after notice of termination has been filed by MISO.”²⁹ MISO explains that this is not a hypothetical concern; at least one interconnection customer has indicated an intention to breach its GIA, citing the October 4 Order.³⁰

28. MISO asserts that delaying the funding of upgrades by breaching a GIA is effectively a *de facto* suspension that creates the same problems addressed by its 2008 tariff revisions that limited suspension rights.³¹ MISO contends that the Commission’s determination in the October 4 Order that Lakeswind’s delay was not a *de facto* suspension is at odds with the rationale in the 2008 Queue Reform Order, and appears to endorse a “breach-default-delay” strategy.³²

29. MISO further states in its rehearing request that, in reaching its determination, the Commission did not reference substantial evidence in the record that Lakeswind delayed payments while seeking financing for a longer period than that allowed in the GIP.³³ MISO reiterates that Lakeswind failed to make a payment under Appendix B of the GIA when it was due on January 1, 2011, and “only provided an amended letter of credit to [Great River] after it was declared in breach, fell into default for failure to cure the breach, and MISO filed the notice of termination... .”³⁴ MISO asks the Commission to reverse the finding in the October 4 Order that Lakeswind delayed payment because of the impact of the Group 5 Restudy on its cost responsibility, or to clarify that Lakeswind’s rationale for the delay is not the determining factor in whether its action is

²⁹ MISO Rehearing at 4.

³⁰ *Id.* at 5.

³¹ *Id.* at 5-6 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183, at PP 91-111 (2008) (2008 Queue Reform Order)).

³² *Id.* at 6-8.

³³ *Id.* at 9.

³⁴ *Id.* at 10.

permissible.³⁵ MISO further requests clarification that the Commission did not endorse delaying payments based on concerns with a pending restudy, and to clarify that such a delay could be an impermissible *de facto* suspension under different circumstances.

30. Regarding the Commission's conclusion that Lakeswind did not choose to delay payment until forced with termination, but rather delayed payment because of the impact of the Group 5 Restudy on its cost responsibility, MISO asks the Commission to reverse its finding or to clarify that the rationale for Lakeswind's delay is not the determining factor for whether its action is permissible or for whether or not the GIA should be terminated. In particular, MISO asks for clarification that the Commission does not endorse a delay on grounds that Lakeswind had concerns about the pending restudy and that such a delay could be an impermissible *de facto* suspension under different circumstances.

31. In conclusion, MISO acknowledges that the pending restudy may have affected the upgrades that Lakeswind would have to fund, but notes that restudies are common in MISO and states that until a GIA is amended pursuant to a restudy the contractual milestones need to be met to provide certainty for other projects. Thus, MISO requests that the Commission clarify that concerns about a restudy should not justify intentionally breaching a GIA. Citing Order No. 2003, MISO notes that parties may negotiate to extend the time allowed to cure a default; however, MISO stresses that non-defaulting parties have a right to terminate to protect themselves from lengthy defaults.³⁶

Commission Determination

32. Regarding MISO's request that the Commission clarify that it does not endorse suspensions that are prohibited by the Tariff, we agree. The Commission does not endorse any activity that is not permitted under a filed tariff or agreement. We note, however, that "*de facto* suspension" is not a defined term in MISO's Tariff, and, indeed, does not appear anywhere in the Tariff. Hence, the Commission is reluctant to find that

³⁵ MISO Rehearing at 9-11 (according to MISO, Lakeswind's rationale for not making its payment was based at least in part on its inability to find investors). *See also* Lakeswind Aug. 26, 2011 Protest, White Aff., ¶ 10.

³⁶ *Id.* at 12 & n.33 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 629 (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)).

any particular circumstances constitute a *de facto* suspension or to clarify that particular actions are delaying tactics “tantamount to a *de facto* suspension,”³⁷ as MISO requests.

33. The Commission acknowledges that there are backlogs in MISO’s interconnection queue that would be exacerbated by interconnection customers seeking to delay progress of their interconnections. Indeed, the Commission recently conditionally accepted tariff revisions to MISO’s interconnection procedures in order to address delays.³⁸ As the Commission indicated in the October 4 Order, the outcome in this proceeding is limited to the particular facts presented here.³⁹ The record in this proceeding does not indicate that Lakeswind engaged in a “breach-default-delay” tactic as alleged by MISO. Rather, as the Commission found in the October 4 Order, the record indicated that Lakeswind did not seek to improperly avoid or delay paying for network upgrades, but instead requested amendment of its GIA to reflect revised milestones. The circumstances in this case shifted in light of preliminary results of the Group 5 Restudy indicating that network upgrades were no longer required for Lakeswind’s project.⁴⁰ While the Parties could refuse to give consent to such an amendment at the time that Lakeswind sought the amendment, this Commission must evaluate the proposed termination based on whether the applicant demonstrates that the proposed termination is not unjust, unreasonable, unduly discriminatory or preferential,⁴¹ or if it is consistent with the public interest.⁴² We believe that a reasonable outcome here was to reject the proposed termination given the lack of harm to any of the Parties in the proceeding, the fact that no interconnection customers were disadvantaged by Lakeswind’s proposed amendments, and that Lakeswind made good faith efforts to cure its breach.

34. MISO requests that the Commission clarify that Lakeswind’s inability to find investors was not the determining factor in the October 4 Order’s determination that termination of the GIA would not be just and reasonable. As explained in the October 4

³⁷ *Id.* at 4, 5.

³⁸ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233 (2012) (accepting tariff revisions to limit delays associated with the failure of projects to move through the queue and late-stage terminations, among other goals).

³⁹ See October 4 Order, 137 FERC ¶ 61,008 at PP 26, 30.

⁴⁰ See Lakeswind Protest at 7; MISO Answer at 4.

⁴¹ October 4 Order, 137 FERC ¶ 61,008 at P 25 (citing *Allegheny Power System, Inc.*, 102 FERC ¶ 61,318, at P 9 (2003)).

⁴² *Id.* (citing *Duke Energy Moss Landing LLC, et al.*, 83 FERC ¶ 61,318, at 62,306 (1998), *order on reh’g*, 86 FERC ¶ 61, 227 (1999)).

Order, key factors considered were (1) whether any other projects were relying on network upgrades to be built by Lakeswind and thus would be harmed by Lakeswind's extension of its milestones,⁴³ and (2) evidence that Lakeswind made good faith efforts to cure its breach,⁴⁴ including payment of security for transmission owner interconnection facilities sufficient to satisfy the Transmission Owner, Great River. Thus, Lakeswind's rationale was not dispositive.⁴⁵

35. Nevertheless, the Commission does not agree with MISO's characterization of certain facts in its request for rehearing. Specifically, in its rehearing request, MISO refers to the 2008 Queue Reform Order which approved tariff revisions to limit the time allowed for an interconnection customer to develop its project and market its energy,⁴⁶ and later asserts that Lakeswind exceeded that limit.⁴⁷ MISO's assertion that Lakeswind had not performed those tasks within the time required was first raised in its request for rehearing and was not provided by MISO in the notice of termination or its September 12, 2011 answer; thus it was not part of the record that the Commission considered in the October 4 Order. MISO also references the Commission's discussion in the Queue Reform Order rejecting challenges to that timeline, including concerns about projects in suspension not having to make payments for network upgrades, and about network upgrades not being built even though lower-queued projects may be depending on them. We emphasize that MISO did not raise either of these concerns at the time that the Commission reviewed MISO's notice of termination of Lakeswind's GIA. We reject these claims by MISO as improperly raised for the first time on rehearing. Further, to the extent that the Commission faces similar issues related to the 2008 Queue Reform Order in a future proceeding, such issues should be raised at the appropriate time, and not at the rehearing stage.

⁴³ October 4 Order, 137 FERC ¶ 61,008 at P 28.

⁴⁴ *Id.* P 29.

⁴⁵ Lakeswind's rationale was, however, relevant to the determination whether the project was speculative and thus a source of uncertainty for Project G555. As Lakeswind made good faith efforts to move its project forward, the developer of G555 could plan accordingly.

⁴⁶ MISO Rehearing at 6-7 (citing 2008 Queue Reform Order, 124 FERC ¶ 61,183 at PP 108-09).

⁴⁷ *Id.* at 9.

2. Impact of Breach or Default

36. MISO's second contention focuses on the Commission's reliance on Exhibit A-10 to the GIA, finding that it obligated MISO to work with Lakeswind to revise the milestones. Specifically, paragraph 26 of the October 4 Order states 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." MISO argues that that provision of the GIA does not impose additional negotiation obligations beyond the terms of the GIA and does not impose any additional duty on MISO or the Transmission Owner "to accommodate delay by an interconnection customer."⁴⁸

37. MISO asserts that Exhibit A10 is only intended to provide a list of contingent facilities and asks that the Commission clarify that it "does not impose a different obligation beyond the text in the body of the GIA or limit MISO's authority to restudy in the Tariff."⁴⁹ According to MISO, the listing of contingencies should not impose a duty on MISO to accept a delay by an interconnection customer even if the GIA might need to be amended under Article 11.3 of the GIA.

38. MISO also requests clarification that if an interconnection customer breaches its GIA in order to delay milestone payments, then the other Parties should be released from their obligations under the agreement.

Commission Determination

39. As we indicated in the October 4 Order, Exhibit A10 provided 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. Interconnection Customer will not be responsible for upgrading any of the equipment listed without a restudy or review from all parties involved.⁵⁰

⁴⁸ MISO Rehearing at 14.

⁴⁹ *Id.*

⁵⁰ GIA at Original Sheet No. 103.

40. Lakeswind interpreted this provision to allow it to decline to pay for more upgrades than it was responsible for, according to preliminary results of the Group 5 Restudy. While it is true that that provision does not require MISO or the Transmission Owner to “accommodate delay,” a reasonable response given the change in circumstances indicated by the draft restudy⁵¹ and given that no other interconnection customers would be adversely affected by the requested extension, would have been to renegotiate Lakeswind’s milestones.

41. Generally, an interconnection customer is responsible for making all payments and meeting all other milestones during the process of a restudy.⁵² An interconnection customer that fails to meet its requirements may be in breach and subject to the termination provisions of the GIA. In the event that all of the parties to a GIA can agree to amend the GIA, however, a breach may be avoided.

42. In response to MISO’s request for clarification regarding the extent of parties’ obligations in the case where an interconnection customer breaches its GIA in order to delay milestone payments, the terms of a GIA remain in effect until the time that the Commission acts on a Notice of Termination. According to Article 17, upon the occurrence of a breach, the non-breaching parties are to give a written notice of breach to the breaching party. Article 17.1.1 provides a period of time for the breaching party to cure the breach. The provision does not relieve non-breaching parties of any responsibilities or obligations while the breaching party has an opportunity to cure the breach.

The Commission orders:

MISO’s request for rehearing is hereby denied, and the alternative request for clarification is hereby granted in part and denied in part, as discussed in the body of this order.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵¹ Of note was the fact that the preliminary results of the restudy became available, and Lakeswind provided a letter of credit in the amount of \$50,000, in February 2011, during the period allowed to cure the breach.

⁵² Similarly, a Transmission Owner may have milestones that it is responsible for meeting pursuant to the GIA during the process of restudy.