

142 FERC ¶ 61,171  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission  
System Operator, Inc.

Docket No. ER13-701-000

ORDER DISMISSING NOTICE OF TERMINATION WITHOUT PREJUDICE

(Issued March 4, 2013)

1. On January 3, 2013, Midwest Independent Transmission System Operator, Inc. (MISO) filed a notice of termination of the Large Generator Interconnection Agreement (Interconnection Agreement) among Jeffers South, LLC (Jeffers South), ITC Midwest LLC, and MISO. The Interconnection Agreement and corresponding Facilities Construction Agreement, which MISO also seeks to terminate, relate to an interconnection request for a wind generation facility that Jeffers South proposes to construct (Jeffers South Project). These agreements and the Jeffers South interconnection request are the focus of a complaint proceeding initiated by Jeffers South that is currently ongoing in Docket No. EL10-86. For the reasons discussed in this order, we dismiss MISO's notice of termination without prejudice.

**I. Background**

2. MISO's notice of termination pertains to an interconnection request that has a long and complex history. However, the portion of that history that is pertinent to our inquiry here consists primarily of the facts that explain the current posture of the complaint proceeding in Docket No. EL10-86.<sup>1</sup>

3. In May 2005, Jeffers South's predecessor in interest submitted to MISO a request to interconnect the Jeffers South Project, a 150 MW wind powered generation facility whose capacity was subsequently reduced to 130 MW. The Jeffers South Project was to

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<sup>1</sup> An extensive discussion of the history of the Jeffers South interconnection request can be found in the Presiding Judge's initial decision issued in Docket No. EL10-86-002, *Jeffers South, LLC v. Midwest Indep. Transmission Sys. Operator Inc.*, 139 FERC ¶ 63,002 (2012) (Initial Decision).

be located in southern Minnesota, and the request made was to interconnect it to transmission facilities that were at the time owned by Interstate Power & Light Company.

4. MISO completed a system impact study for the proposed interconnection in April 2006. This study contemplated the construction of upgrades to certain transmission facilities extending from Storden to Heron Lake, Minnesota, as well as the construction of additional facilities.

5. MISO did not pursue this interconnection plan and instead adopted a joint study plan that Interstate Power & Light Company proposed together with Great River Energy and Xcel Energy Services (2006 Joint Study). In addition to the upgrades proposed in the April 2006 study, the joint study plan included the construction of a new 161 kV transmission line from Storden to Dotson, Minnesota, where the line was to interconnect with a new 161 kV transmission line extending from Dotson to New Ulm, Minnesota, that Great River Energy would build. In addition to the interconnection of the Jeffers South Project, the expanded plan was intended to accommodate anticipated new ethanol plants and other system load requirements.

6. Jeffers South objected to the use of the joint study plan and to MISO's proposed allocation of costs, which included additional costs for Jeffers South associated with the new Storden-to-Dotson line. Jeffers South requested that MISO file the unexecuted Interconnection Agreement with the Commission so that the Commission could rule on the issues it raised. MISO did this in September 2007 in Docket No. ER07-1375-000. In December 2007 MISO filed, in Docket No. ER08-320-000, an unexecuted Facilities Construction Agreement among itself, Great River Energy, and Jeffers South's predecessor-in-interest. A settlement was eventually reached in these proceedings, and the Commission approved the settlement in August 2009.<sup>2</sup> As a result of the settlement, Jeffers South and MISO executed a restudy agreement that led to two restudies of the network upgrades needed for interconnection of the Jeffers South Project, one commissioned by Jeffers South, and the other commissioned by MISO (July 2010 Restudy). The parties also agreed as part of the settlement that suspension under section 5.16.1 of the Interconnection Agreement was permitted for a period of three years, and Jeffers South was deemed to have exercised its suspension rights for the two agreements on the dates that they were filed unexecuted, i.e., September 14, 2007 (for the Interconnection Agreement) and December 10, 2007 (for the Facilities Construction Agreement). The settlement further provided that Jeffers South would notify the parties whether it desires to end the suspension period within 45 days of the effective date of the settlement. Whether Jeffers South has any remaining suspension time is an issue in the pending request for rehearing that MISO filed in Docket No. EL10-86-003.

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<sup>2</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 128 FERC ¶ 61,121 (2009).

7. Approximately eight months before the Commission approved the settlement, Great River Energy informed MISO that it no longer supported the joint study plan and that it did not intend to construct the Dotson-to-New Ulm transmission line. The July 2010 Restudy retained the Dotson-to-New Ulm transmission line and related upgrades on the grounds that three lower-queued projects would be materially adversely affected if the network upgrades contemplated by the original joint study plan were not constructed. MISO redesignated the Dotson-to-New Ulm line as a network upgrade that Jeffers South would pay for.

8. On September 1, 2010, Jeffers South filed a complaint in Docket No. EL10-86-000 in which it challenged MISO's restudy process and other matters related to the Jeffers South interconnection request. On January 7, 2011, the Commission issued an order denying in part the relief requested in the complaint, establishing a hearing process, and holding the hearing in abeyance pending settlement judge procedures.<sup>3</sup> A settlement was not reached, and the hearing was held on December 12, 2011. The Presiding Judge issued the Initial Decision on April 16, 2012. Commission action on the Initial Decision is currently pending.

## **II. Notice of Termination**

9. MISO now proposes to terminate its Interconnection Agreement with Jeffers South. MISO also seeks to terminate the related Facilities Construction Agreement.<sup>4</sup> MISO requests an effective date of March 4, 2013 for the terminations.

10. MISO makes two arguments in support of its notice of termination.<sup>5</sup> First, MISO maintains that Jeffers South is in breach and default under the Interconnection Agreement

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<sup>3</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 134 FERC ¶ 61,013 (2011) (Order on Complaint), *order on reh'g*, 138 FERC ¶ 61,149 (2012) (Complaint Rehearing Order).

<sup>4</sup> MISO explains that: (1) the Facilities Construction Agreement is a requirement for interconnection service under the Interconnection Agreement; (2) obligations to fund upgrades under the Facilities Construction Agreement have not been met; and (3) without the underlying Interconnection Agreement, the Facilities Construction Agreement would serve no purpose.

<sup>5</sup> MISO provides specific details in support of its argument in an exhibit to its notice of termination that it has designated as privileged. However, Jeffers South has provided information on MISO's allegations in its protest to the notice of termination. We find that this information, along with the other public filings in the proceeding, are sufficient to allow us to rule on MISO's proposal without recourse to any filings that have been designated privileged.

for failing to meet required milestones that are material terms of the Interconnection Agreement and the related Facilities Construction Agreement. MISO states that it has provided to Jeffers South a notice of breach, notice of default, and notice of termination in accordance with the terms of the Interconnection Agreement.<sup>6</sup> MISO states that to its knowledge, Jeffers South has neither taken steps to cure the breach or the default that MISO alleges have occurred, nor placed any disputed amount in escrow as required by the Interconnection Agreement. It also states that the Jeffers South Project is no longer in suspension.

11. Second, MISO argues that termination of the Interconnection Agreement is just and reasonable, is not unduly discriminatory, and is consistent with the public interest. MISO maintains that Commission precedent supports this conclusion.<sup>7</sup> MISO notes that in ruling on a notice of termination in *Lakeswind*, the Commission stated:

[w]hen 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.<sup>8</sup>

12. MISO argues that acceptance of its notice of termination meets this standard because acceptance will eliminate the harm to lower-queued projects, to the transmission owner, and to the MISO interconnection queue process that the Jeffers South Project will

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<sup>6</sup> MISO cites the following Interconnection Agreement terms as support for termination: (1) Article 1 (defining “breach” as the failure of a party to perform any material term or condition of the agreement and “default” as the failure of a breaching party to cure its breach in accordance with Article 17); (2) Article 2.3.2 (providing that any party may file to terminate the Interconnection Agreement upon the occurrence of a default); (3) Article 12.4 (requiring payment of disputed amounts to the transmission provider or transmission owner, or to an escrow account, in the event of a billing dispute); and (4) Article 17.1 (permitting a breaching party to cure the breach within 30 calendar days of receipt of the breach notice, or commence the cure within 30 calendar days and complete the cure within 90 calendar days when such breach is not capable of cure within 30 days).

<sup>7</sup> MISO bases its argument on *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008 (2011) (*Lakeswind*), *order on reh’g and clarification*, 141 FERC ¶ 61,097 (2012) (*Lakeswind Rehearing Order*).

<sup>8</sup> MISO Notice of Termination at 4-5 (quoting *Lakeswind*, 137 FERC ¶ 61,008 at P 25 (citations omitted)).

cause if it remains in the queue. It adds that acceptance will benefit other projects by removing uncertainty regarding whether the upgrades in question will be built.

13. MISO also states that termination of the Interconnection Agreement is appropriate because neither the suspension under the Interconnection Agreement nor the extension of milestones is a permissible option. It maintains that no additional suspension time can be permitted for the Jeffers South Project, regardless of how the Commission decides the pending proceedings, and it argues that to permit a project to evade the limits on suspension without first curing a default would permit a *de facto* suspension. MISO states that the Commission clarified in the *Lakeswind Rehearing Order* that key factors in its determination not to accept the notice of termination in question were: (1) whether any other projects were relying on network upgrades that the interconnection customer was to build, and (2) the interconnection customer's good faith efforts to cure its default, including payment of security sufficient for the transmission owner. MISO maintains that Jeffers South's default has not been cured, and MISO cannot permit Jeffers South to avoid its obligations or alter its milestones until the current default is cured.

### **III. Notice of Filing and Responsive Pleadings**

14. Notice of MISO's filing was published in the *Federal Register*, 78 Fed. Reg. 2387 (2013), with interventions and protests due on or before January 24, 2013. Jeffers South filed a timely motion to intervene and protest. ITC Midwest LLC filed a timely motion to intervene, and MISO Transmission Owners filed a timely motion to intervene and comments.<sup>9</sup> On February 8, 2013, MISO filed an answer to Jeffers South's protest.

15. In its protest, Jeffers South maintains that the notice of termination is procedurally defective for two reasons. First, Jeffers South argues that in filing the notice of

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<sup>9</sup> The MISO Transmission Owners consist of: Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company; American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Duke Energy Corporation for Duke Energy Indiana, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

termination, MISO has failed to comply with section 27 of the Interconnection Agreement, which requires the parties to follow a specified dispute resolution procedure. Jeffers South argues that section 27.1 of the Interconnection Agreement provides that a dispute must be referred to a designated senior representative of each party for resolution on an informal basis as promptly as practicable after receipt of the notice of dispute. Jeffers South states that this did not occur in this case, as MISO did not respond to its notice of dispute prior to filing the notice of termination. Jeffers South maintains that MISO's failure to follow the required dispute resolution process constituted a waiver of its previous notice of breach. It also maintains that if MISO is not deemed to have waived its notice of breach, its failure to follow the dispute resolution provisions of the Interconnection Agreement would itself constitute a breach.

16. Second, Jeffers South states that MISO has not yet tendered a facilities study agreement, and that Section 8.1 of the MISO Large Generator Interconnection Procedures contained in Attachment X of the MISO Tariff provides that a deposit for a facilities study is not required until 30 days after receipt of the study agreement. Jeffers South maintains that MISO consequently has no basis for asserting that a breach has occurred.

17. Jeffers South also questions whether the notice of termination can be considered at this time. Jeffers South indicates that it received from MISO a request for a deposit of \$265,000 in connection with a proposed facilities study for the Jeffers South Project but, on June 15, 2012, Jeffers South notified MISO that it disputed the validity of this request. Jeffers South states that MISO did not respond to this notice of dispute, and Jeffers South thus believed that the matter was closed until the issues under review in the hearing proceeding in Docket No. EL10-86-002 had been resolved.

18. Jeffers South further notes that MISO seeks a study deposit pursuant to the Settlement Agreement, but one of the issues before the Commission in Docket No. EL10-86-002 is whether the Settlement Agreement is void. Jeffers South argues that until this issue is resolved, it would be unreasonable to take action under that agreement. Jeffers South also argues that its obligation under the Settlement Agreement is a reimbursement obligation, and since MISO has not performed the study, it is not entitled to any reimbursement.

19. Jeffers South argues that MISO's proposed facilities study is based upon an earlier system impact study, the 2006 Joint Study, which has been invalidated by MISO's recent queue reform. It also states that while MISO has maintained that three lower-queued projects could be harmed if the facilities discussed in that system impact study were not constructed, two of these projects have withdrawn from the queue as the result of MISO's recent queue reform. Jeffers South adds that there is no direct evidence to show that the third project would be harmed. Jeffers South also states that even if there is some additional cost for the remaining project, Jeffers South should have the option to compensate the project for the amount in question. Jeffers South states that MISO

proposed such a solution in the *Lakeswind* proceeding, and MISO's unwillingness to do that here is unjust, unreasonable and unduly discriminatory.

20. Finally, Jeffers South states that MISO has asserted that under Section 12.4 of the Interconnection Agreement, Jeffers South is required to place an amount equal to at least 50 percent of the requested study deposit into an independent escrow pending resolution of the dispute. Jeffers South maintains that there is no requirement under the Settlement Agreement, the Interconnection Agreement, or the MISO interconnection procedures to pay a deposit or place any amount in escrow during the pendency of the dispute resolution process. However, Jeffers South states that, as a sign of good faith, it has nevertheless deposited 50 percent of the requested study deposit with a law firm in Minneapolis, Minnesota, which will hold it pending the resolution of the dispute. Based on this action, Jeffers South maintains that it would no longer be in default even under MISO's view of these matters.

21. The MISO Transmission Owners maintain that termination is justified because of the uncertainty caused by Jeffers South's breach and the potential harm to lower-queued projects that could arise if Jeffers South terminates the Interconnection Agreement and the Facilities Construction Agreement at a later date. The MISO Transmission Owners maintain that the potential adverse effect of cascading restudies also supports termination. They state that MISO and affected transmission owners should be protected from having to expend resources for speculative projects, and that lower-queued interconnection customers are entitled to greater certainty. The MISO Transmission Owners state that it is detrimental to the market if a party to an agreement can escape the consequences of its breach. Finally, the MISO Transmission Owners argue that the proposed termination is consistent with the position on termination that the Commission took in *Lakeswind* and the *Lakeswind Rehearing Order*.

22. In its answer, MISO maintains that Jeffers South's protest contradicts many findings in the Initial Decision. MISO also states that its notice of termination is not premature. It maintains that the Interconnection Agreement provides for, but does not require, dispute resolution before filing the notice of termination. MISO also maintains that there is no remaining suspension time for the Jeffers South Project, and it asks the Commission to address this issue based on the evidence before it in its order on the Initial Decision.

23. MISO disputes Jeffers South's argument that MISO must first tender a facilities study agreement before Jeffers South is obligated to make the requested deposit. MISO states that the study agreement it provided to Jeffers South earlier contemplated that restudy would be in accordance with the Settlement Agreement, which contemplated that both a system impact study and a facilities study might be needed.

24. MISO disagrees with Jeffers South that the Commission cannot act on the notice of termination until it has acted on the Initial Decision. MISO states that the Commission has directed it to act if it felt that Jeffers South was in breach and default, and it has done so here.<sup>10</sup> MISO also states that Jeffers South has misunderstood the escrow deposit provision of Section 12.4 of the Interconnection Agreement. MISO states that such a deposit would be considered a substantial effort to begin to cure the breach, but it does not cure it.

25. MISO disputes that the Settlement Agreement requires that it first fund a restudy and then seek reimbursement from Jeffers South. MISO states that the Settlement Agreement indicates that, to the extent possible, the restudy procedures and timelines in Attachment X of the MISO Tariff will apply. MISO states that its tariff requires interconnection customers to fund restudies.

26. With respect to harm to lower-queued projects, MISO states that changes to the three projects that are behind Jeffers South in the queue do not impede termination of the Interconnection Agreement. MISO states that the Initial Decision found that the three projects would be harmed, and although two of them have dropped out of the queue, the remaining project would be negatively affected. MISO further contends that Jeffers South misapplied an exhibit that was rejected in the hearing to argue that no harm to the remaining project in the queue exists, and states that it is unknown whether any other projects have entered the queue since that time which would be impacted by a change to the Jeffers South Project.

27. Finally, MISO disagrees with Jeffers South that the proposed facilities study is based upon an earlier system impact study that has been invalidated by MISO's recent queue reform.<sup>11</sup> MISO states that while the queue process has been amended, the requirements for modifications of the type Jeffers South proposes remain the same. MISO also states that Commission precedent supports its authority to prohibit such changes, and the Presiding Judge considered the changes that Jeffers South had proposed and found that they harmed projects that were lower in the queue.

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<sup>10</sup> MISO Answer at 11 (citing Complaint Rehearing Order, 138 FERC ¶ 61,149 at P 19).

<sup>11</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233 (2012), *order on reh'g and compliance filing*, 139 FERC ¶ 61,253 (2012), *clarification requested*.

#### IV. Discussion

##### A. Procedural Matters

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept MISO's answer, as it has provided information that assisted us in our decision-making process.

##### B. Substantive Matters

30. We dismiss MISO's notice of termination without prejudice because a ruling on whether acceptance is just and reasonable is dependent upon the resolution of matters pending before the Commission as a result of the hearing held in Docket No. EL10-86. In addition, MISO has not demonstrated that acceptance of its proposed notice of termination is not unreasonable, unduly discriminatory or preferential, or that it is consistent with the public interest. The Commission stated in *Lakeswind* that in considering whether to accept a notice of termination, it 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. As we explain below, MISO has not shown that there will be any harm to any party or to the public interest that would require Commission action on the notice of termination at this time.

31. In establishing hearing and settlement judge procedures in the Order on Complaint, the Commission stated:

. . . we find that Jeffers South's complaint otherwise raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. These issues include, but are not limited to, whether the July 2010 Restudy was performed in a manner consistent with the various agreements between the parties, such as the Settlement Agreement and the restudy agreement, and whether the Dotson-New Ulm Line would not be necessary but for the interconnection of the [Jeffers South Project].<sup>12</sup>

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<sup>12</sup> Order on Complaint, 134 FERC ¶ 61,013 at P 34.

32. Even if the facilities study agreement requirement has been met here, which Jeffers South disputes, the July 2010 Restudy is the system impact study that serves as the indirect precondition of the facilities study for which MISO seeks a deposit.<sup>13</sup> The passage from the Order on Complaint quoted above states that the validity of that restudy is an issue of material fact that requires a hearing for its resolution. In addition, the Dotson-to-New Ulm Line is a facility that the July 2010 Restudy designates as a responsibility of Jeffers South. The Commission ruled in the Order on Complaint that this responsibility also is an issue of material fact that was to be dealt with at the hearing. Until these issues of material fact are resolved, it is not possible for us to find that all the conditions precedent to Jeffers South's duty to deposit \$265,000 toward the proposed facilities study have occurred. Since the existence of Jeffers South's duty is contingent on the resolution of these issues, so too is the question of whether Jeffers South is in breach of its duty and in default under the Interconnection Agreement. Similar considerations apply to MISO's argument that regardless of how the complaint proceeding is resolved, termination is justified because Jeffers South has no additional suspension time. The Commission has found that Jeffers South's project is not in suspension.<sup>14</sup> Although MISO has requested rehearing of this finding, and suspension is addressed in the Initial Decision, the Commission has not yet ruled on either the rehearing request or the Initial Decision. We therefore cannot act on a notice of termination until these matters are resolved, in other words, until: (1) the Commission's order on the Initial Decision has been issued, and (2) the Commission's order on the request for rehearing has been issued in Docket No. EL10-86-003.

33. MISO argues in its answer that Jeffers South's escrow payment does not mean that Jeffers South has cured its default. However, whether Jeffers South is in default ultimately depends on the outcome of the complaint proceeding in Docket No. EL10-86. MISO maintains that the Commission directed it in the Complaint Rehearing Order to proceed with any studies, and if it felt that Jeffers South was in breach and default, it should act in accordance with the tariff.<sup>15</sup> But in taking the action that MISO refers to, the Commission was not making MISO the final arbiter of whether Jeffers South was in fact in breach and default. The Commission simply stated that if MISO "believes" that Jeffers South was obligated to fund a restudy, "[MISO] should proceed in accordance with the provisions of its Tariff and Jeffers South's [Interconnection Agreement]

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<sup>13</sup> Under the interconnection procedures applicable to the Jeffers South Project, a system impact study is a precondition to a facilities study agreement and a facilities study agreement is a precondition for a facilities study. *See* MISO Tariff, Attachment X, §§ 7.3, 7.4, 8.1, 8.2, 8.3.

<sup>14</sup> Complaint Rehearing Order, 138 FERC ¶ 61,149 at P 19.

<sup>15</sup> MISO Answer at 11 (citing Complaint Rehearing Order, 138 FERC ¶ 61,149 at P 19).

governing the failure to pay amounts due.”<sup>16</sup> MISO states that it has done this here, but the Commission remains the arbiter of any conflicts between MISO and Jeffers South concerning MISO’s actions here.

34. Finally, we have no basis to conclude that dismissing the notice of termination without prejudice will result in any harm that weighs against dismissing it. MISO argues that whether there will be harm to lower-queued projects has already been established in the Initial Decision, but the Commission has not yet ruled on the Initial Decision or the exceptions thereto. We therefore cannot prejudge that issue here. Secondly, no entity has indicated in this docket that it would be harmed unless the notice of termination is accepted. That helps persuade us that action at this time is not necessary to prevent potential harm. Finally, no specific evidence of any other possible harm has been presented here. MISO Transmission Owners argue that MISO and affected transmission owners should be protected from having to expend resources for speculative projects, but they do not identify any unnecessary expenditure that accepting the notice of termination at this time would prevent. We therefore find that there is no basis to conclude here that accepting the notice of termination would prevent any harm of the type discussed in *Lakeswind*.

35. Since we cannot act on a notice of termination until the issues described above have been resolved, we will not address the procedural issues that the parties have raised in connection with MISO’s current filing, such as whether the dispute resolution requirements of the Interconnection Agreement have been complied with or whether MISO has tendered a facilities construction agreement.

The Commission orders:

MISO’s notice of termination is hereby dismissed without prejudice, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>16</sup> Complaint Rehearing Order, 138 FERC ¶ 61,149 at P 19.