

161 FERC ¶ 61,076
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Midcontinent Independent System Operator, Inc.

Docket No. EL18-17-000

ORDER INSTITUTING SECTION 206 PROCEEDING AND COMMENCING PAPER
HEARING PROCEDURES AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued October 19, 2017)

1. In an order being issued concurrently,¹ the Commission is denying rehearing of a March 4, 2016 order accepting Midcontinent Independent System Operator, Inc.'s (MISO) notice of termination of the Generator Interconnection Agreement (GIA) entered into by enXco Development Corporation (subsequently assigned to Merricourt Power Partners, LLC (Merricourt)), Montana-Dakota Utilities Company and MISO (Merricourt GIA).² In addressing the arguments on rehearing in the Termination Rehearing Order, the Commission determined that MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) may contain conflicting provisions.

2. In this order, we find that MISO's Tariff may be unjust, unreasonable, unduly discriminatory or preferential because of inconsistencies between Section 4.4.4 of MISO's Generator Interconnection Procedures (GIP) and Article 2.3.1 of MISO's *pro forma* GIA. Accordingly, we institute a proceeding in Docket No. EL18-17-000 pursuant to section 206 of the FPA³ to examine MISO's Tariff.

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,077 (2017) (Termination Rehearing Order).

² *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,172 (2016) (March 4 Order).

³ 16 U.S.C. § 824e (2012).

I. Background

A. History of Applicable Tariff Provisions

3. Prior to 2012, Section 4.4.4 of MISO's GIP, addressing modifications to Interconnection Requests, provided as follows:

Extensions of less than three (3) cumulative years in the Commercial Operation Date of the Generating Facility to which the Interconnection Request relates are not [Material Modifications] and should be handled through construction sequencing.⁴

4. This provision allowed an Interconnection Customer, after entering the interconnection queue, to extend its Commercial Operation Date (COD) by up to three years without any risk of losing its queue position. The provision also allowed an Interconnection Customer to extend its COD beyond three years without taking a new place in the queue if MISO found that such additional extension would not adversely impact lower-queued customers, i.e., would not constitute a Material Modification.⁵

5. As part of MISO's 2012 queue reform efforts, the Commission accepted related revisions to Section 4.4.4 of MISO's GIP and Article 2.3.1 of MISO's *pro forma* GIA concerning changes to the CODs of Interconnection Requests.⁶ The Commission accepted the following revisions to Section 4.4.4 of the GIP:

⁴ This language matches the Commission's Large Generator Interconnection Procedures (LGIP) established in Order No. 2003. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008). MISO's GIP and the Order No. 2003 LGIP define Material Modification as those modifications that have a material impact on the cost or timing of any Interconnection Request with a later queue priority date.

⁵ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 120 FERC ¶ 61,293, at P 23 (2007).

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233, at P 223 (Queue Reform III Order), *order on reh'g*, 139 FERC ¶ 61,253, at P 120 (2012) (Queue Reform III Rehearing Order); *Midwest Indep. Transmission Sys. Operator, Inc.*,

Prior to entering the Definitive Planning Phase, extensions of less than three (3) cumulative years in the In-Service Date or Commercial Operation Date of the Generating Facility to which the Interconnection Request relates are not [Material Modifications] and should be handled through construction sequencing. After entering the Definitive Planning Phase any extension by Interconnection Customer to the In-Service Date or Commercial Operation Date of the Generating Facility shall be deemed a Material Modification except that the Transmission Provider will not unreasonably withhold approval of an Interconnection Customer's proposed change in the In-Service Date or Commercial Operation Date of the Generating Facility if that change is the result of either (a) a change in milestones by another party to the GIA or (b) a change in a higher-queued Interconnection Request, provided that in either case, these changes do not exceed three years beyond the original Commercial Operation Date or In-Service Date. A change to either of these dates that exceeds three years from the date in the original Interconnection Request is a Material Modification.

6. As a result of the revisions, after entering the interconnection queue in the Definitive Planning Phase (DPP), an Interconnection Customer modifying its COD would have to take a new queue position, except in two narrow circumstances, and even in those narrow circumstances, extensions in the COD could not exceed three years. MISO explained that the purpose of these changes was to provide all queued projects with certainty that only projects that are ready to proceed to commercial operation enter the DPP.⁷

7. On October 21, 2016, MISO proposed further revisions to Section 4.4.4 of the GIP to provide, among other things, that an interconnection study delay may also permit a COD extension:

~~Prior to entering the Definitive Planning Phase, extensions of less than three (3) cumulative years in the In-Service Date or Commercial Operation Date of the Generating Facility to which the Interconnection Request relates are not material and should be handled through construction sequencing. After entering the Definitive Planning Phase any extension by Interconnection Customer to the In-Service Date or Commercial Operation Date of the Generating Facility shall be deemed a Material Modification except that the Transmission Provider will not unreasonably withhold approval of an Interconnection Customer's proposed change in the In-Service Date or~~

137 FERC ¶ 61,188, at P 29 (2011), *order on compliance filing*, 139 FERC ¶ 61,197, at P 8 (2012).

⁷ Queue Reform III Order, 138 FERC ¶ 61,233 at P 222.

Commercial Operation Date of the Generating Facility if that change is the result of either (a) a change in milestones by another party to the GIA, ~~or~~ (b) a change in a higher-queued Interconnection Request, or (c) delays in the completion of the Definitive Planning Phase Studies, provided that in ~~either~~ any case, these changes do not exceed three years beyond the original Commercial Operation Date or In-Service Date and the expected In-Service Date of the Generating Facility is no later than the process window for the Transmission Provider's Definitive Planning Phase period, unless Interconnection Customer demonstrates that engineering, permitting and construction of the Generating Facility will take longer than the process window for the Transmission Provider's Definitive Planning Phase period. A change to either of these dates that exceeds three years from the date in the original Interconnection Request is a Material Modification.

8. The Commission accepted these revisions in a January 3, 2017 Order.⁸
9. In Docket No. ER12-56, the Commission also accepted the following revisions to Article 2.3.1 of MISO's *pro forma* GIA addressing termination of the GIA in the event of failure to achieve commercial operation:⁹

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

⁸ *Midcontinent Indep. Sys. Operator. Inc.*, 158 FERC ¶ 61,003 (2017).

⁹ *See supra* n.6.

Thus, as revised, Article 2.3.1 of the GIA effectively provides Interconnection Customers an ability to extend their COD by three years before MISO can seek to terminate a GIA.

II. Discussion

10. As a result of the revisions to the GIP and *pro forma* GIA enumerated above, there is a potential conflict between the two provisions. Specifically, an Interconnection Customer's ability to extend its COD up to three years without risk of termination under Article 2.3.1 of MISO's *pro forma* GIA conflicts with Section 4.4.4 of MISO's GIP which provides that any extension – apart from the narrow circumstances identified in that provision – is a Material Modification. While MISO's deficiency response in its 2012 queue reform proceeding claimed that the two provisions do not conflict because Section 4.4.4 applies to a project earlier in the process (i.e., pre-GIA) than Article 2.3.1, MISO's response does not adequately explain the distinction between the two provisions.¹⁰ Not only does Section 4.4.4 contemplate that a GIA has already been

¹⁰ In a deficiency letter in Docket No. ER12-309-000, Commission Staff asked whether there was any inconsistency between the revision to Section 4.4.4 of the GIP and Article 2.3.1 of the GIA which states that the GIA may be terminated if the Generating Facility fails to achieve commercial operation for three consecutive years following the COD. MISO responded that there was no conflict. MISO explained that the revisions to Section 4.4.4 of the GIP address changes that occur after a project enters the DPP. MISO stated that at this stage of the interconnection process, the timeline and cost of the facilities to be incorporated into the GIA are dependent on the COD of the Generating Facility. Thus, MISO explained, it is impossible to efficiently process the queue if that date is constantly changing, and it is therefore reasonable to require an Interconnection Customer to commit to that date when it proceeds to the DPP.

On the other hand, in regard to the revisions to Article 2.3.1, MISO explained that after entering into a GIA, the In-Service Date of Transmission Owner Interconnection Facilities and Network Upgrades are not allowed to change as a result of changes in the COD, each Generating Facility is required to fund the Transmission Owner Interconnection Facilities and Network Upgrades pursuant to the GIA, and thus there is no short term impact on other projects that have been studied as a result of extensions in the COD of up to three years. However, MISO noted, there is a longer term impact if interconnection capacity remains unused because additional incremental transmission upgrades may be required for subsequent generating facilities that would otherwise not be needed, and thus it is important to eliminate unused interconnection capacity in a GIA after three years. *Midwest Indep. Transmission Sys. Operator, Inc.*, Deficiency Response, Docket No. ER12-309-000 (filed Jan. 30, 2012).

executed,¹¹ but MISO has referenced Section 4.4.4 when it desires to terminate a GIA, citing Section 4.4.4 for the proposition of expressly precluding an extension of a COD beyond three years of the original COD.¹² Moreover, the permissive nature of MISO's right to seek to terminate a GIA for any extensions beyond three years of the COD is also at odds with Section 4.4.4's requirement that any extension that exceeds three years from the date in the original Interconnection Request is a Material Modification.

11. It appears that MISO's Tariff may be unjust, unreasonable, or unduly discriminatory or preferential because of inconsistencies between Section 4.4.4 of MISO's GIP and Article 2.3.1 of MISO's *pro forma* GIA. Accordingly, we institute a proceeding in Docket No. EL18-17-000, pursuant to section 206 of the FPA, to examine whether MISO should revise Article 2.3.1 of MISO's *pro forma* GIA and Section 4.4.4 of MISO's GIP to make them consistent with each other. Upon initial review, the concerns identified by the Commission might be addressed by revising MISO's Tariff to contain certain elements. Specifically, Section 4.4.4 of the GIP should be revised to reference Article 2.3.1 of the *pro forma* GIA and allow that once a GIA is executed or filed unexecuted, a three-year period from the COD should lapse before MISO seeks to terminate the GIA.¹³ Once that three-year period lapses, MISO must seek to terminate a

¹¹ Section 4.4.4 states that "Transmission Provider will not unreasonably withhold approval of an Interconnection Customer's proposed change in the In-Service Date or Commercial Operation Date of the Generating Facility if that change is the result of either (a) a change in milestones by another party to the GIA" This is also consistent with the Commission's discussion of Section 4.4.4 in the queue reform proceeding, in which the Commission stated that a successful change in COD under Section 4.4.4 would result in a modification of the COD in the appendices to the GIA. *See* Queue Reform III Rehearing Order, 139 FERC ¶ 61,253 at P 123.

¹² *See, e.g.*, MISO, Motion to Answer and Answer, Docket No. ER13-1074-000, at 6-7, filed Apr. 17, 2013 ("[B]ecause Ellerth cannot suspend its obligations under the G968 GIA absent a Force Majeure event, MISO cannot extend Ellerth's milestones unless Ellerth first cures its default and, even then, only within the bounds of the Tariff which limits the extension of a project's [COD] to three years." (citing Section 4.4.4 of the GIP)).

¹³ In Order No. 2003, the Commission approved LGIP Section 4.4.5 which provides that extensions of less than three cumulative years in the COD of the Generating Facility are not material and should be handled through construction sequencing. Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 177. In Order No. 2003-A, the Commission stated, "[W]e realize that permitting extensions for a cumulative period of three years places a burden on the Transmission Provider's expansion planning process, but as the Commission stated in Order No. 2003, these extensions in most cases are well

GIA, except in the limited circumstance that an Interconnection Request would be served by a contingent network upgrade with an in-service date that is farther out than the COD otherwise permitted by the Tariff.¹⁴ MISO may explain if it believes that other circumstances warrant a general exception to the requirement that MISO seek to terminate a GIA beyond three years from the original COD, and if so, should propose appropriate revisions to its GIP and/or *pro forma* GIA.

12. Similarly, Article 2.3.1 of the *pro forma* GIA should be revised to note the limited circumstance in which an interconnection customer may extend the COD in its GIA when it fails to timely reach commercial operation, i.e., an Interconnection Request that MISO has determined is served by a contingent network upgrade with an in-service date that is farther out than the COD otherwise permitted by the Tariff. If MISO believes that other circumstances warrant a general exception to the requirement that MISO seek to terminate a GIA beyond three years from the original COD, it also should include corresponding revisions to Article 2.3.1 of the *pro forma* GIA noting these other circumstances.

13. As described above, this section 206 proceeding aims to resolve inconsistencies in MISO's current GIP and *pro forma* GIA. We intend that the revisions required in response to this section 206 proceeding will eliminate ambiguity regarding the circumstances in which an interconnection customer is entitled to a COD extension beyond three years from the original COD, as well as MISO's obligation to seek to terminate a GIA in a not unduly discriminatory fashion. To the extent an interconnection customer believes relief from the COD deadline is appropriate, it may seek waiver of the applicable Tariff provision¹⁵ or submit a complaint pursuant to section 206 of the FPA.

14. We find that a paper hearing, as ordered below, is the appropriate procedure to resolve this matter. Any entity desiring to participate in the paper hearing must file a

within the scope of other unforeseen changes that affect the planning process.” Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 134.

¹⁴ See, e.g., *Southwest Power Pool, Inc.*, 147 FERC ¶ 61,201, at P 114 (2015) (finding that a transmission provider should not force a customer to use a COD that is earlier than the in-service date of the network upgrades that would permit the requested interconnection service).

¹⁵ The interconnection customer would be required to satisfy the Commission's standard four-part waiver test: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties. See, e.g., *New York Indep. Sys. Operator, Inc.*, 160 FERC ¶ 61,124, at P 22 (2017).

notice of intervention or timely motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017).

15. We will require MISO and other interested parties to file initial briefs no later than 30 days after the publication of notice in the *Federal Register* of the Commission's initiation of this section 206 proceeding in Docket No. EL18-17-000. Parties also may file reply briefs in response to parties' initial briefs within 21 days after the due date of initial briefs.

16. In cases where, as here, the Commission institutes a proceeding under section 206 of the FPA, the Commission must establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of the proceeding in the *Federal Register*, and no later than five months subsequent to that date.¹⁶ Consistent with Commission precedent,¹⁷ we will establish a refund effective date at the earliest date allowed, i.e., the date the notice of the initiation of the proceeding in Docket No. EL18-17-000 is published in the *Federal Register*. The Commission is also required by section 206 to indicate when it expects to issue a final order. We expect to issue a final order in this proceeding within six months of receiving the reply briefs, or June 18, 2018.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), the Commission hereby institutes a proceeding in Docket No. EL18-17-000, as discussed in the body of this order.

(B) MISO and other interested parties may file initial briefs no later than 30 days after the publication of notice in the *Federal Register* of the Commission's initiation of the section 206 proceeding in Docket No. EL18-17-000. Reply briefs may be filed no later than 21 days thereafter.

(C) Any interested person desiring to be heard in Docket No. No. EL18-17-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in

¹⁶ 16 U.S.C. § 824e(b) (2012).

¹⁷ See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge Elec. Light Co.*, 75 FERC ¶ 61,177, *clarified*, 76 FERC ¶ 61,020 (1996); *Canal Elec. Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2017)) within 21 days of the date of issuance of this order.

(D) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of a section 206 proceeding in Docket No. No. EL18-17-000.

(E) The refund effective date in Docket No. No. EL18-17-000 established pursuant to section 206 of the FPA shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (D) above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.