

161 FERC ¶ 61,077
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. ER16-471-001

ORDER DENYING REHEARING

(Issued October 19, 2017)

1. On March 4, 2016, the Commission accepted 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).¹ The Merricourt GIA addresses Merricourt's proposed 150 MW wind farm located in Dickey and McIntosh Counties, North Dakota (the Project). In this order, we deny Merricourt's request for rehearing of the March 4 Order.²

I. Background

2. In the March 4 Order, the Commission accepted MISO's notice of termination of the Merricourt GIA after Merricourt failed to meet its December 1, 2012 Commercial Operation Date (COD) for three years.³ The Commission stated that, "[w]hile Section 4.4.4 [of MISO's Generator Interconnection Procedures (GIP)] allows an extension of the COD, it does so only if the change is the result of (a) a change in milestones by another party to the GIA or (b) a change in a higher-queued

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,172 (2016) (March 4 Order).

² Merricourt April 1, 2016 Request for Rehearing (Rehearing Request).

³ March 4 Order, 154 FERC ¶ 61,172 at P 35. The COD in the Merricourt GIA is December 1, 2012. Merricourt states that on June 1, 2015, Merricourt requested a new COD of December 31, 2016.

interconnection request, and provided that in either case these changes do not exceed three years beyond the original COD.”⁴ Neither of these circumstances was present in the case.

II. Rehearing Request

3. In its April 1, 2016 request for rehearing, Merricourt argues that the Commission erred: (1) by relying on Section 4.4.4 of MISO’s GIP to accept the notice of termination; (2) by failing to address the applicability of Article 2.3.1 of Merricourt’s GIA as a basis to terminate the Merricourt GIA and by failing to render a decision based on the terms of Article 2.3.1; (3) by not finding MISO’s treatment of Merricourt to be unduly discriminatory; (4) by failing to apply any of the “factors” it has consistently applied in all GIA termination and extension cases; (5) by failing to find that the evidence shows the Project is not speculative, will not result in harm to lower-queued projects, and that Merricourt has shown progress towards developing its generating facility; and (6) by failing to render a public interest determination.

III. Discussion

A. Reliance on Section 4.4.4 of MISO’s GIP and Applicability of Article 2.3.1 of Merricourt’s GIA

4. We reject Merricourt’s argument that the Commission erred by relying on Section 4.4.4 of MISO’s GIP to accept the notice of termination.⁵ Section 4.4.4, effective at the time of the notice of termination, provides in relevant part:

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.

⁴ *Id.*

⁵ Rehearing Request at 11-20.

5. The Commission accepted this provision and other revisions to the GIP as part of MISO's queue reform proceeding in 2012, consistent with the overall goals of interconnection queue reform, i.e., discouraging speculative or unviable projects from entering the queue, getting projects that are not making progress towards commercial operation out of the queue, and helping viable projects achieve commercial operation as soon as possible.⁶ As to Section 4.4.4 specifically, the Commission found that "MISO's proposal to limit the types of changes permissible in the Definitive Planning Phase is consistent with the need to ensure that a project that enters the Definitive Planning Phase is 'definitive.'"⁷

6. To that end, Section 4.4.4 of MISO's GIP, effective at the time of the notice of termination, provides that *any* extension beyond the original COD is deemed to be a

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233, at P 66 (Queue Reform III Order), *order on reh'g*, 139 FERC ¶ 61,253 (2012).

⁷ Queue Reform III Order, 138 FERC ¶ 61,233 at P 223. We note that, since the acceptance of the revisions in MISO's 2012 queue reform proceeding, MISO has proposed additional revisions to Section 4.4.4 of the GIP which have been accepted by the Commission. *Midcontinent Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,003 (2017). The currently effective Section 4.4.4 provides:

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, (b) a change in a higher-queued Interconnection Request, or (c) delays in the completion of the Definitive Planning Phase Interconnection Studies, provided that in 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.

Material Modification unless very narrow circumstances are satisfied.⁸ In this case, Merricourt does not claim that either circumstance exists here. Thus, Merricourt's request to change its COD is expressly precluded by the terms of Section 4.4.4, as set forth in the March 4 Order.

7. In its rehearing request, Merricourt argues that a strict application of Section 4.4.4 of the GIP is at odds with Article 2.3.1 of the Merricourt GIA. Article 2.3.1 of the Merricourt GIA provides as follows:

This GIA may be terminated by Transmission Provider if the Generating Facility has ceased Commercial Operation for three (3) consecutive years, beginning with the last date of Commercial Operation for the Generating Facility, after giving Interconnection Customer ninety (90) Calendar Days advance written notice. The Generating Facility will not be deemed to have ceased Commercial Operation for purposes of this Article 2.3.1 if 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. Merricourt states that, "it cannot be the law that MISO has the discretionary right to not terminate a GIA and extend the COD three years beyond the original COD as Article 2.3.1 of the GIA provides and the Commission confirmed in *Mankato*, and at the same time 'a COD extension may not exceed three years beyond the original COD,' as the Commission rendered in the March 4 Order."⁹ Merricourt also argues that, if Section 4.4.4 provides an absolute requirement that a COD extension may not exceed

⁸ Article 1 of the Merricourt GIA defines "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." Article 1 of the GIA further specifies that the failure "to perform or observe any material term or condition" of the agreement shall constitute a breach. If a breach is not cured, or is incapable of being cured, Article 17.2 of the GIA provides that "the non-Breaching Party or Parties shall have the right to terminate this GIA by written notice to the Breaching Party at any time until cure occurs." MISO December 4, 2015 Filing at Exhibit 1 (containing the Merricourt GIA).

⁹ Rehearing Request at 15 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,180 (2015) (*Mankato*)).

three years beyond the original COD, then the exemption the Commission granted to Mankato is inconsistent with this determination.¹⁰

9. While it does not change our ultimate finding in this case, we agree with Merricourt on these points. In *Mankato*, MISO proposed to revise an existing GIA to reflect a change in COD from 2007 to 2018 for Phase II of a generation project which was not yet built.¹¹ The Commission found that MISO appropriately applied Article 2.3.1 of the GIA to allow extension of the COD of Phase II to June 1, 2013, even though the version of Article 2.3.1 in the Mankato GIA, like that in Merricourt's GIA, only addressed extensions of time for a generator that had ceased commercial operation. The Commission "disagree[d] that [Article] 2.3.1 must be interpreted to apply only where a project has gone into commercial operation and subsequently gone out of service [Article] 2.3.1 of the Original GIA grants the Transmission Provider a positive and *permissive* right to terminate an agreement when the project fails to achieve commercial operation three years after its COD."¹² The Commission also accepted the further extension of the COD to 2018 to coincide with completion of a Multi-Value Project.¹³

10. We now find that the Commission erred in *Mankato* when it stated that Article 2.3.1 should be interpreted to apply to projects that have not yet achieved commercial operation. Article 2.3.1 in both the Merricourt and Mankato GIAs provides a permissive right to seek termination for only a facility that "has *ceased* Commercial Operation." The provision notes that the "Generating Facility will not be deemed to have ceased Commercial Operation for purposes of this Article 2.3.1 if Interconnection Customer can document that it has taken other significant steps to *maintain or restore* operational readiness of the Generating Facility." The plain language of the provision – specifically the reference to a facility that "has ceased Commercial Operation" and "significant steps to maintain or restore operational readiness" – demonstrates that Article 2.3.1 was not intended to apply to a facility that has not yet reached commercial operation. Thus, Article 2.3.1 in the Merricourt GIA does not apply in the circumstances of this case

¹⁰ *Id.* at 19. Merricourt argues that the Commission erred by finding that Merricourt is unlike Mankato for Section 4.4.4 purposes. *Id.* at 17 (citing March 4 Order, 154 FERC ¶ 61,172 at P 36).

¹¹ *Mankato*, 150 FERC ¶ 61,180 at P 2.

¹² *Id.* P 19.

¹³ *Id.* P 20 (citing *Southwest Power Pool, Inc.*, 147 FERC ¶ 61,201, at P 114 (2014)).

where the Project has not yet achieved commercial operation. Given this determination, it is thus unnecessary to apply the “documented significant steps” provision.¹⁴

11. Merricourt argues that the Commission’s statement in the March 4 Order that MISO “followed its process to restudy the [Mankato] project, taking into account the queue at the time,” is not relevant for Section 4.4.4 and COD extension purposes.¹⁵ We agree. While MISO’s restudy determined that the Mankato GIA would require a contingent network upgrade, that determination alone did not permit extension of the Mankato GIA until 2018 because MISO’s Tariff does not provide for such exception under Section 4.4.4.¹⁶ Thus, the Commission erred in *Mankato* when it permitted a COD extension until 2018 to accommodate a contingent network upgrade. However, in this case, we find that the Commission appropriately relied on the explicit language of Section 4.4.4 of the GIP effective at the time of the notice of termination in making its determination.¹⁷

¹⁴ Rehearing Request at 45-46.

¹⁵ *Id.* at 20 (citing March 4 Order, 154 FERC ¶ 61,172 at P 36).

¹⁶ We also note that, in contrast to the statement in the March 4 Order, Mankato was, in fact, subject to Section 4.4.4 accepted in the Queue Reform III Order just as Merricourt is subject to that same provision. *See Mankato*, 150 FERC ¶ 61,180 at P 22 (“[B]ecause MISO has provided notice of its restudy and completed those studies, this project is now considered an ‘outstanding request,’ is now subject to Queue Reform Order III, and is required to transition to the revised GIP.”).

¹⁷ We agree with Merricourt that Mankato notified MISO of its desire to proceed with Phase II of its generation project prior to the end of the Article 2.3.1 period (June 1, 2013) rather than the three year suspension period (June 1, 2010), as noted in the March 4 Order. Rehearing Request at 18. Specifically, there were two distinct three year periods involved in Mankato. The three-year period from June 1, 2007 through June 1, 2010 was the Phase II suspension period, with a COD set at June 1, 2010. The second three year period was the Article 2.3.1 period running from June 2, 2010 to June 1, 2013. In the March 4 Order, the Commission agreed “with MISO’s reasoning in its answer . . . that Section 4.4.4 of the GIP did not apply to Mankato because Mankato notified MISO of its desire to proceed prior to the end of the three-year suspension period . . .” March 4 Order, 154 FERC ¶ 61,172 at P 36. We now clarify that it was the Article 2.3.1 period, rather than the suspension period, in which Mankato notified MISO of its desire to proceed with Phase II of its generation project. However, this clarification does not alter

the ultimate conclusion in this case that Section 4.4.4 of the GIP should be applied to

12. In contrast to Merricourt's claims, this decision is consistent with *Ellerth Wind*.¹⁸ In *Ellerth Wind*, the Commission found "no record support that a new viable [COD] was proposed or that Ellerth would qualify to change its [COD] or In-Service Date even if a viable [COD] had been proposed, as [Section 4.4.4 of] the GIP only allows changes in the [COD] or In-Service Date of a GIA under narrow circumstances which are not present here."¹⁹ While it is true that *Ellerth Wind* listed certain equitable factors that the Commission has considered in the past when examining a requested GIA termination or extension (i.e., whether the extension would harm generators lower in the queue and any uncertainty that speculative projects may present to other projects in the queue),²⁰ *Ellerth Wind* is consistent with the outcome of Merricourt. In both cases, the Commission found that Section 4.4.4 precluded a COD extension.

13. Finally, we note that Article 2.3.1 of MISO's currently effective *pro forma* GIA provides a permissive right for MISO to seek to terminate a GIA for both facilities that have failed to achieve commercial operation and those that have ceased commercial operation.²¹ Under the currently effective Article 2.3.1, MISO may terminate an

Merricourt.

¹⁸ Merricourt argues that this case is not "similar to *Ellerth Wind*" for Section 4.4.4 purposes because, according to Merricourt, the Commission did not accept the notice of termination in *Ellerth Wind* relying on Section 4.4.4. Rehearing Request at 15-16 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114 (*Ellerth Wind*), *order on reh'g*, 145 FERC ¶ 61,038 (2013)).

¹⁹ *Ellerth Wind*, 143 FERC ¶ 61,114 at P 26.

²⁰ *Id.* P 27.

²¹ MISO's current *pro forma* GIA, Article 2.3.1, provides:

This GIA may be terminated by Interconnection Customer after giving 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 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

interconnection agreement after three consecutive years have lapsed from the COD. It appears that MISO's currently effective Article 2.3.1 in its *pro forma* GIA may conflict with currently effective Section 4.4.4 of the GIP. Specifically, an interconnection customer's ability to extend its COD up to three years under Article 2.3.1 of MISO's *pro forma* GIA, without risk of termination, may conflict 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.²² Moreover, MISO's permissive right in Article 2.3.1 of its *pro forma* GIA to seek to terminate a GIA where there is an extension request *beyond* three years may further conflict with Section 4.4.4 of MISO's GIP, which provides that any extension that exceeds three years from the date in the original Interconnection Request is a Material Modification. In an order being issued concurrently, the Commission is instituting a proceeding under section 206 of the Federal Power Act to address these potential conflicts, among other things.²³

B. Unduly Discriminatory Treatment of Merricourt

14. Merricourt argues that the Commission erred in the March 4 Order by not finding MISO's treatment of Merricourt is unduly discriminatory, by not finding that MISO provided a preference to *Mankato* and *South Fork* not provided to Merricourt, and by not finding MISO abused its discretion.²⁴ Specifically, Merricourt argues that it is similarly situated with Mankato because Merricourt and Mankato contain the same Article 2.3.1 in their respective GIAs and Mankato received a COD extension and Merricourt did not.²⁵ As noted above, we acknowledge that in *Mankato*, MISO should not have applied Article 2.3.1 and the Commission should not have allowed such application to the termination of a GIA for a facility that had not yet achieved commercial operation.

ceased Commercial Operation for purposes of this Article 2.3.1 if 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.

²² We note that MISO's currently effective GIP provides three narrow circumstances under which a COD extension may be permitted. *See supra* note 7.

²³ *Midcontinent Indep. Sys. Operator*, 161 FERC ¶ 61,076 (2017).

²⁴ Rehearing Request at 20.

²⁵ *Id.* at 21.

15. We disagree that the *South Fork* case,²⁶ in which South Fork failed to build its generating facility three years after the COD, and MISO filed to terminate but then withdrew that termination, shows that the Commission or MISO has allowed discriminatory and preferential application of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).²⁷ The Commission issued no orders in the *South Fork* proceeding and therefore made no merits determination which would serve as precedent to be applied to Merricourt. MISO's notice of withdrawal in *South Fork* stated that, "As a part of the Commission's Dispute Resolution process, MISO and South Fork have come to an amicable resolution. As a part of that resolution, MISO committed to withdraw its Notice of Termination."²⁸ MISO's withdrawal of its notice of termination following a confidential resolution with South Fork distinguishes that case from the instant proceeding and does not provide sufficient information to determine whether MISO acted in an unduly discriminatory manner in that case.

16. Finally, Merricourt states that Section 4.4.4 of MISO's GIP does not justify the discriminatory and preferential outcome rendered by the March 4 Order.²⁹ Merricourt argues that if Mankato was exempt from Section 4.4.4 then Merricourt was also exempt. Again, we acknowledge that the outcome of *Mankato* was inconsistent with Section 4.4.4 of the GIP, and we will not in this case compound the prior misapplication of that provision. As noted in the March 4 Order, Section 4.4.4 of the GIP does not authorize a COD extension beyond three years.³⁰

C. Factors Considered in Past Termination and Extension Cases

17. Merricourt argues that the Commission erred by failing to apply any of the "factors" it has consistently applied in all GIA termination and extension cases. Specifically, Merricourt states that in deciding whether a milestone or COD extension or

²⁶ *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER15-954-000 (*South Fork*) (proceeding involving MISO's January 30, 2015 filing to terminate the South Fork GIA).

²⁷ Rehearing Request at 12, 27-31.

²⁸ Docket No. ER15-954-000, MISO Motion to Withdraw Filing at 1 (filed April 29, 2015).

²⁹ Rehearing Request at 31-33.

³⁰ March 4 Order, 154 FERC ¶ 61,172 at P 36.

GIA termination is just and reasonable, not unduly discriminatory or preferential and consistent with the public interest, the Commission has stated:

When considering whether to extend milestones or 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.³¹

We recognize that the Commission has cited this standard in orders addressing MISO's proposal to terminate individual GIAs both prior to, and after, the approval of MISO's 2012 generator interconnection queue reform.³²

18. As part of this queue reform, however, the Commission accepted MISO's proposal to significantly limit interconnection customers' authority to extend their COD without requiring that the customer submit a new interconnection request.³³ As noted above, the Commission found that MISO's proposal, with certain modifications, was "consistent with the need to ensure that a project that enters the Definitive Planning Phase is 'definitive.'"³⁴ The Commission also concluded that MISO's broader queue reforms were intended to meet the Commission's goals of "discouraging speculative or unviable projects from entering the queue [and] getting projects that are not making progress towards commercial operation out of the queue."³⁵ The Commission therefore recognized the importance of clarity and certainty regarding the circumstances in which an interconnection customer may extend its COD as a matter of right.

19. Since the revised GIP was accepted in Queue Reform III Order, with the exception of *Mankato*, the Commission has applied Section 4.4.4 to limit COD extensions in MISO

³¹ Rehearing Request at 33 (citing *Ellerth Wind*, 143 FERC ¶ 61,114 at P 23).

³² See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008, at P 25 (2011), *order on reh'g and clarification*, 141 FERC ¶ 61,097 (2012) (*Lakeswind*); *Ellerth Wind*, 143 FERC ¶ 61,114 at P 23.

³³ In particular, and as relevant here, revised GIP Section 4.4.4 deemed changes to a project's COD after the project entered the DPP to be a Material Modification to the project's interconnection request except in two limited circumstances.

³⁴ Queue Reform III Order, 138 FERC ¶ 61,233 at P 223.

³⁵ *Id.* P 30.

termination cases.³⁶ The Commission nonetheless continued to consider factors beyond the plain language of the MISO GIP and relevant GIA in determining whether to grant a requested COD extension.³⁷ On further reflection, we recognize that this introduced uncertainty regarding how the Commission would review requests for COD extensions in light of GIP Section 4.4.4. We therefore conclude that adhering to the terms of the MISO Tariff provides an appropriate framework for considering an interconnection customer's request to extend its COD.³⁸ Given this finding, we decline to review on rehearing whether Merricourt has made consistent progress towards developing its generating facility or whether the request for COD extension will not harm lower queued projects, as Merricourt suggests.³⁹ Rather, we find that the plain terms of Section 4.4.4 of the GIP do not authorize Merricourt's COD extension in this case, consistent with the determination in the March 4 Order.

³⁶ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198, at P 30 (2014) (“Second, as to the adjustment of milestones, we find no record to support that that [sic] New Era would qualify to change its [COD], as the GIP only allows changes in the [COD] under narrow circumstances that are not present here.”); *Ellerth Wind*, 143 FERC ¶ 61,114 at P 26 (“Second, as to adjustment of milestones, we find no record support that a new viable [COD] was proposed or that Ellerth would qualify to change its Commercial Operation Date or In-Service Date even if a viable [COD] had been proposed, as the GIP only allows changes in the [COD] or In-Service Date of a GIA under narrow circumstances which are not present here.”).

³⁷ As previously articulated by the Commission:

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.

E.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114, at P 23 (2013) (citations omitted).

³⁸ As noted in the companion order issued in Docket No. EL18-17-000, to the extent an interconnection customer believes relief from a COD deadline is appropriate, it may seek waiver of the applicable provision of the Tariff or submit a complaint pursuant to section 206 of the Federal Power Act. *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC 61,076 (2017).

³⁹ Rehearing Request at 37-41.

D. Public Interest Finding

20. On rehearing, Merricourt argues that the Commission erred by failing to render a public interest determination and by failing to find that the notice of termination is not in the public interest. Specifically, Merricourt states 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, *or if it is consistent with the public interest.*”⁴⁰ Merricourt argues that it provided many reasons why the proposed notice of termination is not in the public interest, and the Commission provided no evaluation of any of those reasons in the March 4 Order.

21. Consistent with our determination above, we find that the public interest is served in this case by accepting MISO’s notice of termination. Section 4.4.4 of MISO’s GIP does not authorize the COD extension that Merricourt seeks. This provision is intended to balance the many interests which are at stake – those of MISO, interconnection customers, and transmission owners – in determining whether a project should receive a COD extension or submit a new interconnection request. Section 4.4.4 was accepted in the queue reform proceeding as a means to achieve the overall goals of interconnection queue reform, and we find its application here to be consistent with the public interest.

The Commission orders:

Merricourt’s request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner LaFleur is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁰ *Id.* at 46-49.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.

Docket No. ER16-471-001

(Issued October 19, 2017)

LaFLEUR, Commissioner *concurring*:

Today's order denies rehearing of the Commission's March 4, 2016 order that accepted a notice of termination filed by the Midcontinent Independent System Operator, Inc. (MISO) for 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.¹ I believe that today's rehearing order, as well as a companion order issued concurrently in Docket No. EL18-17-000,² provide a reasonable resolution to the outstanding issues identified in this proceeding, and I therefore concur.

My earlier dissent in this proceeding was driven by two related concerns: (1) that the Commission was unnecessarily muddling its precedent regarding how it reviews requests for GIA commercial operation date (COD) extensions; and (2) in so doing, it failed to provide relief to Merricourt that was warranted by the record. On the first issue, today's rehearing order resolves the ambiguity in the March 4 Order regarding the Commission's analysis that supported its decision. Along with the directives in the GIP Clarification Order, these orders will provide needed clarity to MISO and interconnection customers regarding their respective obligations going forward.

Critically, the Commission also confirms in the GIP Clarification Order that, if an interconnection customer believes relief from its COD deadline is appropriate, it may seek waiver of the applicable tariff provisions, which will allow the Commission to provide relief in individual cases if justified by the record. This backstop authority is necessary to ensure that the strict application of bright line rules does not inadvertently result in an unjust and unreasonable outcome for a particular project. I believe that the clarity required in MISO's generator interconnection procedures and *pro forma* GIA, coupled with the Commission's authority to consider relief in individual cases, strike the

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,172 (2016) (March 4 Order).

² *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,076 (2017) (GIP Clarification Order).

right balance by ensuring MISO's ability to process its queue while also protecting against the unjustified termination of a project's GIA.

Finally, I concur in the decision to deny Merricourt's requested relief at this time. While I would have granted that relief in March 2016, it is now over a year and a half later, past even the September 30, 2017 COD extension date sought by Merricourt. I do not see a basis to grant rehearing at this point.

Accordingly, I respectfully concur.

Cheryl A. LaFleur
Commissioner