

163 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Midcontinent Independent System
Operator, Inc.

Docket No. EL18-17-000

ORDER ON PAPER HEARING

(Issued June 21, 2018)

1. On October 19, 2017, the Commission instituted a proceeding, in Docket No. EL18-17-000, pursuant to section 206 of the Federal Power Act (FPA)¹ (paper hearing) to examine certain provisions in Midcontinent Independent System Operator, Inc.'s (MISO) Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff) addressing the termination of generator interconnection agreements (GIA).² In this order, we find that MISO's Tariff is unjust and unreasonable and we accept MISO's proposal made in the paper hearing proceeding to revise certain termination provisions in MISO's *pro forma* GIA and Generator Interconnection Procedures (GIP), subject to modification, as explained more fully below.

I. Background

2. Concurrent with the October 19 Order, the Commission denied rehearing of a March 4, 2016 order accepting MISO's notice of termination of the GIA among enXco Development Corporation (subsequently assigned to Merricourt Power Partners, LLC (Merricourt)), Montana-Dakota Utilities Company, and MISO (Merricourt GIA).³ In affirming its acceptance of the termination of the Merricourt GIA in the Termination Rehearing Order, the Commission also stated that it appeared that certain interconnection

¹ 16 U.S.C. § 824e (2012).

² *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,076 (2017) (October 19 Order).

³ *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,077 (2017) (Termination Rehearing Order).

termination provisions in MISO's Tariff may conflict. To address these potential conflicts, the Commission instituted the instant section 206 paper hearing proceeding in the October 19 Order.⁴ In the October 19 Order, the Commission found 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. The currently effective Section 4.4.4 of MISO's GIP and Article 2.3.1 of MISO's *pro forma* GIA provide as follows:

MISO GIP Section 4.4.4

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.

MISO GIA Article 2.3.1

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

⁴ Termination Rehearing Order, 161 FERC ¶ 61,077 at P 13.

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 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.

3. In the October 19 Order, the Commission determined that a potential conflict existed between the two provisions.⁵ The Commission explained that an interconnection customer's ability to extend its commercial operation date (COD)⁶ by up to three years without risk of MISO seeking termination under Article 2.3.1 of MISO's *pro forma* GIA conflicted with Section 4.4.4 of MISO's GIP, which provided that any extension to the COD – apart from the narrow circumstances identified in that provision – was a material modification (i.e., a significant change to an interconnection request rendering it withdrawn from the interconnection queue).⁷ In a deficiency response in its 2012 queue reform proceeding, MISO claimed that the two provisions did not conflict because Section 4.4.4 of the GIP applied before the execution of a GIA, while Article 2.3.1 of the *pro forma* GIA applied after the execution of a GIA. In the October 19 Order, however, the Commission found that MISO's response did not adequately explain the distinction between the two provisions and was also inconsistent with MISO's subsequent termination actions. Moreover, the Commission explained that the permissive nature of MISO's right to seek to terminate a GIA pursuant to Article 2.3.1 of the *pro forma* GIA for any extensions beyond three years of the COD was also at odds with Section 4.4.4's

⁵ October 19 Order, 161 FERC ¶ 61,076 at P 10. The history of the applicable Tariff provisions is discussed in the October 19 Order. *Id.* PP 3-9.

⁶ Per MISO's Tariff, the "Commercial Operation Date (COD) of a unit shall mean the date on which the Generating Facility commences Commercial Operation as agreed by the Parties pursuant to Appendix E to the Generator Interconnection Agreement." Additionally, the "In-Service Date (ISD) shall mean the date upon which Interconnection Customer reasonably expects it will be ready to begin use of the Transmission Owner's Interconnection Facilities to obtain back feed power." MISO Tariff, Attachment X, Section 1.

⁷ Further, Section 4.4.4 provides that in any event, all extensions beyond three years are material modifications.

requirement that any extension that exceeds three years from the date in the original interconnection request is a material modification.⁸

4. Accordingly, the Commission instituted the instant section 206 proceeding to examine whether MISO should revise Article 2.3.1 of its *pro forma* GIA and Section 4.4.4 of its GIP to build consistency between the provisions. The Commission stated that it intended that the revisions required in response to the 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.”⁹

5. Specifically, the Commission suggested that 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. The Commission stated that once that three-year period lapses, MISO *must* seek to terminate a 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. The Commission stated that 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.¹⁰

6. Similarly, the Commission suggested that 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 failed 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 beyond the COD otherwise permitted by the Tariff.¹¹ The Commission added that, if MISO believed that other circumstances warranted a general exception to the requirement that MISO seek to terminate a GIA beyond three years from the original COD, it should include corresponding revisions to Article 2.3.1 of the *pro forma* GIA noting these circumstances.¹² Additionally, the Commission stated

⁸ October 19 Order, 161 FERC ¶ 61,076 at P 10.

⁹ *Id.* P 13.

¹⁰ *Id.* P 11.

¹¹ *Id.* P 12.

¹² *Id.*

that to the extent an interconnection customer believed relief from the COD deadline was appropriate, it could seek waiver of the applicable Tariff provision or submit a complaint pursuant to section 206 of the FPA.¹³

II. Notice of Paper Hearing and Interventions

7. Notice of the initiation of the paper hearing was published in the *Federal Register*, 82 Fed. Reg. 49,606 (2017), with interventions due on or before November 9, 2017. Timely motions to intervene were filed by: Apex Clean Energy Management, LLC; MidAmerican Energy Company; Consumers Energy Company; EDF Renewable Energy, Inc. (EDF); E.ON Climate & Renewables North America, LLC (E.ON); MISO Transmission Owners;¹⁴ and jointly by Invenergy Wind Development North America LLC, Invenergy Solar Development North America LLC, Invenergy Thermal Development LLC, and Invenergy Storage Development LLC.

8. On November 14, 2017, MISO filed a motion to intervene out-of-time. On November 15, 2017, GenOn Energy Management, LLC and NRG Power Marketing LLC jointly filed a motion to intervene out-of-time. On November 17, 2017, ALLETE, Inc. filed a motion to intervene. On November 21, 2017, NextEra Energy Resources, LLC

¹³ *Id.* P 13.

¹⁴ MISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company and Ameren Transmission Company of Illinois; American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Cooperative Energy; Dairyland Power Cooperative; Duke Energy Business Services, LLC for Duke Energy Indiana, LLC; East Texas Electric Cooperative; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, 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); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power Inc.; 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.

filed a motion to intervene out-of-time. On November 27, 2017, EDP Renewables North America LLC filed a motion to intervene out-of-time.

III. Paper Hearing

9. Initial briefs were filed on November 27, 2017 by MISO and jointly by EDF and E.ON. Reply briefs were filed on December 18, 2017 by MISO and jointly by EDF and E.ON.

A. Initial Briefs

10. With regard to exceptions to the requirement to seek to terminate a GIA for any extension beyond three years of the COD, MISO proposes to revise Section 4.4.4 of the GIP “in line with the Commission’s preliminary findings in the October 19 Order.”¹⁵ MISO states that, at this time, there are no circumstances outside of those it proposes (i.e., relating to contingent network upgrades) that warrant another general exception to the requirement that MISO terminate a GIA beyond three years from the original COD.¹⁶ MISO also proposes to revise Section 4.4.4 of the GIP to make clear that a permissible extension should apply to both the in-service date and the COD.¹⁷

11. MISO’s proposed revisions to GIP Section 4.4.4 are as follows:

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, or (d) 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. Where such exceptions apply, extensions to the Commercial Operation Date or In-Service Date shall provided that in any case, these changes do not exceed three years beyond the original

¹⁵ MISO Initial Brief at 11.

¹⁶ *Id.* at 12 n.50.

¹⁷ *Id.*

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. At the completion of the Definitive Planning Phase, the Commercial Operation Date shall be set forth in a GIA. Once that GIA is executed or filed unexecuted, consistent with Article 2.3.1 of the GIA, the three-year extension period provided in this Section 4.4.4 must lapse before Transmission Provider may seek to terminate the GIA for failure to achieve Commercial Operation by the Commercial Operation Date. Notwithstanding the foregoing, in the limited circumstance that the Interconnection Request is served by a contingent Network Upgrade with an in-service date that is farther out than the Commercial Operation Date permitted under this Section 4.4.4, Transmission Provider may only terminate the GIA for failure to achieve Commercial Operation by that later in-service date of the contingent Network Upgrade.

12. Regarding revisions to Article 2.3.1 of its *pro forma* GIA, MISO proposes "language [that] restates almost verbatim the Commission's recommended revision" to go toward the end of Article 2.3.1.¹⁸ MISO's proposed revisions to Article 2.3.1 are as follows:

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~~ by the Commercial Operation Date established in accordance with Section 4.4.4 of Attachment X, including any extension provided thereunder, 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~~ by the Commercial Operation Date established in accordance with Section 4.4.4 of Attachment X, including any extension provided thereunder,

¹⁸ *Id.* at 13.

Transmission Provider may only terminate that portion of the GIA. Notwithstanding the foregoing, in the limited circumstance that the Interconnection Request is served by a contingent Network Upgrade with an in-service date that is farther out than the Commercial Operation Date permitted under Section 4.4.4 of Attachment X, Transmission Provider may only terminate this GIA for failure to achieve Commercial Operation by that later inservice date of the contingent Network Upgrade. 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.

13. With regard to ensuring consistency between Section 4.4.4. of the GIP and Article 2.3.1 of the *pro forma* GIA on allowing extensions of up to three years from the COD before MISO must seek to terminate a GIA, MISO proposes, as indicated in the above proposed revisions, to revise certain provisions within Article 2.3.1 of its *pro forma* GIA to explicitly reference Section 4.4.4 of the GIP. According to MISO, by expressly referencing Section 4.4.4 of the GIP, these revisions make clear that the COD is to be established in accordance with Section 4.4.4. Further, MISO states that these proposed revisions also remove any ambiguity as to which Tariff provision determines the COD and any permissible three-year extension beyond the COD, thereby providing greater certainty.¹⁹

14. EDF and E.ON state that Section 4.4.4 of the GIP and Article 2.3.1 of the *pro forma* GIA are imprecise, and it is unclear which provision applies after a GIA becomes effective. They argue that Section 4.4.4 of the GIP should apply only to the Definitive Planning Phase, i.e., from submission of an interconnection request until a GIA becomes effective. EDF and E.ON argue that once a GIA becomes effective, only Article 2.3.1 of the *pro forma* GIA should apply. Thus, under this approach, MISO would terminate an interconnection request pursuant to Section 4.4.4 of the GIP during the Definitive Planning Phase, and MISO would terminate a GIA pursuant to Article 2.3.1 of the *pro forma* GIA once there is an effective GIA.²⁰

15. EDF and E.ON propose three revisions. First, they propose to remove the phrase “a change in milestones by another party to the GIA” from the GIP – as a circumstance that would allow an extension of the in-service date or COD so long as the extension is no longer than three years from the in-service date or COD listed in the interconnection

¹⁹ *Id.* at 14.

²⁰ EDF and E.ON Initial Brief at 4.

request – and add it to MISO’s *pro forma* GIA. With that change, EDF and E.ON explain that Section 4.4.4 of the GIP would only address events occurring during the Definitive Planning Phase and thus would remove any perceived inconsistency and ambiguity. Further, EDF and E.ON state that the in-service date/COD in a GIA could be extended if a party to the GIA, other than the interconnection customer, changes milestones that impact the in-service date/COD. EDF and E.ON argue that it is just and reasonable to allow for an in-service date/COD extension if those dates are impacted by events beyond the interconnection customer’s control and the interconnection customer is not the cause.²¹ EDF and E.ON argue that their proposed revision is cleaner than the Commission’s suggestion to revise Section 4.4.4 of the GIP to reference Article 2.3.1 of the *pro forma* GIA, and they do not support the Commission’s suggestion.²²

16. Second, EDF and E.ON propose the addition of objective criteria to Article 2.3.1 of the *pro forma* GIA to provide guidance regarding extensions of the GIA beyond three years of the original COD. As part of these criteria, EDF and E.ON propose requiring that before MISO terminates a GIA, MISO must confirm that allowing a GIA extension will result in harm to lower-queued projects in the queue. Where MISO determines that lower-queued projects will be harmed, EDF and E.ON also propose that an interconnection customer be given the opportunity to demonstrate that its generating facility and GIA are still commercially viable under objective criteria that MISO would review before the interconnection customer’s GIA is terminated, in order to remove subjectivity and guard against discrimination and non-transparency in MISO’s termination decisions.²³ EDF and E.ON argue that the Commission has approved the use of commercial viability criteria in the California Independent System Operator’s (CAISO) interconnection process.²⁴ In addition, EDF and E.ON argue that the existence of a contingent network upgrade should not be the sole circumstance for which MISO permits COD extensions beyond three years of the original COD. They argue that this is too limiting and does not reflect all legitimate circumstances that a party to a GIA could encounter, nor all the conditions that support a COD extension. EDF and E.ON contend that no matter the circumstance, if there is no material modification, then a COD extension should be allowed.²⁵

²¹ *Id.* at 5.

²² *Id.* at 5-6.

²³ *Id.* at 6-8.

²⁴ *Id.* at 8.

²⁵ *Id.* at 9-10.

17. Third, EDF and E.ON propose revising Article 2.3.1 of the *pro forma* GIA to provide that MISO will permit a COD extension beyond three years of the original COD if the generating facility has completed specific construction milestones demonstrating that the generating facility is not speculative in nature.²⁶ Consistent with their arguments above, EDF and E.ON propose a new paragraph for the end of current Article 2.3.1 of the *pro forma* GIA.²⁷

B. Reply Briefs

18. EDF and E.ON assert that their proposed Tariff revisions will result in greater clarity than the revisions proposed by MISO. EDF and E.ON argue that MISO provided no justification for its revisions and merely adopted suggestions made by the Commission in the October 19 Order.²⁸ EDF and E.ON emphasize that, under MISO's proposal, the phrase "a change in milestones by another party to the GIA" in Section 4.4.4 of the GIP would remain, thus retaining ambiguity between the GIP and *pro forma* GIA.

19. EDF and E.ON oppose MISO's proposed addition of the following language within Section 4.4.4 of the GIP: "Once that GIA is executed or filed unexecuted, consistent with Article 2.3.1 of the GIA, the three-year extension period provided in this Section 4.4.4 must lapse before Transmission Provider may seek to terminate the

²⁶ *Id.* at 10.

²⁷ EDF and E.ON's proposed addition to Article 2.3.1 is as follows (see EDF and E.ON Initial Brief at 13):

(b) 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, Transmission Provider shall allow a Commercial Operation Date extension if it would not result in Material Modification. MISO shall undertake a study to make this determination when requested by the Interconnection Customer. If Transmission Provider determines there would be a Material Modification, Interconnection Customer must satisfy and maintain the Commercial Viability Criteria in Transmission Provider's Tariff in order to extend the Commercial Operation Date. Notwithstanding the foregoing, if a party to this GIA, other than the Interconnection Customer, changes a milestone that impacts achieving the Commercial Operation Date, the Commercial Operation Date shall be reset to accommodate the change in milestone, with the three (3) consecutive years following the Commercial Operation Date running from that new Commercial Operation Date.

²⁸ EDF and E.ON Reply Brief at 1-2.

GIA for failure to achieve Commercial Operation by the Commercial Operation Date.”²⁹ EDF and E.ON argue that this language “add[s] to the confusion” by including further references to Article 2.3.1 of the *pro forma* GIA within Section 4.4.4 of the GIP.³⁰ Moreover, EDF and E.ON argue that MISO’s proposed language can be interpreted to mean that the right to terminate under Article 2.3.1 of the *pro forma* GIA is linked to whether the three-year extension period articulated in Section 4.4.4 of the GIP has lapsed. Yet, EDF and E.ON contend, Section 4.4.4 does not provide for termination or withdrawal from MISO’s queue. EDF and E.ON urge the Commission to avoid conflating MISO’s GIP with its *pro forma* GIA.³¹

20. EDF and E.ON oppose listing the contingent network upgrade circumstance as the sole exception under which MISO will permit extensions beyond three years of the COD, arguing that MISO has not explained why a single exception is appropriate. They contend that the Commission’s suggested exception in the October 19 Order was not tantamount to a finding that this exception was the sole just and reasonable exception. EDF and E.ON reiterate that if a COD extension does not impact any other interconnection request, there is no harm, and thus, no reason to deny a request to extend a COD beyond three years of the original COD. Further, E.ON and EDF reiterate that an interconnection customer should have the opportunity to demonstrate that its generating facility and GIA remain commercially viable. EDF and E.ON assert that the instant paper hearing provides the ideal forum to determine what criteria MISO should apply when evaluating whether to terminate a GIA.³²

21. Finally, EDF and E.ON seek clarification regarding the implications of adding the contingent network upgrade exception, or any broader exception, to Section 4.4.4 of the GIP and Article 2.3.1 of the *pro forma* GIA. EDF and E.ON contend that while MISO’s proposed revision to Article 2.3.1 makes clear that a GIA will not be terminated if the exception applies, Section 4.4.4 has no comparable statement. EDF and E.ON assert that Section 4.4.4 should provide that, if such an exception occurs, it will not result in a material modification.³³

²⁹ *Id.* at 3-5.

³⁰ *Id.* at 3.

³¹ *Id.*

³² *Id.* at 5.

³³ *Id.* at 7.

22. MISO argues that EDF and E.ON's proposed revisions reflect a misunderstanding of the purpose of Section 4.4.4 of the GIP and are contrary to the Commission's objectives set forth in the October 19 Order. MISO argues that EDF and E.ON's proposed revisions go beyond what the Commission required, whereas its revisions address each of the Commission's concerns and eliminate the ambiguity identified by the Commission.³⁴

23. MISO argues that EDF and E.ON's additional revisions to Article 2.3.1 of the *pro forma* GIA would increase ambiguity regarding COD extensions rather than eliminate it. For example, MISO criticizes their proposal to add the phrase "if a party to this GIA, other than the Interconnection Customer, changes a milestone that impacts achieving the [COD], the [COD] shall be reset to accommodate the change in milestone, with the three (3) consecutive years following the [COD] running from that new [COD]." MISO argues that this change would make the COD nebulous and thus would increase ambiguity and undermine commercial certainty for all parties to the GIA.³⁵

24. Regarding EDF and E.ON's position that no matter the circumstance, if there is no material modification, then a COD extension should be allowed, MISO contends that EDF and E.ON's proposed change could push back the COD in perpetuity or at least until some unknown date.³⁶ Regarding EDF and E.ON's proposal to allow for a COD extension in a GIA if the generating facility has completed specific construction milestones, MISO argues that this potentially creates an open-ended COD. MISO contends that nothing would prevent an interconnection customer from subsequently revising its documentation, including its timeline, and forcing the COD to adjust to accommodate the revised construction timeline.³⁷ MISO reiterates that there are no other circumstances that warrant another general exception to the requirement that MISO terminate a GIA after three years from the original COD have lapsed, and that is why it did not propose any additional exceptions.³⁸

25. Further, MISO argues that EDF and E.ON propose revisions to the Tariff that amount to an attempted end run around Commission precedent and the Commission's goals with respect to generator interconnection queue reform. MISO contends that EDF

³⁴ MISO Reply Brief at 4-5.

³⁵ *Id.* at 6.

³⁶ *Id.* at 7.

³⁷ *Id.*

³⁸ *Id.* at 8.

and E.ON's proposed requirement that MISO grant a COD extension where it determines that projects lower in the queue would not be harmed runs counter to the Termination Rehearing Order, the *New Era* order, and the *Ellerth* order.³⁹ MISO states that in the Termination Rehearing Order, the Commission specifically abandoned its practice of considering whether the extension would harm generators lower in the interconnection queue.⁴⁰

26. MISO also opposes EDF and E.ON's proposal to apply commercial viability criteria. Noting the Commission's explanation that, under Section 4.4.4 of the GIP, any extension beyond the original COD is deemed to be a material modification except in very narrow circumstances, MISO argues that the fact that an interconnection customer could demonstrate commercial viability criteria is immaterial. According to MISO, the only cure for such a breach would be to achieve commercial operation.⁴¹

27. Additionally, MISO references the Commission's statement in the October 19 Order that, to the extent an interconnection customer believes relief from the COD deadline is appropriate, it may seek waiver of the applicable Tariff provision or submit a complaint pursuant to section 206 of the FPA. MISO states that such a proceeding would be an appropriate venue for EDF and E.ON's request that there should be room to allow for COD extension in a GIA beyond the three-year period if the generating facility has completed specific construction milestones. In such a proceeding, MISO states that EDF and E.ON would be required to either comply with the Commission's stringent requirements regarding tariff waiver requests or, alternatively, bear the burden of proof required by section 206 of the FPA to demonstrate that the existing provisions are not just and reasonable.⁴²

28. MISO disputes EDF and E.ON's argument that after a GIA is effective, it becomes the primary governing document. According to MISO, while the GIA memorializes the arrangement reached in the GIP process, the GIP continues to apply.⁴³ Further, MISO

³⁹ *Id.* at 9 (citing Termination Rehearing Order, 161 FERC ¶ 61,077; *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198 (2014) (*New Era*); *Midwest Indep. Transmission System Operator, Inc.*, 143 FERC ¶ 61,114 (2013) (*Ellerth*)).

⁴⁰ *Id.* (citing Termination Rehearing Order, 161 FERC ¶ 61,077 at n.37).

⁴¹ *Id.* at 10.

⁴² *Id.* at 11.

⁴³ *Id.* at 12 (citing Termination Rehearing Order, 161 FERC ¶ 61,077 at P 19; *New Era*, 147 FERC ¶ 61,198 at PP 30, 32; *Ellerth*, 143 FERC ¶ 61,114 at P 26).

argues that Section 4.4.4 of the GIP and Article 2.3.1 of the *pro forma* GIA accomplish different purposes. MISO states that Section 4.4.4 addresses modifications to the generator interconnection request, which may occur before or after a GIA has been executed, whereas Article 2.3.1 addresses termination of the GIA, whether due to failure to achieve commercial operation or otherwise.⁴⁴

IV. Discussion

A. Procedural Matters

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene serve to make the entities who filed them parties to this proceeding.

30. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2017), the Commission will grant the late-filed motions to intervene given the entities' interest in the proceeding, the early stage of the proceeding, and absence of undue prejudice or delay.

B. Substantive Matters

31. As an initial matter, we find that MISO's Tariff provisions in Section 4.4.4 of the GIP and Article 2.3.1 of the *pro forma* GIA are unjust and unreasonable because the termination clauses contained therein are inconsistent and MISO's Tariff must therefore be revised to correct the inconsistency as discussed below.

32. In this order, we find MISO's proposed revisions to Attachment X of its Tariff (that contains MISO's GIP and *pro forma* GIA) that clarify the termination clauses in both the GIP and *pro forma* GIA, with the additional modifications discussed below, to be just and reasonable.

33. In order to achieve consistency in the termination provisions found in Section 4.4.4 of the GIP and Section 2.3.1 of the *pro forma* GIA, MISO proposes revisions to ensure that the termination clause in the GIP matches the termination clause in the *pro forma* GIA. We accept MISO's proposal with the modifications discussed below. With regard to the Commission's suggestion in the October 19 Order that revising Section 4.4.4 of the GIP to reference Article 2.3.1 of the *pro forma* GIA might address the Commission's concerns regarding a potential inconsistency between the two provisions, MISO has instead suggested revisions to Article 2.3.1 of the *pro forma* GIA to reference Section 4.4.4 of the GIP. MISO argues that, in the interest of clarity, Article 2.3.1 of the *pro forma* GIA should explicitly reference Section 4.4.4 of the

⁴⁴ *Id.* at 12-13.

GIP. MISO further points out that by referencing the COD established in Section 4.4.4 of the GIP, there will be no ambiguity regarding which provision determines a potential termination date. We find that this is an acceptable alternative to address the concerns. We also agree with MISO that the GIP and *pro forma* GIA are intended to work together, and although the *pro forma* GIA “memorializes the arrangements reached in the GIP,”⁴⁵ the GIP does continue to apply even after execution of a GIA; therefore, specifically referring to the correct section of the GIP in the *pro forma* GIA is preferable to separating the two documents entirely in these circumstances.

34. We are not persuaded by EDF and E.ON’s suggestion that the two documents should be separate and that the phrase “a change in milestones by another party to the GIA” should be removed from the list of circumstances in Section 4.4.4 of the GIP under which an interconnection customer may request an extension of the COD or in-service date (up to three years) after entering the Definitive Planning Phase, without the change being considered a material modification. EDF and E.ON argue that this circumstance should instead be listed in the *pro forma* GIA.⁴⁶ We find that MISO’s proposed revisions place, in one location, the universe of circumstances under which an interconnection customer may request an extension of the COD or in-service date (up to three years) after the Definitive Planning Phase commences. The execution, or requested unexecuted filing, of a GIA occurs after the Definitive Planning Phase commences, so it is still appropriate to include “a change in milestones by another party to the GIA” within the list of circumstances in Section 4.4.4 of the GIP. We also note that isolating this circumstance (within the *pro forma* GIA) from the rest of the list of circumstances (within the GIP) could cause confusion as to the full list of circumstances under which an interconnection customer may extend its COD or in-service date.

35. However, we also find that MISO’s proposed revisions, as written, lack clarity as to the three-year period that must lapse before MISO must seek to terminate a GIA for failure of a generating facility to achieve commercial operation by the COD. MISO’s current Article 2.3.1 of the *pro forma* GIA states that, “This GIA may be terminated... if the Generating Facility or a portion of the Generating Facility fails to achieve

⁴⁵ *Id.* at 12.

⁴⁶ EDF and E.ON also appear to propose that a change in milestones by another party to the GIA that impacts achieving the COD should allow for unlimited extensions of the COD as an exception to the requirement that MISO shall terminate a GIA if commercial operation is not achieved within three years after the COD. We reject this proposal for the same reasons we reject EDF and E.ON’s other proposed exceptions in the discussion below, namely that it is inconsistent with the Commission’s objective of providing clarity and certainty in MISO’s Tariff provisions governing GIA terminations for failure to meet the COD. *See infra* at P 38.

Commercial Operation for three (3) consecutive years following the Commercial Operation Date.” In MISO’s proposed revisions to Section 4.4.4 of the GIP, it is not clear that MISO may not terminate a GIA until three years following the COD as stated in the GIA (which would make it consistent with Article 2.3.1 of the *pro forma* GIA), as the Commission stated in the October 19 Order. Our concerns must be addressed with the following revisions to MISO’s proposed revisions to Section 4.4.4 of MISO’s GIP (revisions shown in bold) in the compliance filing ordered below:

At the completion of the Definitive Planning Phase, the Commercial Operation Date shall be set forth in a GIA. **Consistent with Article 2.3.1 of the GIA, o**Once that GIA is executed or filed unexecuted, **if the Generating Facility fails to reach Commercial Operation by the Commercial Operation Date, such Commercial Operation Date may be extended by Interconnection Customer for a period up to three (3) consecutive years, after which** ~~consistent with Article 2.3.1 of the GIA,~~ **Transmission Provider shall terminate the GIA if the Generating Facility has still failed to reach Commercial Operation the three-year extension period provided in this Section 4.4.4 must lapse before** ~~Transmission Provider may seek to terminate the GIA for failure to achieve Commercial Operation by the Commercial Operation Date.~~ Notwithstanding the foregoing, in the limited circumstance that the Interconnection Request is served by a contingent Network Upgrade with an in-service date that is farther out than the Commercial Operation Date permitted under this Section 4.4.4, **Transmission Provider may** ~~shall~~ only terminate the GIA for failure to achieve Commercial Operation by that later in-service date of the contingent Network Upgrade.

36. Further, our concerns must be addressed with the following revisions to clarify MISO’s proposed revisions to Article 2.3.1 of MISO’s *pro forma* GIA (revisions shown in bold) in the compliance filing ordered below:⁴⁷

This GIA may be terminated by Interconnection Customer after giving Transmission Provider and Transmission Owner ninety (90) Calendar Days advance written notice ~~or~~. **This GIA shall be terminated 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 by the Commercial Operation Date established in accordance with Section 4.4.4 of Attachment X, including any extension provided thereunder,~~ or has ceased

⁴⁷ We note that while MISO has stricken language from Article 2.3.1 of the *pro forma* GIA referencing that three years from the COD must lapse before MISO seeks termination of the GIA for failure to reach commercial operation, that three year extension is now provided for in Section 4.4.4 of the GIP.

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~~ by the Commercial Operation Date established in accordance with Section 4.4.4 of Attachment X, including any extension provided thereunder, Transmission Provider **mayshall** only terminate that portion of the GIA. Notwithstanding the foregoing, in the limited circumstance that the Interconnection Request is served by a contingent Network Upgrade with an in-service date that is farther out than the Commercial Operation Date permitted under Section 4.4.4 of Attachment X, Transmission Provider **mayshall** only terminate this GIA for failure to achieve Commercial Operation by that later in-service date of the contingent Network Upgrade.

37. We also find just and reasonable MISO's proposal to add a single exception in both Section 4.4.4 of the GIP and Article 2.3.1 of the *pro forma* GIA to the requirement that MISO shall terminate a GIA if commercial operation is not achieved within three years after the COD. MISO's proposed exception is that, if a contingent facility does not go into service within three years of the COD, MISO cannot terminate the GIA until the in-service date of the contingent facility. We find that MISO's exception is consistent with the Commission's previous findings, as noted in the October 19 Order, 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.⁴⁸

38. EDF and E.ON request other exceptions to the three year extension of the COD, as they argue that the single exception MISO proposes regarding contingent facilities is too limiting. EDF and E.ON propose that extensions should be allowed for any project as long as MISO determines in a study that the extension does not adversely affect lower-queued customers triggering the material modification provisions in the Tariff. However, they also propose that even if a study shows that an extension would cause a material modification, the customer should be allowed to meet some unspecified "commercial viability criteria" to extend the COD. Outside of listing the CAISO commercial viability criteria and referring to them as a best practice that they are "not wed to,"⁴⁹ EDF and E.ON do not propose any specific criteria for this case. The Tariff language proposed by EDF and E.ON would essentially allow for any COD extension and is therefore

⁴⁸ October 19 Order, 161 FERC ¶ 61,076 at P 11 & n.14 (citing *Southwest Power Pool, Inc.*, 147 FERC ¶ 61,201, at P 114 (2015)).

⁴⁹ EDF and E.ON Initial Brief at 9.

inconsistent with the Commission's objective to provide "clarity and certainty regarding the circumstances in which an interconnection customer may extend its COD as a matter of right."⁵⁰ As such, EDF and E.ON have not shown that their proposals regarding the length of the extension to the COD and the exceptions that would allow a customer to extend its COD improve the clarity and certainty of the MISO Tariff, and we therefore reject them.

39. Furthermore, EDF and E.ON's request is inconsistent with the Commission's other findings in the Termination Rehearing Order. In that order, the Commission recognized that it had previously considered factors beyond the plain language of the MISO GIP and relevant GIA in determining whether to grant a requested COD extension, such as the impact on lower-queued customers, but determined that this introduced uncertainty regarding how the Commission would review requests for COD extensions in light of Section 4.4.4 of the GIP.⁵¹

40. In sum, we accept MISO's proposed Tariff revisions, including the contingent network upgrade exception, subject to the revisions noted above, and we direct MISO to file such revisions in a compliance filing to be made within 30 days of the date of this order.

The Commission orders:

(A) The Commission hereby finds MISO's existing Tariff unjust and unreasonable and accepts MISO's proposed Tariff revisions, subject to further revisions, as discussed in the body of this order.

(B) MISO is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁰ Termination Rehearing Order, 161 FERC ¶ 61,077 at P 18.

⁵¹ *Id.* P 19.