

168 FERC ¶ 61,118
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

South Shore Energy, LLC

Docket No. ER19-1031-001

ORDER DENYING REHEARING

(Issued August 26, 2019)

1. In a March 27, 2019 order,¹ the Commission denied a request by South Shore Energy, LLC and Dairyland Power Cooperative (Applicants) seeking waiver of: (1) section 7.6.2 of the Midcontinent Independent System Operator, Inc.'s (MISO) Generator Interconnection Procedures (GIP),² relating to the deadline to withdraw from MISO's Definitive Planning Phase (DPP) while still remaining eligible for a full refund of paid milestone payments; and (2) section 11 of the GIP,³ relating to the 150-day deadline to execute a Generator Interconnection Agreement (GIA) (or request that a GIA be filed unexecuted). Applicants seek rehearing of the March 2019 Order. For the reasons discussed below, we deny the request for rehearing.

I. Background

2. MISO studies generator interconnection requests pursuant to the GIP in its Tariff. The final phase of this study process, termed the DPP,⁴ contains three sequential phases

¹ *South Shore Energy, LLC*, 166 FERC ¶ 61,221 (2019) (March 2019 Order).

² See MISO Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff), Attachment X, § 7.6.2.

³ See *id.* §§ 11.1-11.3.

⁴ During the DPP, MISO conducts reliability and deliverability studies that determine whether there is available transmission capacity to accommodate the interconnection of new, proposed generating facilities or whether network upgrades are needed.

during which MISO conducts system impact studies and a facilities study.⁵ Each phase of the DPP requires an interconnection customer to post a milestone payment to advance in the study process. The DPP provides two designated “off-ramps,” termed Decision Points, at which time an interconnection customer may withdraw its interconnection request and receive a refund of prior milestone payments. After advancing past the last Decision Point, an interconnection customer’s prior milestone payments become non-refundable,⁶ and the interconnection customer enters into the GIA negotiation phase.

3. Applicants stated that MISO’s practice is to divide the DPP study cycles into separate, sub-regional groups, with each group studied on its own timeline.⁷ Applicants stated that MISO included Applicants’ Nemadji Trail Project in the August 2017 DPP study cycle of the East (American Transmission Company, or ATC) Group (East (ATC) Group).⁸ However, Applicants stated that MISO informed Applicants that, due to the project’s unique location, the Nemadji Trail Project could be subject to common use upgrade⁹ costs identified in another subgroup’s studies (the August 2017 DPP study cycle of the West Group (West Group)).¹⁰ Applicants indicated that the studies from the West Group would not be completed until after the Nemadji Trail Project moved beyond the last Decision Point in the East (ATC) Group and was in the GIA negotiation phase of the interconnection process.¹¹

⁵ *Midcontinent Indep. Sys. Operator, Inc.*, 160 FERC ¶ 61,059, at P 2 (2017).

⁶ MISO Tariff, Attachment X, Section 7.6.2.

⁷ Waiver Request at 8. *See also* MISO DPP Schedule, <https://cdn.misoenergy.org/Definitive%20Planning%20Phase%20Estimated%20Schedule106547.pdf>.

⁸ Waiver Request at 2.

⁹ Common use upgrades are an interconnection facility, network upgrade, system protection facility, or any other classified addition, alteration, or improvement on the transmission system or the transmission system of an affected system, not classified under Attachment FF as a baseline reliability project, market efficiency project, or multi-value project, that is needed for the interconnection of multiple interconnection customers’ generating facilities and which is the shared responsibility of such interconnection customers. MISO Tariff, Attachment X, § 1 Definitions.

¹⁰ Waiver Request at 4.

¹¹ *Id.* at 13-14.

4. Applicants sought waiver of section 7.6.2 of the GIP so that they could extend their eligibility to receive a full refund of their milestone payments, to five business days after they received study results from the West Group.¹² Applicants also sought waiver of section 11 of the GIP so that they could extend the deadline to negotiate and execute a GIA, to 150 days after they had received the West Group DPP Phase III study results.¹³ The Commission denied this waiver request in the March 2019 Order, finding that a waiver could not be granted because Applicants did not meet the criteria set forth in the Commission's four prong waiver test.¹⁴ Specifically, the March 2019 Order found that there could be undesirable consequences from granting the waiver, such as harm to third parties.¹⁵

II. Discussion

1. Notice of Network Upgrade Costs & Refund Milestones

a. Rehearing Request

5. Applicants argue that the Commission deviated from precedent requiring that interconnection customers receive notice of their potential liability for network upgrade costs before they must decide whether to enter into a GIA (or consent to MISO filing an unexecuted GIA).¹⁶ Specifically, Applicants contend that the Commission's policy is to require transmission providers to notify interconnection customers of their maximum possible funding exposure for network upgrade costs before the interconnection customer is required to enter into a GIA.¹⁷ Applicants argue that, without their requested waiver, they will not be afforded this requisite notice in contravention of Commission precedent

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ March 2019 Order, 166 FERC ¶ 61,221 at P 24.

¹⁵ *Id.* PP 24-26.

¹⁶ Rehearing Request at 6 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220, at P 320, *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (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)).

¹⁷ *Id.*

and section 11 of the GIP.¹⁸ Applicants claim that this creates an unreasonable risk for them because they will receive information on potential common use upgrade costs from the West Group studies only after the deadline to withdraw penalty-free from the DPP has passed.¹⁹ Applicants also argue that the MISO Tariff and related Commission precedent provide interconnection customers with the right to obtain a full refund of milestone payments, and they may be denied their right to penalty-free withdrawal in the event Applicants are allocated significant additional network upgrade costs for common use upgrades identified in the West Group DPP studies.²⁰ Applicants also contend that requiring them to decide whether to execute a GIA (or consent to MISO filing an unexecuted GIA) without a complete estimate of the cost of network upgrades, and the estimated maximum funding exposure for such upgrades, is not reasoned decision-making.

b. Commission Determination

6. We deny rehearing as we find these arguments to be unpersuasive. In the March 2019 Order, the Commission found that Applicants' waiver request could not be granted because Applicants did not satisfy the Commission's four part waiver criteria.²¹ Specifically, the Commission found that there could be undesirable consequences from the granting of waiver, such as harm to third parties.²² We find that none of Applicants' arguments made on rehearing, concerning the potential negative impact to Applicants of not granting waiver of sections 7.6.2 and 11 of MISO's GIP, refute the Commission's finding in the March 2019 Order that granting waiver could have undesirable consequences, such as harm to third parties. Applicants' arguments concerning any potential inconsistency with Commission precedent and MISO's Tariff that may result from denial of waiver are likewise irrelevant to whether Applicants' waiver request may harm third parties. Rather, Applicants' objections here relate to the justness and

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 6-8. *See also* Waiver Request at 2-3, 13 (citing MISO Tariff, Attachment X, § 7.6.2 (which explains that interconnection customers have a period of five business days to withdraw penalty-free from the queue due to an increase in network upgrade costs of 50 percent and more than \$20,000 per MW from the preliminary system impact study to any DPP Phase III system impact study)).

²⁰ Rehearing Request at 9.

²¹ March 2019 Order, 166 FERC ¶ 61,221 at P 24.

²² *Id.* PP 24-26.

reasonableness of MISO's Tariff and MISO's application of the Tariff, which are outside the scope of a waiver request.

2. Supporting Evidence

a. Rehearing Request

7. Next, Applicants contend that the Commission ignored evidence that it is unlikely that the withdrawal of the Nemadji Trail Project would result in the allocation of additional network upgrade costs to other projects in the East (ATC) Group.²³ Applicants allege that the Commission's sole reason for declining to give any weight to this record evidence was that the DPP Phase I study results were preliminary in nature, and thus MISO was not precluded from reallocating network upgrade costs among the East (ATC) Group customers or finding a restudy necessary after the withdrawal of the Nemadji Trail Project.²⁴ Applicants request that the Commission make a finding, on rehearing, regarding the likelihood of MISO reallocating the Nemadji Trail Project's network upgrade costs to other East (ATC) Group projects and using the preliminary system impact study results to determine that the requested waiver will not result in harm to other customers in the East (ATC) Group.²⁵

8. Applicants also argue that the Commission relied on the mere possibility of harm to third parties, ignoring evidence demonstrating that the probability of harm was low or non-existent.²⁶ Applicants argue that the Nemadji Trail Project is geographically and electrically isolated from other projects in the East (ATC) Group, and consequently, if the Nemadji Trail Project were to withdraw from MISO's interconnection queue, no reallocation of network upgrade costs to other East (ATC) Group customers would likely occur, and thus, no harm to third parties would result.²⁷

9. Last, Applicants request that the Commission accept their submission of the East (ATC) Group revised system impact study and information regarding the cohort of East

²³ Rehearing Request at 10.

²⁴ *Id.* at 12.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 12.

(ATC) Group projects entering DPP Phase III, for rehearing purposes.²⁸ Applicants contend that this new evidence demonstrates that the upgrades allocated to the Nemadji Trail Project are allocated solely to the Nemadji Trail Project and not to other projects in the East (ATC) Group, and conversely, that upgrades allocated to other projects in the East (ATC) Group are not shared with the Nemadji Trail Project. Applicants also argue that the list of projects entering DPP Phase III should be accepted because it demonstrates that the number of projects in the East (ATC) Group has not meaningfully changed between DPP Phase I and DPP Phase III.²⁹ Applicants contend that good cause exists for accepting this new evidence, which was available only after (or immediately preceding) the March 2019 Order.³⁰ Applicants argue that the new evidence would not create a moving target because they do not intend such submission to introduce new arguments and that the new information merely buttresses the evidence already presented in their waiver request.³¹

b. Commission Determination

10. We deny rehearing. We are not persuaded by Applicants' suggestion that we should rely on the preliminary system impact study results to determine that the requested waiver will not result in harm to other customers in the East (ATC) Group. Because MISO's interconnection queue process is dynamic, with projects entering and exiting the queue, the preliminary study relied on by Applicants is insufficient to determine whether network upgrade costs will ultimately be borne. Final cost and time estimates for building necessary network upgrades for a customer's project will not be known until the final system impact study and facilities study have been completed, and even these final estimates are subject to change. MISO maintains the ability to restudy and reallocate network upgrade costs,³² and it may do so if the Nemadji Trail Project withdraws.³³ The

²⁸ *Id.* at 13. Applicants state that the East (ATC) Group revised system impact study was available five days prior to the issuance of the March 2019 Order and that the list of projects entering DPP Phase III was available on April 15, 2019.

²⁹ *Id.* at 14.

³⁰ *Id.*

³¹ *Id.*

³² *See* MISO Tariff, Attachment X, §§ 11.1-11.3 (permitting MISO to restudy and reallocate network upgrade costs to interconnection customers after they execute a GIA if higher-queued projects in the same DPP cycle leave the queue).

³³ March 2019 Order, 166 FERC ¶ 61,221 at PP 25-26.

Commission is not in the position to posit the likelihood of whether MISO will reallocate network upgrade costs because this determination may be based on the results of a restudy, if one is conducted.³⁴ Furthermore, it is not yet possible to determine what impact a withdrawal of the Nemadji Trail Project would have on lower-queued interconnection customers. As such, we reaffirm the Commission's finding that granting this waiver could result in harm to third parties.

11. Moreover, the Commission did not ignore Applicants' evidence suggesting that the electrical and geographic isolation of the Nemadji Trail Project makes it unlikely that its withdrawal from MISO's interconnection queue would result in the allocation of additional network upgrade costs, but rather found this information was not compelling. We continue to find that granting a waiver could create uncertainty for other East (ATC) Group projects and lead to increased costs.³⁵ In particular, if waiver is granted, other East (ATC) Group projects will experience a longer period of uncertainty regarding whether the Nemadji Trail Project will withdraw from the MISO interconnection queue, and if it does withdraw, what reallocation costs could be assessed to the remaining East (ATC) Group projects.³⁶ Additionally, a late stage withdrawal of the Nemadji Trail Project may require MISO to conduct a restudy for the group of customers remaining in the East (ATC) Group, creating the type of cascading restudies that MISO intended to mitigate.³⁷ As stated in the March 2019 Order, we also agree with MISO that, if Applicants are allowed to withdraw with a full refund of milestone payments, those funds will not be available to mitigate the financial impact to the remaining projects in the East (ATC) Group, which could cause other East (ATC) Group projects to experience higher unforeseeable network upgrade costs.³⁸

12. Regarding the matter of new evidence, the Commission looks with disfavor on parties supplementing the record on rehearing.³⁹ This is because other parties are not

³⁴ See MISO Tariff, Attachment X, Appendix 6 § 11.3.2.

³⁵ March 2019 Order, 166 FERC ¶ 61,221 at P 25.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* (citing MISO Comments at 5).

³⁹ See, e.g., *Calpine Oneta Power v. American Elec. Power Serv. Corp.*, 114 FERC ¶ 61,030, at P 7 (2006); *Midwest Indep. Transmission Sys. Operator, Inc.*, 112 FERC ¶ 61,211, at P 34 (2005) (citing *Baltimore Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000)); *Baltimore Gas & Elec. Co.*, 92 FERC ¶ 61,043, at 61,114 (2000)).

permitted to respond to a request for rehearing.⁴⁰ Contrary to Applicants' contentions, such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision. Even if the Commission were to consider such new evidence and arguments raised by Applicants, we would nonetheless deny Applicants' request for rehearing due to the potential harm the waiver request may have upon third parties.⁴¹

The Commission orders:

Applicants' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁰ 18 C.F.R. § 385.713(d) (2018).

⁴¹ March 2019 Order, 166 FERC ¶ 61,221 at PP 24-26.