

152 FERC ¶ 61,074  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

July 27, 2015

In Reply Refer To:  
Southwest Power Pool, Inc.  
Docket No. ER15-1797-000

Southwest Power Pool, Inc.  
Attn: Tessie Kentner  
201 Worthern Drive  
Little Rock, AR 72223

Reference: Termination of Interconnection Agreement

Dear Ms. Kentner:

1. On May 28, 2015, pursuant to section 205 of the Federal Power Act (FPA)<sup>1</sup> and section 35.15 of the Commission's regulations,<sup>2</sup> Southwest Power Pool, Inc. (SPP) submitted a notice of termination of the transmission-to-transmission interconnection agreement between Tres Amigas LLC (Tres Amigas) and Southwestern Public Service Company (SPS), with SPP as signatory (Agreement).
2. SPP filed the Agreement with the Commission on February 8, 2013 in Docket No. ER13-912-000. The Agreement governs the interconnection of the Tres Amigas Superstation to the SPS transmission system.<sup>3</sup> The Agreement—which encompasses the first phase of the Tres Amigas project—contemplates the interconnection of a 73-mile, 345 kV Tres Amigas-owned transmission line providing a 750 MW two-node inertia between the SPS transmission system in the Eastern Interconnection and the Public Service Company of New Mexico transmission system in the Western Interconnection.

---

<sup>1</sup> 16 U.S.C. § 824d (2012).

<sup>2</sup> 18 C.F.R. § 35.15 (2014).

<sup>3</sup> The Tres Amigas Superstation is a facility that, when completed, will consist of transmission lines that tie together three alternating current to direct current converter stations at one location. If constructed as planned, the Tres Amigas project will provide new interconnections among and between the Western Interconnection, the Eastern Interconnection, and the Electric Reliability Council of Texas. *Southwest Power Pool, Inc.*, 143 FERC ¶ 61,030, at P 1 (2013).

The Commission accepted the Agreement on April 9, 2013, noting that the Agreement did not convey any interchange rights or rights of injection to Tres Amigas.<sup>4</sup>

3. The Agreement is similar in scope and application to other utility-to-utility transmission interconnection agreements as well as the *pro forma* generator interconnection agreement in the SPP Open Access Transmission Tariff. For example, Exhibit B identifies the required interconnection facilities and modifications as well as the cost allocation for the facilities. Exhibit C contains various construction milestones requiring payments or progress toward construction by certain dates. Article 12 includes a list of events that constitute a breach of the Agreement, as well as cure and default provisions.<sup>5</sup> Further, Article 13.3 specifies that termination of the Agreement requires Commission approval. As distinguished from the *pro forma* generator interconnection agreement, Article 3.2 of the Agreement includes an affirmative obligation that states, “As needed and upon reasonable notice, the Parties shall work in good faith to modify, update, or amend the milestones provided in Exhibit C.”<sup>6</sup>

4. According to SPP, on May 12, 2015, SPS provided notice to Tres Amigas that it was terminating the Agreement due to default by Tres Amigas. SPS requested that SPP promptly file a notice of termination of the Agreement with the Commission. SPP states that it is filing the notice of termination in accordance with this request and Article 13.3 of the Agreement. SPP requests waiver of the Commission’s 60-day notice requirement to make the termination of the Agreement effective May 12, 2015, the date of SPS’s notice to Tres Amigas.

5. Notice of the May 28, 2015 filing was published in the *Federal Register*, 80 Fed. Reg. 31,902 (2015), with interventions and protests due on or before June 18, 2015. Golden Spread Electric Cooperative, Inc.; Xcel Energy Services, Inc. (Xcel), on behalf of its utility operating company affiliate SPS; and Tres Amigas filed timely motions to intervene. Xcel submitted comments, and Tres Amigas submitted a request to reject SPP’s filing. Xcel and SPP submitted answers to Tres Amigas’s request. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest unless

---

<sup>4</sup> *Id.* P 10.

<sup>5</sup> Article 12.1(a) denotes a failure to comply with any material term or condition of the Agreement as a breach of the Agreement.

<sup>6</sup> Article 1.1.1 of the Agreement also requires the parties to act reasonably and in accordance with good faith and fair dealing principles in performance of the Agreement.

otherwise ordered by the decisional authority. We will accept Xcel's and SPP's answers because they aided us in our decision-making.

6. Xcel supports SPP's action and asserts that Tres Amigas has consistently failed to comply with milestone requirements in Exhibit C of the Agreement. Xcel states that SPS voluntarily extended the deadlines for compliance with milestones contained in the Agreement four times, thereby delaying the Commercial Operation Date in the Agreement by nearly two years. According to Xcel, SPS also agreed to decrease the initial payment amount owed by Tres Amigas from \$7.5 million to \$1.4 million. Xcel asserts that SPS acted in good faith at all times and sought to comply with the terms of the Agreement, and it is not in dispute that Tres Amigas has failed to make milestone payments.

7. Xcel claims that Tres Amigas has made no appreciable progress toward placing its transmission line project in service or interconnecting with the SPS transmission system. Xcel argues that continuing to allow Tres Amigas to extend its compliance obligations and its in-service date unjustly deprives SPS of the benefit of its bargain in the Agreement and creates uncertainty. In turn, Xcel contends that this lack of certainty inhibits SPS's ability to plan for the impacts of the proposed Tres Amigas project, especially as the SPS transmission system continues to evolve. Xcel asserts that termination of the Agreement is neither unjust nor unreasonable and is in the public interest. Xcel notes that if, in the future, Tres Amigas desires to enter into a new transmission-to-transmission interconnection agreement and can demonstrate it can meet milestone dates, SPS would work with Tres Amigas and SPP to execute a new agreement.

8. Tres Amigas protests the notice of termination, asserting that it is not in default because Article 3.2 of the Agreement requires parties to work in good faith to extend milestones. Tres Amigas claims that SPS, rather than agreeing to extend Exhibit C milestones, took the position in late 2014 that Tres Amigas must make immediate payment. Tres Amigas states that, given the complexities of its project, it has not been able to secure funding and thus requires an extension of milestone deadlines. Tres Amigas argues that SPS is not harmed by extending these milestones and that Tres Amigas will pay for any additional, required studies. Tres Amigas also asserts that there is a strong public interest argument to retain the Agreement, as the Agreement is a necessary element to build the unique Tres Amigas Superstation. According to Tres Amigas, SPP's filing is patently deficient and provides no basis to conclude that Tres Amigas is in default. Tres Amigas further contends that SPP should have contacted Tres Amigas to understand its position before making the May 28, 2015 filing.

9. In its answer, Xcel asserts that SPS cooperated fully and fairly with Tres Amigas. Xcel presents an affidavit and exhibits to support its timeline of events and to refute Tres Amigas's claim that SPS demanded immediate payment in late 2014. Xcel asserts that SPP's filing is not deficient, noting that SPP identified the substantive basis for the termination as well as the basis for its filing with the Commission. Xcel reiterates that

Tres Amigas breached milestones in the Agreement on numerous occasions and that termination mitigates harm to SPS, SPP, and other SPP stakeholders. Xcel also argues that the Agreement must be construed in a manner to be enforceable, which Xcel states requires a reasonable limit to the number of amendments SPS must provide before holding Tres Amigas to its bargain. Additionally, Xcel reiterates SPS's commitment to enter into another interconnection agreement once Tres Amigas is ready to proceed.

10. In its answer, SPP asserts that it acted appropriately and that its filing complies with Part 35 of the Commission's Rules for notices of cancellation or termination.<sup>7</sup> According to SPP, its filing stated the reason for the proposed termination (i.e., SPS terminated the Agreement pursuant to Article 12 due to default by Tres Amigas) and noted that the notice of termination is in accordance with Article 13.3 of the Agreement. SPP also states that it provided notice of its filing to both Tres Amigas and SPS. As a limited signatory to the Agreement, SPP asserts that it has no role in determining whether Tres Amigas breached the Agreement or whether the Agreement should have been terminated. SPP states that this limited role is set out in Article 17 of the Agreement and provides that SPP's involvement is limited to the section of the Agreement that may affect or involve SPP's transmission service or SPP's role as a Commission-approved Regional Transmission Organization. SPP also takes issue with Tres Amigas's assertion that SPP should have contacted Tres Amigas before making the May 28, 2015 filing. According to SPP, it has no such obligation to Tres Amigas. SPP points out that SPP has regular conversations with SPS and other transmission-owning members of SPP concerning matters that affect the transmission system and the SPP region. Nevertheless, SPP notes that when Tres Amigas contacted SPP after the notice of termination was filed, SPP agreed to meet and participated in a June 3, 2015 conference call with both parties. Finally, although it is supportive of the Tres Amigas project, SPP states that uncertainty surrounding the project detracted from its own and SPS's ability to plan for the impacts of the Tres Amigas interconnection to the SPP region. SPP states that it is committed to supporting Tres Amigas when Tres Amigas is ready to proceed. SPP further recommends that a new study commence once Tres Amigas reaches this readiness milestone, given system changes that have occurred since 2011.

11. Commission precedent supports acceptance of a notice of termination if the Commission finds that the proposed termination is not unjust, unreasonable, and unduly discriminatory or preferential,<sup>8</sup> or if the termination is consistent with the public interest.<sup>9</sup>

---

<sup>7</sup> SPP Answer at 4 (citing 18 C.F.R. § 35.15 (2014)).

<sup>8</sup> See, e.g., *Allegheny Power System, Inc.*, 102 FERC ¶ 61,318, at P 9 (2003).

<sup>9</sup> See, e.g., *Duke Energy Moss Landing LLC*, 83 FERC ¶ 61,318, at 62,306 (1998), *order on reh'g*, 86 FERC ¶ 61,227 (1999).

Whether a party has made an attempt to cure a default<sup>10</sup> and whether harm has occurred<sup>11</sup> have been relevant to Commission decision-making in the past.

12. In the instant proceeding, we find Tres Amigas in default of the Exhibit C milestone requirements in the Agreement. Based on the detailed timeline outlined by Xcel,<sup>12</sup> we conclude that SPS made good faith efforts to negotiate the extension of milestone requirements on numerous occasions, consistent with Article 3.2 of the Agreement. SPS extended the first payment milestone and Commercial Operation Date four times and agreed to reduce significantly the amount of Tres Amigas's initial payment.<sup>13</sup> Contrary to Tres Amigas's assertions that SPS failed to negotiate and act in good faith by demanding immediate payment in late 2014, Xcel explains that SPS offered a fourth payment extension to March 15, 2015, as well as a 30-day cure period when Tres Amigas did not meet this new payment milestone.<sup>14</sup> Moreover, Tres Amigas has made no attempts to cure its default and admits that it has been unable to secure funding.<sup>15</sup> We do not view the requirement that SPS negotiate in good faith as requiring SPS to extend required milestone payments *ad infinitum*. Further, we find that project novelty does not excuse breach of contract and failure to cure that breach. With regard to Tres Amigas's claim that SPP's filing is patently deficient, we find that the record is adequate to enable us to discern the parties' positions and the reasoning behind the filing of the notice of termination. Accordingly, we find that termination of the Agreement is not unjust, unreasonable, unduly discriminatory or preferential and accept SPP's notice of termination of the Agreement. We note Xcel's statements that SPS is willing to work

---

<sup>10</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008 (2011), *order on reh'g*, 141 FERC ¶ 61,097 (2012) (in which the Commission rejected termination of an interconnection agreement, in part, because the interconnection customer had cured its breach of the agreement to the satisfaction of the transmission owner).

<sup>11</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114 (2013) (in which the Commission found that an interconnection customer's difficulties in securing funding did not exempt it from meeting obligations in its interconnection agreement, and the extension of milestones without further evidence of intent to cure could cause harm to other interconnection customers).

<sup>12</sup> Tres Amigas did not provide a competing timeline and did not contest Xcel's timeline.

<sup>13</sup> Xcel Comments at 3-5.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> Tres Amigas Protest at 4.

with Tres Amigas on a new interconnection agreement once Tres Amigas is able to meet contractual milestone requirements, as well as SPP's commitment to do the same.<sup>16</sup>

13. Finally, we decline to grant waiver of the Commission's 60-day prior notice requirement, given that the notice of termination is contested,<sup>17</sup> and will accept the notice of termination of the Agreement 60 days after filing.

By direction of the Commission.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

---

<sup>16</sup> Xcel Comments at n.10; Xcel Answer at 11, 13; SPP Answer at 6-7.

<sup>17</sup> See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,984, *order on reh'g*, 65 FERC ¶ 61,081 (1993); *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, at 61,338 (1992).