

107 FERC ¶ 61, 224
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Pacific Gas and Electric Company

Docket Nos. ER03-1091-000,
ER03-1091-001, and
ER03-1091-004

ORDER ACCEPTING AMENDED INTERCONNECTION
AGREEMENT AND DENYING WAIVER

(Issued June 1, 2004)

1. On April 15, 2004, Pacific Gas and Electric Company (PG&E) filed in Docket No. ER03-1091-004 an amended Generator Special Facilities Agreement (GSFA) (April 15 Filing). The GSFA had originally been filed in Docket No. ER03-1091-000 on July 21, 2003 (the July 21 Filing). The April 15 Filing addresses the issues raised by PG&E's September 8, 2003 request for termination of the Duke Morro Bay GSFA. In this order, the Commission accepts the amended GSFA, as well as the Generator Interconnection Agreement (GIA) between PG&E and Duke Energy Morro Bay, LLC (Duke Morro Bay).¹ We deny waiver of the Commission's 60-day prior notice requirement and accept the agreements effective as discussed below. This order benefits customers because it assures that the terms, conditions, and rates for interconnection service will be just and reasonable and thus encourages increased power supply and improved reliability.

¹ Sixth Revised Volume No. 5, Service Agreement No. 42: Generator Special Facilities Agreement with Duke Energy Morro Bay.

I. Background

2. On July 21, 2003, PG&E filed agreements relating to the interconnection between PG&E and the following parties: Wellhead Power Panoche; LLC, Wellhead Power Gates, LLC; CalPeak Power Vaca Dixon, LLC; High Winds, LLC; Energy Transfer – Hanover Ventures, LP; and Duke Morro Bay.²
3. On November 6, 2003, the Commission issued a delegated letter order that accepted five of the agreements and denied waiver of the notice requirement and the time value of money remedy pertaining to those agreements. Consideration of the Duke Morro Bay agreement was deferred pursuant to a request made by PG&E.
4. The original Duke Morro Bay GSFA in the July 21 Filing provides for PG&E to furnish certain facilities necessary for the interconnection of Duke Morro Bay's generating plant to PG&E's transmission system and for PG&E's delivery of standby service to Duke Morro Bay. The GSFA provides for pre-interconnection activities, including procurement, engineering, and limited construction. The GIA, which is unexecuted, sets forth the terms and conditions for billing, operation, maintenance, metering, disconnection/interruption of service, standards, and general ongoing business relationships.
5. PG&E explains that the GSFA in the July 21 Filing contains revisions that conform to the Commission's October 25, 2002 Order³ accepting PG&E's proposal for an Interim Crediting Mechanism for network upgrades funded by wholesale generators. PG&E states that implementing the October Order requires three changes to the previously executed GSFA: (1) a determination of which facilities are network and which are direct assignment, found in a new or revised Appendix A to the GSFA; (2) recovery of the cost of ownership charges for only the direct assignment facilities; and (3) the addition of the Crediting Mechanism approved by the October Order.

² Each set of agreements includes a GSFA and a Generator Interconnection Agreement (GIA). All were being filed for the first time, and all were executed, except for the Duke Morro Bay GIA.

³ Pacific Gas and Electric Company, 101 FERC ¶ 61,079(2002) (October Order), reh'g granted in part, 102 FERC ¶ 61,070(2003). The October Order addressed various aspects of the interconnection agreements for the Los Medanos Energy Center, as well as PG&E's generic interim crediting mechanism for network upgrades funded by wholesale generators (Crediting Mechanism).

6. PG&E also states that it changed the Crediting Mechanism from that previously approved by the Commission so that payments would be made on a quarterly rather than monthly basis.⁴

7. In its July 21 Filing, PG&E requests waiver of the Commission's 60-day prior notice requirement⁵ to permit the GSFA to be retroactively effective.⁶ In support of this request, PG&E states that Commission policy regarding credits for customer-financed interconnection facilities was in flux and that it has been discussing with developers of generation projects in its service territory how the Commission's orders on credits for customer-financed interconnection facilities should be applied in California. PG&E further states that under these circumstances, it would have caused confusion and a waste of resources for PG&E to have filed the agreements earlier. PG&E also argues that denial of the waiver would invalidate the negotiations between the Parties. Furthermore, PG&E states that no other customer will be affected by the Commission's granting of the waiver.

8. PG&E's July 21 Filing requests waiver of the Commission's time value of money remedy for late filing. However, PG&E also states that no funds were collected from Duke Morro Bay.⁷

II. Notice and Further Pleadings

9. Notice of the filing was issued on July 24, 2003,⁸ with interventions, comments, or protests due on or before August 11, 2003. Duke Morro Bay filed comments, stating that while PG&E revised Appendix A to the GSFA, it neglected to delete the old Appendix A and the old estimated cost breakdown sheet. Secondly, Duke Morro Bay argued that the Commission should not accept the GIA, which Duke Morro Bay did not execute, because the filing included PG&E's Standard Form GIA, which is only to serve as a starting point for negotiations between the parties.

⁴See Pacific Gas and Electric Company, 105 FERC ¶ 61,020 (2003).

⁵18 C.F.R. § 35.3 LK:NON: FERC-ALL 18CFR35.3 (2003).

⁶PG&E requests that the GSFA be made effective September 24, 2001 and the unexecuted GIA effective upon acceptance.

⁷See Attachment 8 to the July 21 Filing.

⁸68 Fed. Reg. 45,810 (2003).

10. On August 28, 2003, PG&E requested deferral of action on its July 21 Filing in order to allow it to consider whether it should file a notice of termination with respect to the Duke Morro Bay agreement, and to consider whether to make changes to its Crediting Mechanism. On September 5, 2003, PG&E withdrew its request for deferral, stating that no changes to the Interim Crediting Mechanism were necessary. Concurrently, PG&E filed in Docket No. ER03-1091-001 to terminate the agreement with Duke Morro Bay. The justification offered for termination is that Duke Morro Bay missed milestones 1 and 2 and cannot qualify for the extension of time that would be required for milestone 6.⁹ In refusing the extension, PG&E cited the adverse affect on Global Renewable Energy Partners, Inc. (Global), which owns the Lompoc Wind Project (Lompoc) and is behind Duke Morro Bay in the generator queue.¹⁰

11. Notice of PG&E's filing to terminate the Duke Morro Bay agreements was issued on September 15, 2003,¹¹ with interventions, comments, or protests due on or before September 29, 2003. Global filed a timely motion to intervene.

⁹ There are six milestones contained in Appendix B to the GSFA, three of which are at issue here. Milestone 1 requires a Final Project Development Schedule within 8 months of executing the GSFA. Milestone 2 requires Duke Morro Bay to provide, within 6 months of executing the GSFA, proof of filing and acceptance of the Critical Path Permit and the expected date of such permit. The original deadlines for milestones 1 and 2, based on a contract execution date of September 24, 2001, were May 24, 2002 and March 24, 2002, respectively. Milestone 6 originally required that Duke Morro Bay complete parallel testing and start operation within three years of executing the GSFA, but no later than July 23, 2004.

¹⁰ However, PG&E notes that it did grant a one year extension of the milestones in 2002. The extension was requested by Duke Morro Bay due to delays in the permitting process at the California Energy Commission (CEC) and the Regional Water Quality Control Board. The revised milestones 1, 2 and 6 were thereafter May 24, 2003, March 24, 2003, and September 24, 2005, respectively.

¹¹ 68 Fed. Reg. 61,405 (2003).

Duke Morro Bay filed a protest on September 29, 2003, arguing both that it had cured any missed milestones, pursuant to the GSFA, and that it qualified for an extension of milestone 6.¹²

12. PG&E requested that we defer considering the filing pending negotiation between PG&E, Duke Morro Bay and Global,¹³ which culminated in an agreement (Amended Agreement), filed as an amendment on April 15, 2004. The Amended Agreement would give Duke Morro Bay the option of canceling its GSFA; give Duke Morro Bay a deadline of June 30, 2008 for putting its project into service, or else the GSFA would terminate; and provide for the sharing of network upgrade costs between Duke Morro Bay and Global.¹⁴

13. Specifically, the Amended Agreement provides that Duke Morro Bay is entitled to discontinue the project and cancel the GSFA.¹⁵ However, if it decides to move forward with the project, it will request that PG&E conduct a study at Duke Morro Bay's expense to determine whether PG&E's Morro Bay-Templeton 230kV transmission line could accommodate both Duke Morro Bay's and Lompoc's projects without the need for upgrade. If this re-rating is not feasible, then Duke Morro Bay will be responsible for the

¹² According to Appendix B of the GSFA, PG&E may grant a milestone extension on a nondiscriminatory basis if the delay will not harm another generator in the queue, or if the delay was not the fault of Duke Morro Bay. Duke Morro Bay claimed that it qualified for an extension under both counts: first, because PG&E has not shown that any other generator would be harmed; and second, because the delays are due to the vagaries of the permitting process in California, are typical for projects of its kind, and are therefore beyond Duke Morro Bay's control.

¹³ PG&E requested deferral on November 4, 2003, December 15, 2003, January 23, 2004, February 27, 2004 and March 30, 2004.

¹⁴ Consistent with Commission policy, the network upgrade costs will still be subject to PG&E's crediting mechanism.

¹⁵ The terms of the GIA are unaffected by the Amended Agreement.

cost of reconductoring the 230 kV line (estimated to be \$5.3 million).¹⁶ All other required network upgrades will be paid for by Global.¹⁷

14. However, Global is entitled to defer some of those upgrades, in which case, it may ultimately avoid paying the cost, if Duke Morro Bay does not meet its June 30, 2008 in-service date deadline. In that case, Duke Morro Bay's GSFA will terminate and Duke Morro Bay will lose its place in the generator queue. The upgrades, which are only needed if both generators go online, would no longer be needed. Global recognizes that if it chooses to defer upgrades, it may be more vulnerable to curtailment by the California Independent System Operator Corporation (CAISO).

15. The amendment includes a Second Revised Appendix A, which details the costs to be born by Duke Morro Bay, and a revised Appendix B, which updates the milestones to reflect the terms of the settlement.

III. Discussion

A. Procedure

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Request for Termination and Amended Filing

17. Ordinarily, Commission policy and PG&E's tariff would allow the party first in the queue to enjoy the benefit of any excess capacity in the network (that is, capacity that is available without upgrades), while the parties later in the queue would be responsible for paying for any network upgrades needed for their interconnections (subject to later credits).¹⁸ However, in this case, there is a dispute over who is first in the queue. While

¹⁶ It may, however, opt to terminate the project at this stage as well.

¹⁷ Global's upgrade responsibilities would consist of: reconfiguration of the Templeton Substation, reconductoring of the 115 kV transmission line, and installation of special protection schemes on the Morro Bay-Gates 230 kV line and Templeton-Gates 230 kV line, for a total estimated cost of \$7.6 million.

¹⁸ When the network cannot accommodate the first party in the queue, that party may have to pay for upgrades that may work to the advantage of later parties.

Duke Morro Bay had established an earlier queue position, PG&E claimed that Duke Morro Bay had missed milestones and did not qualify for an extension pursuant to the GSFA, and thus the GSFA should be terminated. In response, Duke Morro Bay claimed that it had cured any missed milestones (milestones 1 and 2) pursuant to the GSFA, and qualified for an extension of milestone 6.

18. All three parties have agreed to extend the time for Duke Morro Bay to meet milestone 6 until June 30, 2008 and for both generators to share network upgrade costs (subject to later credits). This will save the parties and the Commission the cost and risk of litigation. Therefore, the Commission finds that the Amended Agreement provides an equitable sharing of costs and responsibilities and is just and reasonable. It will also facilitate the modernization of Duke Morro Bay's generating plant and the consequent increase in generating capacity.

19. Regarding Duke Morro Bay's objection to the inclusion of a superseded Appendix A to the GSFA, the Commission agrees that the superseded versions should be removed. Since PG&E's April 15 amendment provides an updated version of Appendix A (Second Revised Appendix A), PG&E is directed to remove the superseded versions.

20. Regarding the GIA, we agree with Duke Morro Bay that the GIA filed by PG&E on July 21, 2003, is just the pro forma GIA, and that the actual GIA must be filed with the Commission, consistent with Appendix B of the GSFA and PG&E's statement that upon execution of the GIA, PG&E will file it with the Commission.¹⁹ However, while Duke Morro Bay requests that the Commission take no action on the unexecuted GIA, under section 205 of the Federal Power Act we have a statutory obligation to act upon the filing.²⁰ Since Duke Morro Bay has not stated any specific objections to the language contained in the draft GIA, and it appears just and reasonable, we have no basis to reject the unexecuted GIA. Accordingly, we accept the unexecuted GIA for filing, on the condition that an executed GIA must be filed in accordance with Appendix B of the GSFA and PG&E's statement.²¹

¹⁹ See PG&E's July 21, 2003 Filing at 23.

²⁰ 16 U.S.C. § 824d(d) (2000).

²¹ Id.

C. Request for Waiver

21. PG&E requests waiver of the Commission's prior notice requirement as to the effective date of the GSFA. PG&E has identified no extraordinary circumstances that would justify granting waiver of our prior notice requirement to allow the retroactive effective date.²² The fact that PG&E was discussing a generic Crediting Mechanism is not an extraordinary circumstance justifying PG&E's failure to file in a timely manner. Nor is PG&E's view that Commission policy was "in flux" an excuse for not filing. PG&E could have filed unexecuted agreements. Accordingly, we will deny PG&E's request for waiver of our prior notice requirements, and set the effective date of the agreement as September 20, 2003.

22. PG&E's request for waiver of the time value of money remedy is moot because it has not collected any money from Duke Morro Bay.

The Commission orders:

(A) The Amended Agreement between PG&E and Duke Morro Bay is hereby accepted, to be effective September 20, 2003, as discussed in the body of this order.

(B) PG&E's request for waiver of our prior notice requirements is denied, and the Amended Agreement is to be effective September 20, 2003.

(C) The GIA is hereby accepted for filing, to be effective upon the date of the issuance of this order.

(D) PG&E is directed to remove the superseded versions of Appendix A to the GSFA, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

²² See Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,984, clarified, 65 FERC ¶ 61,081(1993) (citing Central Hudson Gas & Electric Corp., et al., 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992)).