

UNITED STATES OF AMERICA 110 FERC ¶ 61,039
FEDERAL ENERGY REGULATORY COMMISSION

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

Virginia Electric and Power Company

Docket Nos. ER05-256-000
ER03-743-001
ER03-743-002

ORDER ON REVISED GENERATOR INTERCONNECTION
AND OPERATING AGREEMENT

(Issued January 21, 2005)

1. On November 23, 2004, Virginia Electric and Power Company, doing business as Dominion Virginia Power (VEPCO), filed a revised Generator Interconnection and Operating Agreement (IA) between VEPCO and CPV Cunningham Creek LLC (CPV), the interconnection customer, that would modify CPV's milestone dates set forth in the IA and add new terms and conditions governing the failure to meet milestones.¹ In addition, on October 1, 2004, CPV filed an Annual Report on the progress of the project, as required by the Commission. This order accepts the revised IA, subject to modification, and accepts for informational purposes CPV's Annual Report. This order benefits customers because it clarifies the terms and conditions under which CPV may extend its milestones.

Background

2. The Commission conditionally accepted an unexecuted IA with CPV in *Virginia Electric and Power Company*, 97 FERC ¶ 61,262 (2001) (*VEPCO I*). VEPCO submitted a compliance filing, which the Commission accepted in an unpublished letter order dated March 12, 2002 in Docket No. ER02-92-002. On November 21, 2002, in Docket Nos. ER02-2485-000 and ER02-2485-001, the Commission accepted in an unpublished letter order a revised executed IA between VEPCO and CPV. On June 10, 2003, the Commission conditionally accepted a proposal to extend the milestones in the IA in

¹ Under the revised IA, CPV will own and operate a 550 MW generating facility in Fluvanna County, Virginia that will interconnect with the transmission system owned by VEPCO.

Virginia Electric and Power Company, 103 FERC ¶ 61,318 (2003) (*VEPCO II*). On September 9, 2003, in *Virginia Electric and Power Company*, 104 FERC ¶ 61,249 (2001) (*VEPCO III*), the Commission conditionally accepted VEPCO's compliance filing and denied a request for rehearing submitted by Tenaska Virginia II Partners (Tenaska).

3. In *VEPCO III*, the Commission directed CPV to file annual reports, documenting CPV's progress in meeting its milestones, *i.e.*, obtaining financing, breaking ground, and securing customers for the generating facility's output. In addition, the Commission agreed with Tenaska that "because CPV's interconnection would use existing interconnection capability that could otherwise be used for Tenaska's interconnection, there is a possibility that Tenaska will end up funding network upgrades that would not be needed if CPV does not build its facility."² In order to avert this outcome, the Commission directed VEPCO to put in place the following procedure that would allow Tenaska to proceed with its project without running the risk of having to fund transmission upgrades that would be unnecessary if the CPV facility is not built:

[i]f, as Tenaska states, existing transmission capability has been "set aside" for CPV and the next generator in the queue is ready to interconnect before CPV, Dominion Virginia Power must give the next generator the option of interconnecting using (to the extent it can) the transmission capability that had been set aside for CPV's interconnection. For example, if Tenaska is next in the queue, executes its IA (or asks that an unexecuted IA be filed), and is proceeding with its project on a timeline that places its in-service date ahead of CPV, then Dominion Virginia Power must give Tenaska the option to complete its interconnection using the excess transmission capacity that had been set aside for CPV's interconnection, if that capacity can support Tenaska's interconnection. Then, if and when CPV completes its project and interconnection, Tenaska will have to fund the network upgrades needed for CPV's interconnection to the extent that the need for the upgrades is due to Tenaska's use of the excess transmission capability and Tenaska's decision to have its interconnection completed ahead of CPV. This ensures that, if CPV withdraws from the queue, Tenaska will not be in the position of having funded network upgrades that turn out not to be needed. However, it also ensures that, if CPV's project is constructed as planned, CPV will not be required to fund costs in excess of the costs applicable to its original queue position.^{3]}

4. On October 1, 2004, CPV submitted its Annual Report in Docket Nos. ER03-743-001 and ER03-743-002.

² *VEPCO III*, 104 FERC ¶ 61,249 at P 18.

³ *Id.* at P 19 (footnotes omitted).

This Filing

5. VEPCO now proposes to extend the milestone dates in Appendix F “Schedule for Placing Facility in Operation” and Appendix G “Schedule for Placing Dominion Virginia Power Direct Assignment Facilities in Operation” from the existing IA. In Appendix F, the proposed extended milestone dates are: (1) Equipment/Material Purchases – from April 2004 to June 30, 2005; (2) Construction Start Date – from April 2004 to June 30, 2005; (3) Energization Date / Second Funding Date – from June 2005 to September 30, 2005; (4) Construction Completion / Third Funding Date – December 31, 2005; and (5) Commercial Operation Date – from May 2006 to July 31, 2007.

6. In Appendix G, the proposed extended milestone dates are: (1) Construction Start Date – from January 2005 to June 1, 2006; (2) Energization Date (Backfeed) – January 31, 2007; (3) Construction Completion Date (Direct Assignment Facilities) – from June 30, 2005 to January 31, 2007; and (4) Construction Completion Date (Network Upgrades) – from November 30, 2005 to May 31, 2007.

7. In addition, VEPCO proposes to add Article 2.3, “Milestone Dates”, to the IA. Article 2.3 states that CPV agrees that it will not request any further extensions of the milestones in Appendices F and G unless the Construction Start Date has been met.⁴ Once the Construction Start Date has been met, extensions will be limited to actual delays in construction of the facility. The proposed language states that if VEPCO determines in its sole judgment that CPV has failed to meet the milestone dates, and such failure is not excused by reason of force majeure or construction delays, CPV will be found in default and the IA will be terminated.

⁴ Footnote 2 of Appendix F states that CPV will be deemed to have commenced Construction upon the occurrence of three conditions: (1) CPV has entered into a power purchase agreement, a tolling agreement or a letter of intent on or before September 30, 2005 with a non-affiliated third party for at least one-half of the power output of the Facility; (2) CPV has spent an aggregate amount exceeding \$2.5 million on Construction on or before the Construction Start Date; and (3) CPV has commenced Construction on the Construction Start Date, June 30, 2005.

8. VEPCO states that the proposed revisions were the result of discussions between VEPCO, CPV and Tenaska. A “settlement agreement”,⁵ which VEPCO states is submitted for informational purposes only, was filed as an attachment to the filing. The settlement agreement is between VEPCO and CPV; Tenaska is not a party to it.

Notice, Interventions, Protests and Answers

9. Notice of the filing was published in the *Federal Register*, 69 *Fed. Reg.* 71,024, with interventions and protests due on or before December 14, 2004. A timely motion to intervene and protest was filed by Tenaska. CPV filed a timely motion to intervene. On December 29, 2004, and January 3, 2005, respectively, CPV and VEPCO filed answers to Tenaska’s intervention and protest.

10. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept VEPCO’s or CPV’s answers and will, therefore, reject them.

Tenaska’s Protest

12. Tenaska protests the proposed revisions, stating that this is CPV’s fourth extension of the milestones. Tenaska requests that the Commission require CPV and VEPCO to adhere to the contractual milestones and the Commission’s policies set forth in Order No. 2003⁶ and direct VEPCO to terminate the IA.

⁵ VEPCO states that after it notified Tenaska of CPV’s requested extension, Tenaska informed VEPCO that it was opposed to CPV’s request for an extension of the milestone dates. After discussions between VEPCO, CPV and Tenaska, VEPCO requested FERC’s Dispute Resolution Service assistance. The “settlement agreement” represents the agreement reached between VEPCO and CPV.

⁶ Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 *Fed. Reg.* 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003) (Order No. 2003), *order on reh’g*, Order No. 2003-A, 69 *Fed. Reg.* 15, Mar. 26, 2004) FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh’g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004).

13. Alternatively, Tenaska requests that the Commission: (1) clarify the definition of “Construction”⁷ to reflect that CPV must expend an additional \$2.5 million on construction or initial installation of the project following the Commission’s decision in this proceeding; (2) require CPV to file, under oath, and within 30 days after each milestone date, a progress report, together with supporting documentation; and (3) modify the proposed language, which currently states that VEPCO shall have “sole judgment” as to whether CPV has failed to meet any of the milestone,⁸ to state that VEPCO shall exercise “reasonable judgment” as to whether to approve extension requests in order to “reduce VEPCO’s unfettered discretion to extend the milestones again.” Further, Tenaska requests that if the Commission does not reject the proposed revisions and terminate the IA, the Commission modify the proposed milestones and the accompanying settlement agreement to clarify that: (1) CPV must make verifiable progress in the construction of its facility; and (2) there will not be further extensions of any milestone.

Commission Response

14. The Commission will accept VEPCO’s proposed extension of the milestones. In *VEPCO III*, the Commission stated that it encourages transmission providers to be flexible in allowing generators to extend their milestones.⁹ Further, the Commission traditionally has favored the granting of reasonable extensions “to create an opportunity for generation to develop” under certain circumstances.¹⁰ Extensions allow flexibility to meet the needs of all generators, who must deal with the changing nature of business realities. In evaluating requests for extensions of milestones, the Commission has looked to see if the generator commits to funding the necessary system upgrades and whether the extension being granted would harm lower-queued generators.¹¹ However, while the

⁷ Footnote 2 of Appendix F of the Revised IA defines Construction as “the fabrication, erection and installation of the Facility.”

⁸ See proposed section 2.3. See also Attachment C at p. 4, paragraph 6.

⁹ *VEPCO III*, 104 FERC ¶ 61,248 at P 15. See also *Florida Power & Light Co.*, 98 FERC ¶ 61,226 at 61,896, *order on reh’g*, 99 FERC ¶ 61,318 (2002) (*FP&L*).

¹⁰ See, e.g., *PSEG Power In-City I, LLC v. Consolidated Edison Company of New York, Inc.*, 109 FERC ¶ 61,189 (2004).

¹¹ In *FP&L*, the Commission found that it was reasonable to allow an extension of the generator’s milestones, since the generator committed to funding the necessary system upgrades and maintaining a construction schedule that would “not impact adversely lower-queued generators.” *FP&L*, 98 FERC at 61,896.

Commission is in favor of allowing interconnection customers flexibility with respect to interconnection milestones, we also find it important to ensure that interconnection queues do not become clogged with speculative projects; which is why we required CPV to file annual reports in *VEPCO III*.¹²

15. Tenaska alleges that CPV's IA consumes scarce interconnection capacity on the VEPCO transmission system that would otherwise be used to interconnect Tenaska's competing generating project.¹³ In fact, VEPCO's extension of CPV's milestones will not harm lower queued generators. In *VEPCO III*, the Commission stated that any generator currently in the interconnection queue behind CPV could take advantage of any transmission capability that has been "set aside" for CPV in order to complete the interconnection of its generator.¹⁴ Moreover, Tenaska's argument is a collateral attack on *VEPCO III* where the Commission previously addressed this issue.¹⁵

16. While the IA at issue in this proceeding predates Order No. 2003, the rule nevertheless offers useful guidance as to IA terms and conditions that the Commission considers just and reasonable. Consistent with our policy in prior cases, Order No. 2003 is intended to prevent transmission providers from frustrating competition by creating obstacles to impede the interconnection of new generators. Our policy generally favors extensions of the milestones for completion of interconnection projects for a cumulative period of three years, without regard to the cause of the delays, and regardless of whether those delays are entirely attributable to factors within the control of the applicant.¹⁶

¹² *VEPCO III*, 104 FERC ¶ 61,248 at P 17.

¹³ Tenaska protest at 4.

¹⁴ *VEPCO III*, 104 FERC ¶ 61,249 at P 16-19.

¹⁵ *Id.*

¹⁶ Section 4.4.5 of the Large Generator Interconnection Procedures provides that extensions of less than three cumulative years in the Commercial Operation Date of the Generating Facility are not material and should be treated in the same manner as in section 12.3 (Construction Sequencing). In Order No. 2003, the Commission rejected arguments that a three year period is too long a period for such extensions and recognized "that such flexibility places a burden on the Transmission Provider's expansion planning process, but these extensions in most cases are well within the scope of other unforeseen changes that affect the planning process." Order No. 2003 at P 177. In rejecting a request for rehearing of this finding, the Commission found that extensions are appropriate because "a planning process inevitably is affected by a variety of changes in circumstances." Order No. 2003-A at P 134.

17. Tenaska points out that when the IA was originally filed in Docket No. ER02-92-000, the Commercial Operation Date was blank; however, the proposed in-service date found on the Generator Interconnection Request Form was June 2003.¹⁷ Despite the fact that the Generator Interconnection Request Form reflected a June 2003 Commercial Operation Date, the Commission accepted for filing a Commercial Operation Date of July 2004 in Docket No. ER02-92-002 for the CPV IA.¹⁸ Thus, the extension proposed here will not be more than three years from the approved Commercial Operation Date. Based on the Commission accepted Commercial Operation Date of July 2004, the proposed extension to July 31, 2007 is reasonable.

18. Moreover, in section 3.3.1 of the Large Generator Interconnection Procedures, the Commission determined that in order for an interconnection request to be valid the expected In-Service Date range of a new Large Generating Facility was the process window for the Transmission Provider's expansion planning period, which was not to exceed seven years from the date the Interconnection Request is received by the Transmission Provider, unless the Interconnection Customer demonstrates that engineering, permitting and construction of the new Large Generating Facility or increase in capacity of the existing Generating Facility will take longer than the regional expansion planning period.¹⁹ Since CPV's Interconnection Request was filed with VEPCO on August 7, 2000, the proposed extension to July 31, 2007 is within the seven year window and does not invalidate the interconnection request.

19. Given the Commission's policy on extension of milestones for a cumulative period of three years and its policy on valid interconnection requests, with this proposal CPV has reach the limit on the extension of the Commercial Operation Date of the Facility. We will not be inclined to grant further extensions.

20. Further, the proposed requirement that CPV must enter into a power purchase agreement as a condition to receiving a further extension of time is unjust and unreasonable. The Commission has stated previously that a generation interconnection customer is entitled to interconnection service without having to purchase transmission delivery service at the same time.²⁰ We find that, similarly, a generation customer does not have to demonstrate to the transmission provider that it has entered into a power

¹⁷ Tenaska protest at 2.

¹⁸ See unpublished letter order dated March 12, 2002 in Docket No. ER02-92-002.

¹⁹ Order No. 2003 at P 102, 104.

²⁰ *Tennessee Power Co.*, 90 FERC ¶ 61,238 at 61,761 (2000); *Arizona Public Service Co.*, 94 FERC ¶ 61,027 at 61,076, *order on reh'g*, 94 FERC ¶ 61,267 (2001).

purchase agreement. Accordingly, we find that the proposed provision is unjust and unreasonable because it would require CPV to have entered into a power purchase agreement as a condition to receiving a further extension of time. VEPCO is directed to revise the IA to remove this requirement.

CPV Progress Report

21. On October 1, 2004, CPV submitted its Annual Report in compliance with the Commission's order in *VEPCO III*. In *VEPCO III*, the Commission stated that, while it was in favor of allowing interconnection customers flexibility with respect to milestones, it was also important to ensure that interconnection queues do not become clogged with speculative projects.²¹ The Commission required CPV to submit annual reports documenting its progress in meeting its milestones, *i.e.*, obtaining financing, breaking ground, and securing customers. We will accept for informational purposes CPV's October 1, 2004 Annual Report.

The Commission Orders:

(A) VEPCO's revised Generator Interconnection and Operating Agreement is hereby accepted, subject to modification, as discussed in the body of this order.

(B) VEPCO is hereby direct to submit a revised IA within 30 days of the date of this order, as discussed in the body of this order.

(C) CPV's Annual Report is hereby accepted for informational purposes, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²¹ *Id.* at P 17.