

125 FERC ¶ 61,169
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Judith Gap Energy LLC
NorthWestern Corporation

Docket No. EL08-81-000

DECLARATORY ORDER

(Issued November 13, 2008)

1. On August 12, 2008, Judith Gap Energy LLC (Judith Gap) and NorthWestern Corporation (NorthWestern) filed a petition for a declaratory order. The parties requested that the Commission determine whether Judith Gap, pursuant to the terms of its Large Generator Interconnection Agreement (Agreement) with NorthWestern, is entitled to network resource interconnection service for up to the full 188 MW contemplated by the Agreement, even though Judith Gap will have placed only 135 MW into commercial operation by the three-year anniversary of the commercial operation date specified in the Agreement. In this order, we find that Judith Gap remains entitled to network resource interconnection service for the full 188 MW.

I. Background

2. Judith Gap owns and operates approximately 135 MW of wind-powered generation in Wheatland County, Montana, together with limited interconnection facilities (collectively, Judith Gap Facility) that are necessary to connect its generation with NorthWestern's transmission system. Judith Gap states that it is an exempt wholesale generator¹ and has market-based rate authority to sell its power exclusively at wholesale, pursuant to a market-based rate tariff on file with the Commission.² Judith Gap explains that its facility is being constructed in two phases: Phase I, which consists of 135 MW currently subject to a long-term wholesale power sale agreement between

¹ Judith Gap, August 12, 2008 Petition at 3 (citing *Judith Gap Energy LLC*, 111 FERC ¶ 62,045 (2005)).

² Judith Gap, August 12, 2008 Petition at 3 (citing *Spring Canyon Energy LLC, et al.*, Docket No. ER05-717-000, *et al.* (May 25, 2005) (unpublished letter order)).

Judith Gap and NorthWestern's Energy Supply function, and began commercial operations in March 2006; and Phase II, which is not yet built.

3. On December 28, 2004, Invenergy Investment Company, LLC, a parent company of Judith Gap, purchased the rights to develop a wind generating facility in Wheatfield, Montana, from WindPark Solutions America (WindPark). Prior to the acquisition, NorthWestern had already conducted a System Impact Study and System Facilities Study for the entire 188 MW project and found that it could be connected to the 230 kV line between Broadview and Judith Gap at the Judith Gap Interconnection Point, but that interconnection of any amount greater than 150 MW would require the development and implementation of an overload mitigation scheme.³ On July 16, 2004, NorthWestern issued a revised Facilities Study, which identified approximately \$3.3 million of network upgrades (including the overload mitigation scheme) that would be necessary to interconnect the Judith Gap Facility to NorthWestern's system with network resource interconnection service for 188 MW of generating capacity.

4. On March 23, 2005, Judith Gap and NorthWestern executed the Agreement to interconnect 188 MW of generation with network resource interconnection service upon completion of the \$260,357 of interconnection facilities and \$3,279,814 of network upgrades identified in the Agreement. The Agreement specifies that the commercial operation date for the project will be November 15, 2005. Additionally, Judith Gap emphasizes that the Agreement describes the network resource interconnection service provided under the Agreement as extending "up to the Large Generating Facility's full output."⁴ On February 16, 2006, Phase I of the Judith Gap Facility began producing power and making power sales to NorthWestern's Energy Supply function.

5. Because Phase I did not require construction of the overload mitigation scheme, NorthWestern constructed all of the interconnection facilities and network upgrades contemplated in the Agreement except for the overload mitigation scheme. Judith Gap states, however, that NorthWestern expects to complete the overload mitigation scheme prior to November 1, 2008. Judith Gap further states that with the construction of the overload mitigation scheme, which should be completed by November 1, 2008, all of the contemplated interconnection facilities and network upgrades necessary to accommodate the full 188 MW of network resource interconnection service for the Judith Gap project will be fully operational.

³ Judith Gap explains that this overload mitigation scheme is necessary to permit electrical output to exceed 150 MW in the event of a thermal violation on the 230 kV Judith Gap to Broadview transmission line.

⁴ Judith Gap, August 12, 2008 Petition at 7 (citing Agreement, Art. 4.1.2.2).

II. Request for Declaratory Order

6. Judith Gap interprets the Agreement as giving it full rights to network resource interconnection service for the entire 188 MW of electrical output studied by NorthWestern during the interconnection process and memorialized in the Agreement whether or not Judith Gap has placed Phase II of its project into service by the third anniversary of the commercial operation date set forth in the Agreement. Judith Gap notes that nothing in the operative terms of the Agreement imposes such a condition; however, it expresses concern that recent Commission orders⁵ call Judith Gap's right to 188 MW of network resource interconnection service under the Agreement into question. Judith Gap states that this issue has complicated its negotiations for the sale of electrical output from Phase II of its project. Therefore, Judith Gap and NorthWestern jointly request the Commission to decide the following issue: Whether an interconnection customer forfeits all or any portion of its rights to network resource interconnection service as contemplated by an executed Agreement, even if the customer has fully paid for all network upgrades that have been built and placed into service by the transmission provider, because the customer has not put all of its generating facilities into service within three years of the commercial operation date.

7. Judith Gap asserts that the Agreement governs its rights to 188 MW of network resource interconnection service, notwithstanding its pending completion of Phase II of its wind project. Judith Gap notes that the Facilities Study analyzed the entire 188 MW project and identified all facilities necessary to connect the project with NorthWestern's system. Moreover, Judith Gap asserts that the Agreement specifically provides that Judith Gap's right to network resource interconnection service for the 188 MW contemplated in the Agreement is fully perfected once these facilities are built.

8. Judith Gap argues that its right to network resource interconnection service for the entire 188 MW is consistent with the Commission's discussion of network resource interconnection service in Order No. 2003. Judith Gap states that network resource interconnection service is "to provide for only those Network Upgrades needed to allow the *aggregate* of generation in the Generating Facility's local area to be delivered to the *aggregate* of load on the Transmission Provider's Transmission System, consistent with the Transmission Provider's reliability criteria and procedures."⁶ Judith Gap contends

⁵ *Montgomery Great Falls Energy Partners LP v. NorthWestern Corp.*, 123 FERC ¶ 61,181 (2008) (*Montgomery*); *Southern Montana Electric Generation & Transmission Coop., Inc. v. NorthWestern Corp.*, 113 FERC ¶ 61,023 (2005) (*Southern Montana*).

⁶ Judith Gap, August 12, 2008 Petition at 9-10 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs.

(continued)

that the issue of whether the transmission provider must hold network resource interconnection service for a certain time was addressed by the Commission in Order No. 2003-A, where the Commission held that “it is reasonable for the Interconnection Customer to hold, through the life of the interconnection agreement, the right to use the Network Upgrade capacity that allows the Generating Facility to be designated a Network Resource.”⁷ Therefore, Judith Gap believes that notwithstanding the fact that Phase II of its project is not yet complete, it is entitled to the full 188 MW of network resource interconnection service because that was the amount studied during the interconnection process and Judith Gap will have fulfilled all of the requirements for obtaining such service once NorthWestern completes the overload mitigation scheme.

9. Additionally, Judith Gap states that its project has always been contemplated and studied as comprising two phases, with the goal of having Phase I (135 MW) operational by 2005 or early 2006, and a subsequent expansion to 188 MW (Phase II). Judith Gap argues that the fact that it has not yet completed Phase II of the project does not constitute a modification of the Judith Gap Facility and does not implicate article 5.19 (Modification) of the Agreement, which permits parties to undertake modifications and discusses the procedures for doing so. Neither is article 5.16 (Suspension) of the Agreement implicated according to Judith Gap because it has not requested NorthWestern to suspend its work associated with the construction and installation of the interconnection facilities. Judith Gap states that after Phase I went into service, NorthWestern determined that it would be efficient to delay the overload mitigation scheme until the installed generation became greater than 150 MW.

10. As stated earlier, Judith Gap’s concern over its rights to network resource interconnection service for the entire 188 MW contemplated by the Agreement arises primarily from two Commission orders—*Montgomery* and *Southern Montana*—which are described in detail below.⁸ Specifically, Judith Gap is concerned that these decisions may require it to submit a new interconnection request for Phase II of its project, take a subordinate position in the queue, and forfeit its rights to the full network resource

¶ 31,160, at P 531, *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007) (emphasis in original)).

⁷ Judith Gap, August 12, 2008 Petition at 10 (citing Order No. 2003-A at P 560).

⁸ Judith Gap states that NorthWestern takes no position on Judith Gap’s interpretation of these cases and joins the petition to obtain clarification of the Commission’s interconnection policy on this issue.

interconnection service because Phase II will not be completed within three years of the initial commercial operation date. Judith Gap believes *Montgomery* and *Southern Montana* are distinguishable from the instant situation because they do not involve projects with executed Agreements or completed and paid-for network upgrades; instead they involve deferral of the commercial operation date pursuant to section 4.4.5 of the Large Generator Interconnection Procedures (Procedures).⁹

11. Judith Gap states that it has not requested a modification of its project or suspension of work by NorthWestern; rather, both parties were aware that the project would be installed in two phases. Judith Gap distinguishes both *Montgomery* and *Southern Montana* from the present situation, arguing that fundamental differences militate in favor of not applying those cases to the facts presented here. Judith Gap states that unlike the present situation, the parties in *Montgomery* and *Southern Montana* did not already have an executed Agreement. Next, Judith Gap notes that the interconnection facilities discussed in *Montgomery* and *Southern Montana* were not built, while here, all of the network upgrades for the full 188 MW have been paid for, completed and placed in service (with the exception of the overload mitigation scheme). Judith Gap argues that requiring its project to return to the queue after it has paid for all network upgrades required for its project would be fundamentally unfair, contrary to Commission precedent, and would result in an unlawful taking of property.

12. Additionally, Judith Gap states that even assuming that completion of Phase II is considered a material modification, granting an extension of the commercial operation date for that portion of the project will not result in harm to any interconnection customers in the queue. Judith Gap asserts that unlike in *Montgomery* and *Southern Montana*, its project is essentially complete and no longer in the queue, stating that once the overload mitigation scheme is complete (expected November 1, 2008), it believes it can place new wind turbines into commercial operation in as little as two months. Furthermore, Judith Gap argues that its network upgrades are assumed to be in service for the purposes of lower-queued projects' impact analyses. Thus, Judith Gap asserts that unlike in *Montgomery* and *Southern Montana*, the delay will not adversely affect other interconnecting generators. Finally, Judith Gap argues that interpreting the Agreement to require a wind developer to place all of its turbines into service within three years of the

⁹ Procedures § 4.4.5 (Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at 30,586). This order discusses section 4.4.5 of the *pro forma* Procedures, because it is identical to the comparable section of NorthWestern's Procedures for all practical purposes here. The only difference—that NorthWestern's section 4.4.5 includes a separate and express proviso that extensions may necessitate additional studies—is not relevant to the discussion here.

commercial operation date would impose a cramped and unsupported meaning on the Agreement as well as thwart the policy goal of promoting wind generation.

13. Judith Gap states that both it and NorthWestern request expedited treatment of the petition in order to provide regulatory certainty of their rights and obligations under the Agreement prior to the three-year anniversary of the project's commercial operation date, November 15, 2008.

III. Notice and Responsive Pleadings

14. Notice of Judith Gap's filing was published in the *Federal Register*, 73 Fed. Reg. 50,608 (2008), with interventions and protests due on or before August 27, 2008. None were filed.

IV. Discussion

15. For the reasons discussed below, we find that Judith Gap remains entitled to network resource interconnection service for the full 188 MW envisioned in its Agreement with NorthWestern.

16. In Order No. 2003, the Commission established the *pro forma* Procedures in order to reduce disputes arising from the interconnection process, minimize opportunities for undue discrimination, foster the development of electricity generation, and protect system reliability.¹⁰ Section 4.4 of the Procedures pertains to modifications to an interconnection request, providing that "the Interconnection Customer shall retain its Queue Position if the modifications are in accordance with Sections 4.4.1, 4.4.2 or 4.4.5, or are determined not to be Material Modifications. . . ."¹¹ (The modifications specified in sections 4.4.1 and 4.4.2 are not relevant to the discussion here.) Section 4.4.5 states that "[e]xtensions of less than three (3) cumulative years in the Commercial Operation Date of the Large Generating Facility to which the Interconnection Request relates are not material and should be handled through construction sequencing."¹² This three-year provision specifically exempts extensions of the commercial operation date of less than three years from having to drop out of the queue and re-file an interconnection request as such extensions are, by definition, not material modifications.

¹⁰ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 12.

¹¹ Procedures § 4.4 (Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at 30,585).

¹² *Id.* § 4.4.5.

17. This rule, however, does not lead to the corollary that *all* extensions of the commercial operation date beyond three years are considered material modifications. Instead, as our decisions before and after Order No. 2003 make clear, extensions of three years or more will be found “material modifications” based on a number of factors, including whether they harm later-queued generators.¹³ Furthermore, the Procedures define a material modification as one that has “a material impact on the cost or timing of any Interconnection Request with a later queue date.”¹⁴ Therefore, the key factor in determining whether a commercial operation date extension of three years or more is “material” is whether the extension will harm later-queued generators.¹⁵ Neither *Southern Montana* nor *Montgomery* (or other Commission decisions) change that rule.

18. In *Southern Montana*, the Commission addressed whether certain extensions of the commercial operation date were “material modifications” under the Procedures. The Commission determined that the three-year provision would apply to extensions sought after Order No. 2003’s effective date (January 20, 2004) and extensions related to an Agreement on file with the Commission before Order No. 2003’s effective date.¹⁶ In *Southern Montana*, the interconnection customer requested two extensions to the commercial operation date totaling 63 months. The Commission found that because the first extension was requested before Order No. 2003’s effective date, it did not fall under Order No. 2003’s three-year provision. Because the second (post Order No. 2003) extension was less than three years, it could not be considered a “material modification”

¹³ See, e.g., *Illinois Power Co.*, 120 FERC ¶ 61,237, at P 20 (2007) (citing *Virginia Electric and Power Co.*, 103 FERC ¶ 61,318, *order on reh’g*, 104 FERC ¶ 61,249 (2003); *Consolidated Edison Co. of New York, Inc.*, 101 FERC ¶ 61,185 (2002), *order on reh’g*, 102 FERC ¶ 61,254 (2003); *Duke Energy Corp.*, 100 FERC ¶ 61,251, at P 23 (2002); *Florida Power & Light Co.*, 98 FERC ¶ 61,226, *order on reh’g*, 99 FERC ¶ 61,318 (2002)).

¹⁴ Procedures § 1 (Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at 30,578).

¹⁵ Often accompanying this issue is the separate and distinct issue of determining the appropriate commercial operation date when parties disagree on whether it is the date specified on the interconnection request or the Agreement. Because the parties agree that the relevant commercial operation date is November 15, 2005, as specified in the Agreement, we do not address this issue here and use November 15, 2005 as the applicable commercial operation date.

¹⁶ *Southern Montana*, 113 FERC ¶ 61,023 at P 26 (“drawing a distinction between extensions granted prior to Order No. 2003’s effective date [January 20, 2004] and those granted after Order No. 2003 became effective”).

under section 4.4.5 of the Procedures. *Southern Montana*'s discussion of commercial operation date extensions is relevant here to the extent that it reinforces the Commission's policy that such extensions are material modifications, requiring new interconnection requests, only insofar as they harm later-queued generators.¹⁷ *Southern Montana* is also relevant in that it finds that Order No. 2003's three-year extension provision continues to apply even after the customer signs an Agreement.¹⁸

19. The Commission's more recent *Montgomery* decision addressed the same project involved in *Southern Montana*. Most importantly for the purposes here, the Commission found that the transmission provider had determined that allowing the generator's requested extension "would have a material effect on lower-queued projects and therefore could not be accommodated."¹⁹ *Montgomery*, therefore, is consistent with the Commission's longstanding practice of determining whether an extension of the commercial operation date greater than three years is allowable based on whether it harms lower-queued generators.

20. In the case at hand, Judith Gap and NorthWestern agree that the commercial operation date is the same as that listed in the Agreement—November 15, 2005.²⁰ Judith Gap states that it will not have Phase II of its wind-generation facility in service by the three-year anniversary of the commercial operation date. The fact that Judith Gap will not have this portion of its facility in service by November 15, 2008, does not in itself alter Judith Gap's rights to network resource interconnection service for 188 MW, as

¹⁷ *Id.* P 24 (citing *Duke Energy Corp.*, 100 FERC ¶ 61,251, at P 23 (2002) (directing Duke Energy to revise its interconnection agreement to allow a reasonable in-service extension based on its tariff provision); *Florida Power & Light Co.*, 99 FERC ¶ 61,318, at 19 (2002) (finding that it was reasonable to allow an in-service extension since the generator committed to both funding the necessary upgrades and maintaining a construction schedule that would not harm lower-queued generators)).

¹⁸ *Id.* P 26.

¹⁹ *Montgomery*, 123 FERC ¶ 61,181 at P 58 (citing numerous allegations of harm in the comments of three protesting parties).

²⁰ *Southern Montana* discusses where the Commission will look for the commercial operation date in order to apply the three-year provision depending on when certain documents were filed in relation to the effective date of Order No. 2003. As noted earlier, there is no dispute as to the commercial operation date applicable here. Therefore, we do not address this issue and use the November 15, 2005 as the commercial operation date applying the three-year rule.

contemplated by the Agreement. At present, no generator in NorthWestern's interconnection queue below Judith Gap has alleged, let alone shown, any harm resulting from a delay in the commercial operation date beyond November 15, 2008. Without such a showing, we find there to be no material modification of the project, and Judith Gap retains all of its rights to network resource interconnection service for the full 188 MW contemplated in the Agreement.

21. While we clarify that Judith Gap's rights under the Agreement remain intact absent harm to lower-queued generators, this situation may not always be the case, and some generator in the queue may show that Judith Gap's failure to complete Phase II in a reasonable period of time is harming it.²¹ Judith Gap seeks a determination that essentially finds that once all of the network upgrades for a project have been completed and paid for, a generator is no longer subject to Order No. 2003's three-year extension provision and is instead only subject to the terms of the Agreement. However, as indicated above, Order No. 2003 governs extensions to projects, such as Judith Gap's project here, even where the parties have filed an Agreement with the Commission. We see no reason to change that policy here. Therefore, at present, we determine that Judith Gap retains its rights to network resource interconnection service for the full 188 MW after November 15, 2008 but before Phase II is placed in service, only to the extent that such extension does not constitute a "material modification," i.e., it does not harm lower-queued generators.

²¹ However, we doubt that such a showing can be made in this case. If, as Judith Gap asserts, all of the interconnection facilities and network upgrades will be constructed by November 15, 2008, we do not see how any later-queued generators would be harmed by a delay in the construction of Phase II of the Judith Gap Facility past the three-year anniversary of the commercial operation date. Here, not only has the generator committed to funding all of the network upgrades, but such upgrades will actually have been built as well. Therefore, though we do not foreclose the possibility that a lower-queued generator may make a legitimate claim of harm due to Judith Gap's delay in placing Phase II in service, we find that such a situation is highly unlikely.

The Commission orders:

Judith Gap's petition for a declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.