

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

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, John R. Norris,
Tony Clark, and Norman C. Bay.

Arizona Public Service Company

Docket Nos. ER13-447-002

TGP Development Company, LLC, TGP Flying Cloud
Holdings, LLC, and WEC TX Company, LLC

EL13-45-001

v.

Arizona Public Service Company

ORDER ON REHEARING

(Issued August 14, 2014)

1. In this order, the Commission dismisses, on procedural grounds, the request for rehearing by TGP Development Company, LLC, TGP Flying Cloud Holdings, LLC and WEC TX Company, LLC (collectively TGP Parties) in Docket No. ER13-447-002 and by American Wind Energy Association (AWEA) in Docket No. EL13-45-001. In addition, the Commission denies TGP Parties' request for rehearing in Docket No. EL13-45-001. All of the requests for rehearing were filed in response to the Commission's order issued in this proceeding on June 27, 2013.¹

I. Background

A. APS's Tariff Filing (Docket No. ER13-447-000)

2. On November 21, 2012, in Docket No. ER13-447-000, Arizona Public Service Company (APS) proposed revisions to its open access transmission tariff (Tariff). Specifically, APS proposed to revise Section 5 and Attachment M to clarify the transmission services it offered to its customers under its Tariff.² Up to that point, APS

¹ *Arizona Public Service Co.; TGP Development Co., LLC, TGP Flying Cloud Holdings, LLC, and WEC TX Co., LLC v. Arizona Public Service Co.*, 143 FERC ¶ 61,280 (2013) (June 2013 Order).

² APS Transmittal Letter at 1-3.

incorporated by reference the North American Energy Standards Board's (NAESB) Open Access Same-Time Information System (OASIS) Business Practice Standards without specifying the transmission service products it actually offered to its customers.³

3. APS also proposed to revise the *pro forma* service agreements found in its Tariff to include a three-year term for all umbrella service agreements for short-term service to maintain the accuracy of its list of active customers.⁴ In addition, APS proposed several other revisions to the service agreement provisions that it stated would simplify all aspects of service under those agreements. Finally, APS proposed to clarify language in its creditworthiness procedures in Attachment I and proposed other ministerial changes.⁵

4. Notice of APS's filing was published in the *Federal Register*, 77 Fed. Reg. 71,408 (2012), with interventions and protests due on or before December 12, 2012. None was filed. On December 27, 2012, the Director, Division of Electric Power Regulation – West, acted on the then-unprotested Tariff filing by issuing a letter order under delegated authority accepting the revisions to APS's Tariff, as filed.⁶

B. TGP Parties' Motion to Intervene (Docket No. ER13-447-001) and Complaint (Docket No. EL13-45-000)

5. On January 25, 2013, TGP Parties filed a motion to intervene out-of-time in the proceeding in Docket No. ER13-447-001, along with a request for rehearing or clarification of the December 2012 Letter Order.

6. Additionally, on February 1, 2013, TGP Parties filed a separate complaint in Docket No. EL13-45-000 raising the same allegations. Specifically, the TGP Parties took issue with the creditworthiness provisions set forth in Attachment I of APS's Tariff, accepted by the Commission for filing in the December 2012 Letter Order, which require non-creditworthy transmission service customers to provide collateral or security prior to acceptance of their transmission service requests.

³ *Id.* at 2-3.

⁴ *Id.* at 5-6. There are three types of *pro forma* service agreements in APS's Tariff. These are found in: (1) Attachment A (Firm Point-to-Point Transmission Service); (2) Attachment A-1 (Resale, Reassignment, or Transfer of Point-to-Point Transmission Service); and (3) Attachment B (Non-Firm Point-to-Point Transmission Service).

⁵ *Id.* at 6, 8.

⁶ *Arizona Public Service Co.*, Docket No. ER13-447-000 (Dec. 27, 2012) (delegated letter order) (December 2012 Letter Order).

7. In the June 2013 Order, the Commission: (1) denied TGP Parties' late-filed motion to intervene in Docket No. ER13-447-001; (2) dismissed TGP Parties' request for rehearing in Docket No. ER13-447-001; and (3) denied TGP Parties' complaint in Docket No. EL13-45-000.

C. TGP Parties' Request for Rehearing of the June 2013 Order

8. On July 26, 2013, TGP Parties filed a request for rehearing of the June 2013 Order, objecting to the Commission's denial of TGP Parties' complaint challenging the creditworthiness provisions in APS's Tariff. TGP Parties argue that the requirement for transmission customers not qualifying for unsecured credit to post the required security "prior to acceptance of its transmission service request" is unjust and unreasonable.⁷ They argue that the impact of the revised Attachment I will be to require generation developers to provide a significant amount of financial security to APS at the very start of the development process, even prior to APS accepting a transmission service request.⁸ TGP Parties argue that Attachment I, requires a customer submitting a request for transmission service to post security even if the requested transmission capacity is not yet available. TGP Parties contend that it serves no legitimate purpose and is unjust and unreasonable to require customers to post security for capacity that APS does not currently have, and that APS may never ultimately construct or obtain.⁹

9. They further argue that the Commission erred in giving weight to APS's concern about the potential for speculative projects in the APS transmission queue, absent evidence that the revised credit requirement is necessary to eliminate non-viable projects from the queue.¹⁰ TGP Parties also dispute the Commission's conclusion that the revised credit requirement will not create a barrier to developers seeking access to the APS system, and argue that the provision will stifle competition and force otherwise viable projects to exit the queue.¹¹ Finally, TGP Parties argue that APS's credit requirements effectively impose a second reservation fee on transmission customers seeking to defer the commencement of service.¹²

⁷ TGP Parties Rehearing at 2.

⁸ *Id.*

⁹ *Id.* at 7-8.

¹⁰ *Id.* at 2, 8-10.

¹¹ *Id.* at 3-4.

¹² *Id.* at 4.

10. On August 12, 2013, APS filed an answer opposing TGP Parties' rehearing request. APS's answer includes a statement that APS's credit requirements do not require non-creditworthy customers to post collateral as early in the process as feared by TGP Parties. In this regard, APS states that, in fact, non-creditworthy entities are not required to post security at the time they *submit* a transmission service request; rather, APS's Attachment I of the Tariff only requires non-creditworthy transmission service customers to provide collateral or security *prior to APS's acceptance* of the transmission service request, i.e., prior to signing a binding transmission service agreement.¹³

11. On August 27, 2013, TGP Parties filed an answer to APS's answer. TGP Parties' answer includes a statement that they find APS's explanation of the creditworthiness procedures contained in Attachment I of the APS Tariff welcome; they note that this interpretation is not explicit in the language of the Tariff provision.¹⁴ Thus, TGP Parties urge that, if the Commission does not find that the revised Attachment I is unjust and unreasonable, it should confirm APS's interpretation of Attachment I of APS's Tariff.¹⁵ In TGP Parties' view, this clarification would avoid disputes regarding the provision's meaning in future interactions between APS and transmission customers with regard to the non-creditworthy customer security requirement.¹⁶

D. AWEA's Motion to Intervene Out-of-Time in Docket No. EL13-45-001 and Request for Rehearing

12. On July 26, 2013, AWEA filed a motion to intervene out-of-time in Docket No. EL13-45-001 and a request for rehearing of the denial of TGP Parties' complaint in the June 2013 Order. AWEA's rehearing request argues the Commission erred by finding that APS's recent revision to the credit requirements in its Tariff was just and reasonable.¹⁷ AWEA argues that this provision favors utilities and would

¹³ APS Answer at 9.

¹⁴ TGP Parties' Motion at 2.

¹⁵ *Id.* at 3. We note, however, that it appears that TGP Parties still have a different understanding of APS's Tariff than does APS. TGP Parties request "that the Commission clarify that Attachment I of the APS Tariff does not require a non-creditworthy customer to post security until after the execution of a Transmission Service Agreement, and that such Agreement cannot be executed unless and until APS has capacity available or expects such capacity to become available prior to the service commencement date." TGP Parties Answer at 3.

¹⁶ *Id.* at 3-4.

¹⁷ AWEA Rehearing at 1.

disproportionately impact independent renewable generation developers that do not meet APS's creditworthiness criteria at the time they submit their transmission service requests.¹⁸ It further argues that an independent renewable developer would not typically be in a position to post such a substantial amount of collateral when it submits a transmission service request and that the revision is burdensome to developers.¹⁹ It concludes that APS's new credit requirement will have a chilling effect on new generation development within the APS territory, as it will force projects, including viable projects that would ultimately be placed into service, to exit the transmission queue (or decide not to enter the queue at all) because they do not have the necessary liquidity to post such substantial security at the very beginning of the development process.²⁰ It further argues that APS did not justify this revision other than by presenting an unsubstantiated claim that the requirement is necessary to prevent speculative projects from adversely impacting the transmission queue.²¹ Finally, AWEA argues that APS's credit provision gives APS too much discretion and will allow APS to discriminate against developers.²²

13. On August 12, 2013, APS filed an answer opposing AWEA's motion to intervene and request for rehearing. With respect to AWEA's motion to intervene, APS argues that the motion is untimely, filed 143 days out-of-time and *after* the issuance of a dispositive order, and should be denied. APS notes that the Commission has repeatedly held that:

[w]hen late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission may be substantial. *Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.*²³

14. APS argues that AWEA has failed to meet this burden, as it has provided no justification – or even explanation – for its failure to submit a timely intervention in this proceeding.²⁴ APS also argues that AWEA's members had the option of intervening

¹⁸ *Id.*

¹⁹ *Id.* at 2, 5.

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.* at 6.

²³ *Id.* at 5 & n.19.

²⁴ *Id.* at 5.

individually, but that only TGP Parties did so and that they are capable of representing their own interests without the participation of AWEA.²⁵

15. On August 28, 2013, AWEA filed a motion for leave to file an answer, comments, and a request for clarification.

II. Discussion

16. We have before us in this proceeding: (1) TGP Parties' request for rehearing of the June 2013 Order; (2) AWEA's motion to intervene out-of-time in Docket No. EL13-45-000; and (3) AWEA's request for rehearing of the June 2013 Order.

17. In the June 2013 Order, the Commission denied the untimely motion to intervene that TGP Parties filed 44 days after the issuance of the December 2012 Letter Order. Additionally, the Commission denied TGP Parties' request for rehearing in Docket No. ER13-447-001 because TGP Parties lacked standing to challenge the December 2012 Letter Order as they were not parties to the proceeding. On rehearing, while TGP Parties argue that the Commission erred in the June 2013 Order by finding APS's Tariff provisions accepted in the December 2012 Letter Order just and reasonable, they made no attempt to show that the Commission erred in denying their late-filed intervention, which was the basis for denying their request for rehearing of the December 2012 Letter Order.

18. Based on our findings on the procedural issues, we do not reach the merits of TGP Parties' arguments on rehearing of the June 2013 Order as they relate to the Commission's findings in Docket Nos. ER13-447-000 and ER13-447-001 and we reaffirm our dismissal in the June 2013 Order of TGP Parties' request for rehearing of the December 2012 Letter Order based on TGP Parties' lack of standing in Docket No. ER13-447-000.

19. TGP Parties do, however, have standing to seek rehearing of the June 2013 Order as it relates to the denial of their complaint in Docket No. EL13-45-000 that challenged the propriety of APS's Tariff revisions on creditworthiness. In this regard, the Commission in the June 2013 Order rejected TGP Parties' contention that APS's Tariff provisions related to creditworthiness were not just and reasonable. We found that TGP Parties had failed to make that showing (i.e., that the provisions accepted in the December 2012 Letter Order were not just and reasonable). On rehearing, we see nothing in TGP Parties' rehearing request that persuades us to reverse this determination.

²⁵ *Id.* at 5-6.

20. In reaching our determination that APS's creditworthiness Tariff provisions have not been shown to be unjust and unreasonable, we stand by our findings in the June 2013 Order that: (1) the requirement under Attachment I of APS's Tariff for a non-creditworthy transmission customer to provide collateral or security prior to the acceptance of its transmission service request does not impose a second reservation fee on the transmission customer; and (2) APS's security requirements requiring a non-creditworthy customer to post security equal to three months' transmission service do not make APS's tariff unjust and unreasonable and do not create unnecessary barriers to entry.

21. On rehearing, TGP Parties add an additional objection to APS's collateral requirements and argue on rehearing that those requirements unfairly require non-creditworthy customers to post collateral very early in the development process, i.e., at the same time (or even prior to) the date on which they submit their transmission service request to APS.

22. On this point, however, Attachment I of the Tariff, which covers Creditworthiness Procedures, states that, if a transmission customer is required to provide collateral or security, "[t]he customer must provide an Acceptable Form of Financial Security to APS prior to acceptance of its transmission service request."²⁶ Thus, we disagree with TGP Parties' contention that this requirement means that non-creditworthy customers must post collateral at the same time (or even prior to) the date on which they submit their transmission service request to APS. To the contrary, based on APS's representations, non-creditworthy entities are not required to post security at the time they submit a transmission service request; as explained by APS, the Tariff only requires non-creditworthy entities to post security prior to *acceptance* of a binding transmission service agreement, but not before or at the time of requesting service.²⁷

23. Regarding AWEA's motion to intervene out-of-time in Docket No. EL13-45-000, when late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting

²⁶ See APS FERC Electric Tariff, Volume No. 2, Attachment I – Creditworthiness Procedures, Section 4 – Requirements for Security or Collateral.

²⁷ We will accept APS's answer insofar as it clarifies that APS's Tariff does not require the posting of collateral until prior to acceptance of the Transmission Service Request and that APS interprets this to mean that security will not be required until "prior to signing a binding Transmission Service Agreement." APS Answer at 9. We, likewise, will accept TGP Parties' responsive answer insofar as it addresses this same issue. We will reject these pleadings in all other respects.

such late intervention.²⁸ AWEA's motion to intervene and its request for rehearing of the June 2013 Order were filed 143 days out-of-time and well *after* the issuance of a dispositive order; moreover, no justification was made for why such a delay was unavoidable. Accordingly, we find that AWEA has not met the higher burden of justifying its late intervention. Further, as with TGP Parties' request for rehearing in Docket No. ER13-447-001, we will dismiss AWEA's request for rehearing in Docket No. EL13-45-001 because, as a non-party, it lacks standing to seek rehearing of the June 2013 Order under section 313 of the Federal Power Act²⁹ and the Commission's regulations.

The Commission orders:

(A) TGP Parties' request for rehearing in Docket No. ER13-447-002 is hereby dismissed and its request for rehearing in Docket No. EL13-45-001 is hereby denied, as discussed in the body of this order.

(B) AWEA's out-of-time motion to intervene in Docket No. EL13-45-001 is hereby denied, and its request for rehearing in that same docket is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁸ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 & n.10 (2003); *Florida Power & Light Co.*, 99 FERC ¶ 61,318, at 62,358 (2002).

²⁹ 16 U.S.C. § 825k (2012).