

150 FERC ¶ 61,005
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. ER15-360-000

ORDER REJECTING FILING

(Issued January 6, 2015)

1. On November 7, 2014, pursuant to section 205 of the Federal Power Act,¹ and section 35.13 of the Commission's regulations² Southwest Power Pool, Inc. (SPP) filed an unexecuted Generator Interconnection Agreement (GIA) among SPP as transmission provider, Hale Community Energy, LLC (Hale) as interconnection customer, and Southwestern Public Service Company (SPS) as transmission owner (Substitute Original Hale GIA). In this order, we reject the unexecuted Substitute Original Hale GIA, as discussed below.

I. Background

2. On December 20, 2013, SPP filed revisions to its Generator Interconnection Procedures in Docket No. ER14-781-000 that included changes to the *pro forma* GIA. SPP states that the Commission conditionally approved the proposed revisions, subject to further compliance, and granted an effective date of March 1, 2014 for the revised Generator Interconnection Procedures.³ According to SPP, the Commission's June 13 Order required SPP to allow 60 days from June 13, 2014 for any interconnection request that did not have an executed GIA as of March 1, 2014 to transition to the revised Generator Interconnection Procedures, rather than 60 days from the effective date of the

¹ 16 U.S.C. § 824d (2012).

² 18 C.F.R. § 35.13 (2014).

³ *Southwest Power Pool, Inc.*, 147 FERC ¶ 61,201 (2014) (June 13 Order). SPP's compliance filing is pending before the Commission in Docket No. ER14-781-003.

revised Generator Interconnection Procedures (March 1, 2014), as SPP originally proposed.⁴

II. SPP's Filing

3. SPP explains that the Substitute Original Hale GIA facilitates the interconnection of Hale's planned 478 megawatt wind generating facility to SPS's transmission system.⁵ SPP states that the Original Hale GIA became effective on May 29, 2014. However, because Hale did not have an executed GIA as of March 1, 2014, SPP asserts that Hale is subject to the revised Generator Interconnection Procedures approved in the June 13 Order, and it is required to transition to the revised Generator Interconnection Procedures by August 12, 2014. SPP explains that it modified the Original Hale GIA to conform to the *pro forma* GIA approved in the June 13 Order, and sent the draft Substitute Original Hale GIA to Hale for execution on August 12, 2014. According to SPP, Hale notified SPP by letter dated August 21, 2014 that it would not execute the draft Substitute Original Hale GIA, because it did not agree that it was required to comply with the revised Generator Interconnection Procedures. SPP states that it again requested that Hale execute the draft Substitute Original Hale GIA on October 15, 2014, and Hale informed SPP by email on November 4, 2014 that it elected not to sign the *pro forma* GIA, and is predisposed to continue to perform under the GIA it executed with SPP and SPS in May 2014.⁶ SPP explains that it is submitting the Substitute Original Hale GIA because Hale declined to execute it.

4. SPP argues that application of the revised Generator Interconnection Procedures to an interconnection request without an executed GIA as of March 1, 2014 is clear in the June 13 Order and not addressed in the pending compliance filing. SPP states that the June 13 Order required SPP to modify the proposed language in section 5.1.3 of the revised Generator Interconnection Procedures to allow 60 days from the date of the June 13 Order for interconnection requests without executed GIAs as of March 1, 2014 to transition to the revised Generator Interconnection Procedures rather than 60 days from March 1, 2014.⁷ SPP also asserts that at the time of the June 13 Order, SPP had

⁴ Transmittal at 2 (citing June 13 Order, 147 FERC ¶ 61,201 at P 130; Section 5.1.3 of Attachment V submitted in its July 14, 2014 compliance filing in Docket No. ER14-781-003). SPP notes that the compliance filing is pending before the Commission.

⁵ *Id.*

⁶ *Id.* at 2-3.

⁷ *Id.* at 3 (citing June 13 Order, 147 FERC ¶ 61,201 at P 130).

nine GIAs, including the Original Hale GIA, that had been executed after March 1, 2014 that are required to transition to the revised Generator Interconnection Procedures. According to SPP, all but Hale have executed revised GIAs to comply with the June 13 Order. SPP concludes that because Hale did not have an executed GIA as of March 1, 2014, Hale is required to transition to the revised Generator Interconnection Procedures within 60 days from the June 13 Order. Therefore, SPP requests that the Commission accept the Substitute Original Hale GIA and require Hale to transition to the revised Generator Interconnection Procedures.⁸

5. SPP states that the Substitute Original Hale GIA modifies and supersedes the GIA between SPP, Hale, and SPS submitted by SPP in its Electric Quarterly Report,⁹ and updates the Original Hale GIA to conform to the terms and conditions in the *pro forma* GIA accepted by the Commission in the June 13 Order.¹⁰ SPP requests that the Substitute Original Hale GIA become effective on May 29, 2014, and that it be made subject to the outcome of Docket No. ER14-781-000. To permit this effective date, SPP requests waiver of the 60-day prior notice requirement.¹¹

III. Notice of Filing

6. Notice of SPP's filing was published in the *Federal Register*, 79 Fed. Reg. 68,431 (2014), with interventions and protests due on or before November 28, 2014. Hale submitted a timely motion to intervene and a protest. On December 19, 2014, SPP filed an answer to Hale's protest. On December 24, 2014, Hale filed an answer to SPP's answer.

⁸ *Id.* at 3.

⁹ SPP states that the GIA filed in the Electric Quarterly Report, designated as Original Service Agreement No. 2896, is referred to as the "Original Hale GIA" which became effective on May 29, 2014 and was reported in the Electric Quarterly Report commencing with the second quarter of 2014.

¹⁰ SPP Filing at n.6.

¹¹ *Id.* at 3-4 (citing 18 C.F.R. §§ 35.3, 35.11 (2014)).

IV. Discussion

A. Procedural Issues

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motion to intervene serves to make Hale a party 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 or answer unless otherwise ordered by the decisional authority. We will accept SPP's and Hale's answers because they have provided information that assisted us in our decision-making process.

B. Protest

8. Hale protests SPP's filing, contending that the Commission should reject the unexecuted Substitute Original Hale GIA because SPP delayed tender of a draft GIA to Hale in violation of SPP's applicable Open Access Transmission Tariff (Tariff) until after SPP filed revised Generator Interconnection Procedures containing revised security posting requirements.¹² According to Hale, the new security posting requirement exceeds SPP's estimate of the cost of the transmission upgrades that Hale requires, making the new requirements unjust and unreasonable. Hale contends that because Hale is in full compliance with all of the terms and conditions of the contract that SPP signed, including all of its milestones, the Commission should reject SPP's attempted unilateral contractual modification.¹³

9. Hale explains that on August 20, 2013, SPP provided Hale with an Interconnection Facilities Study final report for its wind energy project. Hale states that under the Generator Interconnection Procedures in effect at that time, SPP was required to tender to Hale a draft GIA together with draft appendices simultaneously with the final Interconnection Facilities Study report;¹⁴ however, SPP did not tender the draft GIA and did not seek waiver from the Commission of this Tariff obligation. Hale explains that on December 6, 2013, Hale's project manager emailed SPP's generator interconnection studies manager to inquire about the draft GIA for the project and to request a meeting. According to Hale, it took another three months for SPP to present Hale with a draft GIA on March 5, 2014. Hale states that that on May 13, 2014, SPP, Hale, and SPS executed

¹² Protest at 1.

¹³ *Id.*

¹⁴ *Id.* at 2 (citing SPP OATT, Attachment V, Section 11.1 (effective Aug. 20, 2013)).

the Original Hale GIA with an effective date of May 29, 2014. Hale explains that the signed GIA required Hale to make progress payments according to milestones in Appendix B of the GIA that include the construction of interconnection facilities and network upgrades totaling \$1,760,377.¹⁵

10. In addition, Hale contends that on December 20, 2013, two weeks after Hale contacted SPP to inquire about the draft GIA, SPP filed with the Commission proposed revisions to its Tariff to modify its Generator Interconnection Procedures and *pro forma* GIA to change the method for calculating the security posting requirement. Hale states that the proposed revisions included a new section 11.6 in the *pro forma* GIA, which requires an interconnection customer to make an initial payment equal to the greater of: (1) 20 percent of the total cost of network upgrades, shared network upgrades, transmission owner interconnection facilities and/or distribution upgrades listed in Appendix A of the GIA; or (2) \$4,000 per megawatt of the size of the generating facility (Initial Payment). Hale states that SPP's estimate of the total cost of transmission upgrades and interconnection facilities under the proposed Appendix A is \$1,760,377, 20 percent of which is \$352,075, and given that Hale's generating facility will be 478 megawatts, the \$4,000 per megawatt amount results in an Initial Payment of \$1,912,000. Hale states that SPP requested that any interconnection request that did not have an executed GIA prior to its requested March 1, 2014 effective date be required to transition to the new Generator Interconnection Procedures.¹⁶

11. Hale further explains that on October 15, 2014, SPP informed Hale that it "is obligated to transition to the new *pro forma* GIA" by November 5, 2014, because the revised Generator Interconnection Procedures became effective on March 1, 2014. Hale states that it responded that it saw no reason to sign the proposed GIA because Hale has met its milestone obligations, and intends to continue to meet them, under the effective GIA.¹⁷

12. Hale argues that the Commission should reject the unexecuted Substitute Original Hale GIA submitted by SPP and accept the executed GIA tendered pursuant to the then-effective Tariff. Hale contends that section 11.1 of both the previous and the current Generator Interconnection Procedures require SPP to tender to Hale a draft GIA together with draft appendices "[s]imultaneously with issuance of the final Interconnection Facilities Study report."¹⁸ Hale argues that SPP's failure to tender a draft GIA

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 5 (citing SPP OATT, Attachment V, Section 11.1).

simultaneously with the final Interconnection Facilities Study report as its Tariff requires is an unlawful violation of the filed rate.¹⁹ In this regard, Hale asserts that the Commission has strictly enforced tariff provisions absent a timely waiver request, and has waived those provisions in only limited circumstances.²⁰

13. Hale contends that SPP seeks to use the absence of a Tariff waiver for its unexcused delay in tendering a draft GIA to Hale's disadvantage.²¹ Hale also argues that SPP has not requested or supported an after-the-fact Tariff waiver, and even if it had, there is no reason to grant a waiver for two important reasons. First, Hale argues that there is no reason to believe that SPP's error was unintentional because when SPP promised in December 2013 to produce a draft GIA "as soon as we can," it surely knew that SPP was planning to file a Tariff amendment to change the Generator Interconnection Procedures' security posting requirements to Hale's disadvantage. Hale argues that SPP nevertheless waited another three months until the following March 5 to produce an initial draft, just four days after the effective date it requested for the proposed revisions to its Tariff. Thus, Hale contends that SPP's actions are consistent with a strategy to evade its filed Tariff in order to impose the more burdensome amended Tariff on Hale as it is now attempting to do.²²

14. Second, Hale argues that SPP's unexcused failure to follow its Tariff obligation to tender a draft GIA "simultaneously" with the issuance of its Interconnection Facilities Study report was a harmless error, until now. According to Hale, SPP is attempting to take advantage of its violation of its Tariff to impose on Hale the far more onerous security posting requirement set forth in new section 11.1, which took effect six months after SPP should have tendered a GIA under the old Tariff to Hale. Hale argues that new section 11.1 would require Hale to pay the full amount of the financial security obligations now, rather than make progress payments according to the milestones set

¹⁹ *Id.* at 6 (citing *Cal. ex. rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004)).

²⁰ *Id.* (citing *Critical Path Transmission, LLC and Clear Power, LLC v. Cal. Indep. Sys. Operator Corp.*, 135 FERC ¶ 61,031, at P 38 (2011); *TGP Development Co., LLC v. Cal. Indep. Sys. Operator Corp.*, 135 FERC ¶ 61,083, at P 34 (2011); *Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,132, at P 14 (2010); *Cal. Indep. Sys. Operator Corp.*, 118 FERC ¶ 61,226, at P 24 (2007) (citing *Cal. Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,153, at P 28 (2003)).

²¹ *Id.* at 6 (citing SPP Dec. 20, 2013 Revised Tariff Filing, Hendrix Testimony).

²² *Id.* at 6-7.

forth in Appendix B to the GIA, as Hale has been doing. Hale contends that the new security posting requirement threatens the viability of Hale's project.²³

15. Hale also argues that the new charges in SPP's filing are unjust and unreasonable because section 11.6 would require Hale to post financial security of \$1,912,000, which exceeds the combined costs of required network upgrades (\$1,500,377) and SPS's interconnection facilities (\$260,000).²⁴ Hale also notes that the proposed Substitute Original Hale GIA gives no credits for milestone payments that the customer already made, and it can be interpreted to require that Hale both post this financial security and make milestone payments, thereby more than doubling the financial impact. Hale also contends that section 11.6 on its face requires Hale to overpay the financial security for interconnection costs by at least \$152,000 (before an adjustment to account for amounts that Hale has already paid). Hale argues that it is not just and reasonable to require an interconnection customer to post a financial security deposit that exceeds the customer's total cost exposure for interconnection costs.²⁵ Thus, Hale argues that even if it were lawful for the Commission to ignore SPP's violation of its prior Tariff, the Commission must reject the proposed initial payment requirement because it produces a result that is unjust and unreasonable. Hale contends that if the Commission accepts the unexecuted Substitute Original Hale GIA, it should at a minimum find that SPP can require Hale to post financial security no greater than \$352,075 (i.e., 20 percent of the cost of the cost of the upgrades under Appendix A).²⁶

16. Finally, Hale argues that it would be inequitable for the Commission to require Hale to comply with the unexecuted, *pro forma* GIA, because Hale has been performing under the GIA executed on May 13, 2014. In this regard, Hale argues that since execution of the GIA among SPP, SPS, and Hale on May 13, 2014, Hale has satisfied all milestones and security postings set forth in the Original Hale GIA, and SPP does not claim otherwise. Hale contends that it has complied with all of the milestones in Appendix B of the GIA, and the only party that has failed to perform its obligations has been SPP, which failed to tender a contract to Hale on the schedule required by its Tariff. Hale concludes that it would be inequitable for the Commission to reward SPP's failure

²³ *Id.* at 7.

²⁴ *Id.* at 4, 8.

²⁵ *Id.* at 8 (citing *Southern Calif. Edison Co.*, 135 FERC ¶ 61,093, at P 108 (2011)).

²⁶ *Id.* at 9.

to perform under the Tariff by requiring Hale to abide by a more onerous GIA, when Hale relied on the one SPP signed to begin construction of Hale's generating project.²⁷

C. Answers

17. In its answer, SPP argues that the protest is an impermissible, out-of-time rehearing request and collateral attack on SPP's Commission-approved revisions to its Generator Interconnection Procedures and the June 13 Order.²⁸ SPP claims that the arguments raised in Hale's protest should have been raised in a comment or protest filed in response to SPP's proposed revisions to the Generator Interconnection Procedures in Docket No. ER14-781-000,²⁹ and that the Commission should reject Hale's untimely objections to the reforms adopted in that proceeding.

18. In addition, SPP contends that, because the Substitute Original Hale GIA conforms to the *pro forma* GIA accepted by the Commission, it is just and reasonable and the Commission should accept it.³⁰ SPP asserts that Hale's reliance on the fact that SPP did not provide a draft GIA simultaneous with the issuance of its Interconnection Facilities Study report provides no basis for rejection of the Substitute Original Hale GIA, because SPP informed Hale that it was delayed in providing draft GIAs. SPP also asserts that "[t]he delay in tendering draft GIAs was due, among other things, to SPP complying with its obligation to restudy the Definitive Interconnection System Impact Study cluster of which Hale's project was a part as a result of withdrawals of other interconnection requests from the interconnection queue."³¹ In this regard, SPP argues that its additional Definitive Interconnection System Impact Study iterations that contributed to a delay in the tendering of a draft GIA to Hale resulted in a substantial reduction in Hale's share of upgrade costs from \$16,735,558 at the time Hale's interconnection facilities study report was issued to its current costs of \$1,760,377, which were determined in the January 2014 restudy.³² According to SPP, Hale's protest omits the fact that Hale benefitted from the restudies that resulted in the delayed tendering of the GIA.

²⁷ *Id.*

²⁸ SPP Answer at 6.

²⁹ *Id.* at 7.

³⁰ *Id.* at 9 (citing 18 C.F.R. § 35.1(g) (2014)).

³¹ *Id.* at 10.

³² *Id.*

19. SPP also argues that, although Hale was on notice of the potential that its interconnection request would be subject to the revised Generator Interconnection Procedures as of December 20, 2013 when SPP filed the proposed revisions, Hale made no effort to contact SPP to request a draft GIA and did not intervene in the proceeding on SPP's proposed revisions to its Generator Interconnection Procedures. SPP also asserts that Hale should have filed a request for rehearing or clarification to address its concerns regarding applicability of the proposed revisions to the Generator Interconnection Procedures to its GIA.³³

20. SPP explains that Hale had ample notice of the fact that, if the Commission accepted the proposed revisions to the Generator Interconnection Procedures and Hale had not executed a GIA prior to March 1, 2014, Hale would be subject to an initial payment of the greater of 20 percent of costs of Network Upgrades and Interconnection Facilities or \$4,000 per megawatt of the size of its generating facility. According to SPP, Hale did not take steps to ensure that its interconnection request would be subject to the former Generator Interconnection Procedures, despite having notice of the impact of SPP's proposal. Further, SPP argues that there is no reason to believe that SPP's actions were intentionally aimed at harming Hale.³⁴

21. SPP also argues that Hale is incorrect that the costs of its project have increased as a result of the revised *pro forma* Generator Interconnection Procedures. According to SPP, while Hale is required to make an initial payment of \$1,912,000 pursuant to Article 11.6 of the Substitute Original Hale GIA, any overpayment by Hale from prior milestone payments and the initial payment would be refunded by SPP to Hale under Article 12.2. Finally, SPP contends that Hale's continued performance under the GIA that is being superseded is not determinative of whether the Commission should accept the superseding GIA.³⁵

22. Hale notes that SPP's answer concedes that, contrary to SPP's then-applicable Tariff, SPP did not simultaneously tender a draft GIA to Hale when it completed its Interconnection Facilities Study final report. Therefore, Hale contends that there is no dispute that SPP's untimely tendering of the GIA was an unlawful violation of the filed rate. Hale asserts that SPP's contention that Hale had notice of SPP's Tariff revisions to the Generator Interconnection Procedures does not excuse SPP's Tariff violation that occurred four months prior to the filing of the Tariff revisions because no provision in the amended Tariff had supplanted SPP's obligation to produce a draft GIA on August 20,

³³ *Id.* at 11.

³⁴ *Id.* at 12.

³⁵ *Id.* at 14.

2013. Hale also argues that Hale benefitting from the subsequent restudy does not excuse the Tariff violation because no section of SPP's Tariff authorizes SPP to delay tendering a draft GIA based on further study results.

D. Commission Determination

23. We reject the unexecuted Substitute Original Hale GIA. Section 11.1 of Attachment V (Generator Interconnection Procedures) of SPP's Tariff requires that “[s]imultaneously with issuance of the final Interconnection Facilities Study report, the Transmission Provider shall tender to the Interconnection Customer a draft GIA together with draft appendices. The draft GIA shall be in the form of the Transmission Provider's FERC-approved standard form GIA.” However, SPP did not tender a draft GIA to Hale until March 5, 2014.³⁶

24. Further, section 11.1 provides that “[t]he Transmission Provider, Transmission Owner and the Interconnection Customer shall negotiate concerning provisions of the appendices to the draft GIA for not more than sixty (60) Calendar Days after tender of the final Interconnection Facilities Study report.” Thus, we find that if SPP had tendered a draft GIA to Hale on August 20, 2013 as required by section 11.1, Hale's GIA would have been executed prior to March 1, 2014, the date on which an interconnection customer must have executed a GIA, or be required to transition to SPP's revised GIA.³⁷ As such, we find in this case that it would be unjust and unreasonable to require Hale to transition to the revised GIA. Accordingly, we reject the unexecuted Substitute Original Hale GIA and direct SPP to continue service under the terms and conditions set forth in the Original Hale GIA, which became effective May 29, 2014. Furthermore, we will recognize the Original Hale GIA as a non-conforming service agreement under SPP's Tariff and, accordingly, we direct SPP to submit the Original Hale GIA to the Commission in a compliance filing within 30 days of the date of this order.

The Commission orders:

(A) SPP's unexecuted Substitute Original Hale GIA is hereby rejected, as discussed in the body of this order.

³⁶ While we recognize that the generator interconnection process can be iterative based upon the necessity to conduct restudies, we remind SPP that it must adhere to the terms and conditions of its Tariff or face possible sanctions by the Commission.

³⁷ June 13 Order, 147 FERC ¶ 61,201 at P 130.

(B) SPP is directed to file the Original Hale GIA as a non-conforming service agreement within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.