

155 FERC ¶ 61,240
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. ER16-1350-000

ORDER REJECTING NOTICE OF CANCELLATION

(Issued June 3, 2016)

1. On April 5, 2016, pursuant to section 35.15 of the Commission's regulations,¹ Southwest Power Pool, Inc. (SPP) filed a notice of cancellation of the Generator Interconnection Agreement (GIA) among SPP as transmission provider, Cottonwood Wind Project, LLC (Cottonwood) as interconnection customer, and Nebraska Public Power District (NPPD) as transmission owner (Cottonwood GIA or Fourth Revised Cottonwood GIA).² In this order, we reject the notice of cancellation of the Cottonwood GIA.

I. Background

2. On September 29, 2011, SPP filed with the Commission the original Cottonwood GIA because it contained non-conforming provisions included to accommodate Nebraska state law and to correspond with language in the NPPD membership agreement with SPP. The original Cottonwood GIA provided for the interconnection of an 89.7 MW wind generating facility to NPPD's transmission system in Webster County, Nebraska, which at the time was owned by Infinity Wind Holdings, LLC.³ The original Cottonwood GIA

¹ 18 C.F.R. § 35.15 (2015).

² SPP designated the Cottonwood GIA as Fourth Revised Service Agreement No. 2252 under the SPP Open Access Transmission Tariff (Tariff).

³ Southwest Power Pool, Inc., Submission of Generator Interconnection Agreement, Docket No. ER11-4700-000, at 1-2 (filed Sept. 29, 2011).

was accepted effective August 31, 2011⁴ and was subsequently put in suspension. On December 5, 2012, NextEra Energy Resources, LLC (NextEra) acquired the Cottonwood facility from Infinity Wind Holdings, LLC and notified SPP on March 29, 2013 that it wished to terminate suspension and for work under the GIA to resume. On May 15, 2013, SPP filed revisions to the Cottonwood GIA (First Revised Cottonwood GIA) to reflect new timelines, including an extension of the commercial operation date. On July 10, 2013, the First Revised Cottonwood GIA was accepted effective April 18, 2013.⁵

3. Cottonwood and NPPD subsequently revised the work schedule under the Cottonwood GIA and extended the commercial operation date, and SPP filed revisions to the Cottonwood GIA to reflect these changes (Second Revised Cottonwood GIA).⁶ On September 3, 2014, the Second Revised Cottonwood GIA was accepted effective June 10, 2014.⁷ The parties further amended the GIA to revise the type and quantity of turbines (Third Revised Cottonwood GIA), and on November 10, 2015, the Third Revised Cottonwood GIA was accepted effective October 14, 2014.⁸

4. In the fall of 2015, the parties amended the Cottonwood GIA to extend the commercial operation date and add a new milestone requiring Cottonwood to provide documentation of Nebraska Board approval through a number of alternatives, including Nebraska Board acceptance of the Cottonwood facility as a Qualifying Facility (QF)

⁴ *Sw. Power Pool, Inc.*, Docket No. ER11-4700-000 (Nov. 15, 2011) (delegated letter order).

⁵ *Sw. Power Pool, Inc.*, Docket No. ER13-1495-000 (July 10, 2013) (delegated letter order).

⁶ Southwest Power Pool, Inc., Submission of Generator Interconnection Agreement, Docket No. ER14-2381-000 (filed July 8, 2014); *see also Sw. Power Pool, Inc.*, Docket No. ER14-2381-000 (Sep. 3, 2014) (delegated letter order). The parties also added a new milestone to the agreement, which required Cottonwood to procure, by October 15, 2014, either evidence of a contract for sale of the output of the facility or documentation of Nebraska Power Review Board (Nebraska Board) approval.

⁷ *Sw. Power Pool, Inc.*, Docket No. ER14-2381-000 (Sept. 3, 2014) (delegated letter order).

⁸ *Sw. Power Pool, Inc.*, Docket No. ER15-206-000 (Dec. 17, 2014) (delegated letter order).

under the Public Utility Regulatory Policies Act of 1978 (PURPA).⁹ The Commission accepted the Fourth Revised Cottonwood GIA, effective September 3, 2015.¹⁰

5. Currently, the Cottonwood GIA provides for the interconnection of an 89.48 MW wind generating facility, with a commercial operation date of December 31, 2016.¹¹ Under the Cottonwood GIA, NPPD must complete two sets of network upgrades—the Rosemont Upgrades (which require construction of a new substation) and the Guide Rock Upgrades (which require adding breakers to an existing substation owned by NPPD).¹² Pursuant to article 5.6.3 of the Cottonwood GIA, the transmission owner must receive written authorization from the interconnection customer to proceed with construction of these upgrades by the date specified in the milestones of Appendix B in the GIA.

II. Notice of Cancellation

6. SPP states that article 5.16 of the Cottonwood GIA provides that an “Interconnection Customer, upon written notice to Transmission Provider and Transmission Owner, may suspend, for a period not to exceed 18 months, work by Transmission Owner associated with the construction and installation of Transmission Owner’s Interconnection Facilities and/or Network Upgrades required” under the GIA.¹³ According to SPP, Cottonwood utilized the entirety of the 18-month suspension period permitted under article 5.16 of the Cottonwood GIA.¹⁴ SPP states that, although Cottonwood has met the financial milestones in Appendix B of the Cottonwood GIA, Cottonwood has yet to authorize NPPD to begin construction of the network upgrades required under the Cottonwood GIA. SPP also notes that it has granted Cottonwood a number of extensions to accommodate Cottonwood’s regulatory requirements with the

⁹ 16. U.S.C. § 824a-3 (2012).

¹⁰ *Sw. Power Pool, Inc.*, Docket No. ER15-2652-000 (Nov. 10, 2015) (delegated letter order).

¹¹ During the course of the revisions to the Cottonwood GIA, the parties extended the commercial operation date from August 20, 2013 to December 31, 2016. SPP Filing at n.6.

¹² Cottonwood GIA, Appendix A.

¹³ SPP Filing at 2 (citing Cottonwood GIA, Article 5.16).

¹⁴ SPP states that the suspension period began on October 3, 2011 and that work resumed on April 3, 2013. *Id.*

Nebraska Board, including several extensions of the commercial operation date.¹⁵ SPP notes that the commercial operation date was first extended from August 20, 2013 to December 1, 2014, was extended again until December 1, 2015 due to the addition of a milestone requiring Cottonwood to provide its Nebraska Board documentation, and was extended again until December 31, 2016 to allow Cottonwood to meet additional Nebraska Board requirements.¹⁶

7. SPP states that it understands that on December 11, 2015, when NPPD requested confirmation from Cottonwood to proceed with substation construction, Cottonwood notified NPPD not to proceed with construction of certain network upgrades until Cottonwood provided further notice. SPP asserts that, because Cottonwood already utilized the entirety of the 18-month suspension period permitted under the Cottonwood GIA, Cottonwood no longer had the option to suspend construction work of network upgrades. On January 12, 2016, SPP sent a letter to Cottonwood informing it that its failure to proceed constituted a breach of the Cottonwood GIA and that Cottonwood had 30 days to cure the breach. SPP also states that on February 1, 2016, Cottonwood notified SPP that it disagreed that it was in default, contending that the December 11, 2015 communication between Cottonwood and NPPD was not a request to suspend work on the project; rather, it was an indication that the timing of the construction work had yet to be resolved. SPP states, however, that Cottonwood did not provide notice to NPPD to proceed with the construction of required upgrades, and because Cottonwood did not cure the breach, SPP notified Cottonwood that it was terminating the Cottonwood GIA effective March 10, 2016.¹⁷

III. Notice of Filing and Responsive Pleadings

8. Notice of SPP's filing was published in the *Federal Register*, 81 Fed. Reg. 21,259 (2016), with interventions and protests due on or before April 26, 2016. On April 4, 2016, NextEra filed a motion to intervene. On April 26, 2016, NextEra filed a protest and NPPD filed a motion to intervene and comments. On April 27, 2016 and April 28, 2016, NextEra filed errata to its protest to correct errors pertaining to the pleading's caption and signature block and to request confidential treatment of one exhibit.¹⁸ On

¹⁵ *Id.*

¹⁶ *Id.* n.6.

¹⁷ *Id.* at 2-3.

¹⁸ In its April 27, 2016 errata filing, NextEra indicated that it incorrectly captioned the protest as being filed by its subsidiary Cottonwood, rather than NextEra.

May 11, 2016 and May 12, 2016, respectively, NPPD and SPP filed answers to NextEra's protest.

9. NPPD supports the cancellation of the Cottonwood GIA. NPPD agrees with SPP that, by not confirming NPPD's request to begin construction, Cottonwood's directive resulted in a further suspension of the Cottonwood GIA beyond the permitted 18-month period.¹⁹

10. NextEra protests the notice of cancellation. NextEra states that it has not sought to suspend the GIA as SPP alleges and that at the time of SPP's allegation of breach, Cottonwood and NPPD were still engaged in negotiations over project scheduling. NextEra states that in conjunction with ending the suspension of the Cottonwood GIA, Cottonwood notified NPPD that it was authorized to proceed with the design work for network upgrades under the agreement. According to NextEra, NPPD communicated that, while it could begin design work, it could not begin construction until Cottonwood received construction approval from the Nebraska Board. NextEra states that Cottonwood filed with the Nebraska Board an application for authority to construct on August 29, 2014, which the Nebraska Board subsequently approved.²⁰ NextEra states that Cottonwood was in ongoing negotiations with NPPD for a power purchase agreement for the output of the Cottonwood facility during 2014.²¹ NextEra adds that power purchase agreement negotiations stalled with NPPD, and in order to cure a potential breach of the Cottonwood GIA, Cottonwood entered into a power purchase agreement with its affiliate, NextEra Energy Power Marketing, LLC, for sale of the output from the Cottonwood facility. Cottonwood also requested, and received, several extensions from the Nebraska Board.²²

11. According to NextEra, on September 16, 2015, Cottonwood terminated the power purchase agreement with its affiliate. On September 17, 2015, Cottonwood filed with the Commission a self-certification as a 79.2 MW QF in Docket No. QF15-1026-000.²³ On

¹⁹ NPPD Comments at 4-5.

²⁰ The Nebraska Board approved the construction of the Cottonwood facility, contingent on Cottonwood entering into a power purchase agreement with NPPD for the entire electrical output of the facility within 120 days following issuance of its order. NextEra Protest, Pedroni Affidavit at 4.

²¹ *Id.* at 3.

²² *Id.* at 5-6.

²³ Cottonwood Wind Project, LLC, Form 556, Docket No. QF15-1026-000 (filed Sept. 17, 2015).

November 6, 2015, Cottonwood sent a letter to NPPD requesting that NPPD purchase the output of the Cottonwood facility, pursuant to its obligations under PURPA.²⁴ On December 14, 2015, NPPD replied, saying that it had no obligation to enter into a PURPA purchase contract for the output of the Cottonwood facility.²⁵ On February 12, 2016, NPPD filed an application to terminate mandatory purchase obligations under PURPA, which is currently pending before the Commission.²⁶

12. NextEra states that, pursuant to article 5.6.3 of the Cottonwood GIA, the transmission owner must receive written authorization from the interconnection customer to proceed with construction by the date specified in the milestones in Appendix B. While NextEra admits that there is no date specified for this milestone in Appendix B, it contends that the absence of such a date does not place it in breach of the Cottonwood GIA and does not provide NPPD with authorization to begin construction. NextEra notes that article 30.2 of the Cottonwood GIA provides that, in the event of a conflict between the body of the Cottonwood GIA and attachments, appendices, or exhibits in the Cottonwood GIA, the terms and provisions in the body of the Cottonwood GIA prevail. Therefore, NextEra contends that it has the right to determine when NPPD is to proceed with construction.²⁷ Further, NextEra asserts that “NPPD had not shown that it definitely needed authorization [in December 2015] in order to meet the construction schedule, so it is unreasonable to allege that Cottonwood is in violation of the [Cottonwood GIA], let alone attempting to suspend it.”²⁸

13. In addition, NextEra contends that NPPD breached the Cottonwood GIA. In the fall of 2014, NextEra states that Cottonwood learned that NPPD had completed construction of the Guide Rock Upgrades without permission from Cottonwood to proceed with construction of the upgrades as required by article 5.6.3 of the Cottonwood GIA.²⁹ NextEra asserts that Cottonwood did not declare breach against NPPD when it

²⁴ NextEra Protest, Pedroni Affidavit at 7 (citing Exhibit 14).

²⁵ *Id.* (citing Exhibit 15).

²⁶ Nebraska Public Power District, Application to Terminate Mandatory Purchase Obligation Under the Public Utility Regulatory Policies Act, Docket No. QM16-1-000 (filed Feb. 12, 2016).

²⁷ NextEra Protest at 8-9.

²⁸ *Id.* at 8.

²⁹ According to NextEra, NPPD later claimed that Cottonwood had authorized NPPD to proceed with construction when it took the GIA out of suspension in 2013. NextEra Protest at 7 (citing Exhibit 21).

expended Cottonwood's funds for constructing the Guide Rock Upgrades because, at the time, Cottonwood was engaging in power purchase agreement negotiations with NPPD, which Cottonwood did not want to jeopardize. NextEra states that it intends to make additional filings at the Commission regarding this matter and requests that the Commission either consolidate the instant proceeding with such other proceedings or, if the Commission accepts the notice of cancellation, to do so without prejudice to Cottonwood's rights under the Cottonwood GIA.³⁰

14. In its answer, NPPD states that NextEra raises a number of allegations regarding the Cottonwood GIA that are unrelated to the instant proceeding. NPPD states that it will address these unfounded allegations at the appropriate time and to the extent necessary in a future proceeding. NPPD contends, though, that these allegations do not change NextEra's noncompliance with the Cottonwood GIA or invalidate the factual basis presented by SPP for cancelling the Cottonwood GIA. In addition, NPPD opposes consolidation with a potential future proceeding, asserting that the facts pertaining to its alleged breach are separate from the facts in the instant proceeding and that such consolidation would be administratively inefficient. NPPD further contends that it would be inappropriate to consolidate the instant proceeding with an unspecified future action, given that article 27 of the Cottonwood GIA already provides for dispute resolution pursuant to procedures in the SPP Tariff.³¹

15. In its answer, SPP reiterates that, by failing to authorize NPPD to proceed with construction of network upgrades in December 2015, NextEra effectively suspended the project beyond the suspension period permitted by the Cottonwood GIA. SPP notes that NextEra had the opportunity to direct NPPD to commence work during the cure period but failed to do so. SPP asserts that, as the history of the Cottonwood project demonstrates, NextEra has delayed the project on multiple occasions in an effort to maintain the queue position of a project with questionable viability. SPP states that NextEra's contention that it has not yet authorized construction of the network upgrades is "clearly not in accordance" with the suspension provisions of the Cottonwood GIA.³²

³⁰ *Id.* at 5, 8-10. On May 20, 2016, Cottonwood filed a complaint and motion to consolidate in Docket No. EL16-70-000. *See* Cottonwood Wind Project, LLC v. Nebraska Public Power District, Complaint of Cottonwood Wind Project, LLC and Motion to Consolidate, Docket No. EL16-70-000 (filed May 20, 2016).

³¹ NPPD Answer at 3-5.

³² SPP Answer at 6.

With regard to NPPD's alleged breach of the Cottonwood GIA, SPP states that this issue is outside of the scope of the proceeding.³³

IV. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NPPD's and SPP's answers because they provided information that assisted us in our decision-making process.

B. Substantive Matters

18. We reject the notice of cancellation of the Fourth Revised Cottonwood GIA. SPP's stated reason for the termination of the Cottonwood GIA is that Cottonwood effectively suspended the project when it did not authorize NPPD to proceed with the construction of the Rosemont Upgrades in December 2015. SPP argues that, given that the maximum suspension period under the Cottonwood GIA has been exhausted, Cottonwood can no longer suspend its project; thus the Cottonwood GIA should be terminated. We are not persuaded by these arguments.

19. Article 5.6.3 of the Cottonwood GIA provides that the transmission owner must receive written authorization from the interconnection customer to proceed with construction by the date specified in the milestones in Appendix B. However, there is no milestone or date associated with authorizations to construct in Appendix B of the Cottonwood GIA. Under the terms of the Cottonwood GIA, the body of the Cottonwood GIA prevails over any conflict with the Appendices.³⁴ Accordingly, we find that, under the terms of the Cottonwood GIA, Cottonwood is not required to provide authorization to begin construction by any specific date and is therefore not in breach. Furthermore, article 5.16 of the Cottonwood GIA provides no provisions for effective suspension as argued by SPP. Rather, article 5.16.1 of the Cottonwood GIA requires written notice of suspension subject to certain terms and conditions. Neither Cottonwood nor NextEra have requested suspension of construction under the terms of the Cottonwood GIA.

³³ *Id.* at 5-6.

³⁴ *See* Cottonwood GIA § 30.2.

20. Finally, we find that all other arguments regarding other allegations of breach of the Cottonwood GIA are beyond the scope of this proceeding. Therefore, we decline to consolidate the instant proceeding with other proceedings involving the Cottonwood facility, including the proceeding in Docket No. QM16-1-000 and the complaint filed in Docket No. EL16-70-000. We find that issues raised in those proceedings are outside the scope of this proceeding.

The Commission orders:

The notice of cancellation of the Cottonwood GIA is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.