

155 FERC ¶ 61,285  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Cottonwood Wind Project, LLC

Docket No. EL16-70-000

v.

Nebraska Public Power District, Inc.

ORDER ON COMPLAINT, MOTION TO CONSOLIDATE, AND EXPEDITED  
MOTION TO DISMISS

(Issued June 17, 2016)

1. On May 20, 2016, Cottonwood Wind Project, LLC (Cottonwood) filed a complaint against Nebraska Public Power District (NPPD) pursuant to sections 206 and 306 of the Federal Power Act (FPA)<sup>1</sup> and Rule 206 of the Commission's Rules of Practice and Procedure<sup>2</sup> and a motion to consolidate its complaint with a proceeding in Docket No. ER16-1350-000 (Complaint). Cottonwood alleges that NPPD breached the Generator Interconnection Agreement (GIA) among Cottonwood, as interconnection customer, NPPD, as transmission owner, and Southwest Power Pool, Inc. (SPP), as transmission provider (Cottonwood GIA). As discussed below, we decline to exercise primary jurisdiction over this contractual dispute and, accordingly, grant NPPD's motion to dismiss the Complaint and dismiss the Complaint.

**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

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<sup>1</sup> 16 U.S.C. § 824e, 825e (2012).

<sup>2</sup> 18 C.F.R. § 385.206 (2015).

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 (Cottonwood Facility) to NPPD's transmission system in Webster County, Nebraska, which at the time was owned by Infinity Wind Holdings, LLC.<sup>3</sup> The original Cottonwood GIA was accepted effective August 31, 2011<sup>4</sup> and was subsequently put into 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 Cottonwood 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.<sup>5</sup>

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).<sup>6</sup> 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 of the Cottonwood Facility. On September 3, 2014, the Second Revised Cottonwood GIA was accepted effective June 10, 2014.<sup>7</sup> The parties further amended the Cottonwood GIA to revise the type and quantity of turbines (Third Revised Cottonwood GIA), and on

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

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

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

<sup>6</sup> 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 (Sept. 3, 2014) (delegated letter order).

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

November 10, 2015, the Third Revised Cottonwood GIA was accepted effective October 14, 2014.<sup>8</sup>

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) under the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>9</sup> The Fourth Revised Cottonwood GIA was accepted effective September 3, 2015.<sup>10</sup>

5. The Cottonwood GIA provides for the interconnection of the Cottonwood Facility with a commercial operation date of December 31, 2016.<sup>11</sup> 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).<sup>12</sup> 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 Cottonwood GIA.

6. On April 5, 2016, SPP filed a notice of cancellation of the Cottonwood GIA (Notice of Cancellation), alleging that Cottonwood had utilized the entirety of the 18-month suspension period permitted under the Cottonwood GIA because it had not provided NPPD notice to proceed with construction of the Rosemont Upgrades. The Commission rejected the Notice of Cancellation, finding that Cottonwood had not breached the terms of the Cottonwood GIA.<sup>13</sup> Additionally, the Commission found that

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

<sup>9</sup> 16. U.S.C. § 824a-3 (2012).

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

<sup>11</sup> 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. Complaint at 8.

<sup>12</sup> Cottonwood GIA, Appendix A.

<sup>13</sup> *Sw. Power Pool, Inc.*, 155 FERC ¶ 61,240, at P 19 (2016) (Order Rejecting Cancellation).

all other arguments regarding allegations of breach of the Cottonwood GIA were outside the scope of the Notice of Cancellation proceeding and declined to consolidate the proceeding with this Complaint.<sup>14</sup>

## II. Cottonwood's Complaint

7. In its Complaint, Cottonwood asserts that NPPD breached the Cottonwood GIA because NPPD proceeded with construction of the Guide Rock Upgrades before it obtained necessary government approvals and before Cottonwood authorized construction, as required by the Cottonwood GIA.<sup>15</sup> Cottonwood states that after it was acquired by NextEra, it sent a letter to NPPD on March 29, 2013 stating that NPPD was authorized to proceed with design work for the network upgrades.<sup>16</sup> Cottonwood alleges that it did not authorize construction, further asserting that NPPD claimed it could not start construction until it was granted authority to do so by the Nebraska Board.<sup>17</sup>

8. Cottonwood states that in 2014 it engaged in negotiations with NPPD for a power purchase agreement for the output of the Cottonwood Facility and that in communications between the parties, NPPD continued to maintain that it would not commence construction on the network upgrades because both upgrades required approval by the Nebraska Board.<sup>18</sup> Cottonwood alleges that during that time it considered exercising its rights to terminate the Cottonwood GIA but chose not to do so because of NPPD's statements that it needed to secure Nebraska Board approval prior to construction commencement. Cottonwood states that there were two obstacles to NPPD spending money on construction under the Cottonwood GIA—its need for approvals from the Nebraska Board and its need for authorization from Cottonwood under the Cottonwood GIA. According to Cottonwood, based on this, it decided to continue exploring potential off-takers for the project because it could do so for the time being without incurring significant expenditures under the Cottonwood GIA.<sup>19</sup>

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<sup>14</sup> *Id.* P 20.

<sup>15</sup> Complaint at 11.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.* at 6-7.

9. In addition, Cottonwood states that in the fall of 2014 it learned that NPPD had completed construction of the Guide Rock Upgrades.<sup>20</sup> Cottonwood claims that NPPD had not sought, nor had Cottonwood given, authorization to proceed with construction under article 5.6.3 of the Cottonwood GIA.<sup>21</sup> Cottonwood asserts that in response to Cottonwood's inquiry, NPPD claimed for the first time that it did not need Nebraska Board approval for the Guide Rock Upgrades and thus proceeded to perform the work.<sup>22</sup> Cottonwood states that prior to hearing about NPPD's expenditure of funds for the Guide Rock Upgrades, Cottonwood had considered terminating the Cottonwood GIA to avoid further project expenses. However, Cottonwood recognized that if it terminated the Cottonwood GIA at this point, the expended funds would be lost. Cottonwood states that the alternative—declaring NPPD in breach of the Cottonwood GIA—was likewise a poor option. Cottonwood adds that at the time, Cottonwood and NPPD were engaging in power purchase agreement negotiations, and while Cottonwood was concerned about NPPD's action, it did not declare NPPD in breach of the Cottonwood GIA, as it did not want to compromise the prospect of a power purchase agreement.<sup>23</sup>

10. Cottonwood states that a dispute arose between SPP and Cottonwood over whether Cottonwood had met Milestone 8 in Appendix B of the Cottonwood GIA, i.e., execution of a power purchase agreement. Cottonwood states that it cured a default issued to it by SPP by entering into a power purchase agreement with an affiliate. Cottonwood adds that in the same timeframe, it filed a self-certification as a 79.2 MW QF with the Commission in Docket No. QF15-1026 and, concurrently, Cottonwood and its affiliate terminated their power purchase agreement. Cottonwood states that because the Cottonwood Facility had now been self-certified as a QF, the Nebraska Board no longer required Cottonwood to seek authorization from the Nebraska Board to construct.<sup>24</sup>

11. According to Cottonwood, on December 11, 2015, after inquiries from NPPD, it informed NPPD that it was not yet ready to provide authorization to proceed with construction under the Cottonwood GIA and that Cottonwood made no mention of

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<sup>20</sup> *Id.* at 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 7-8.

<sup>24</sup> *Id.* at 9.

anything related to a potential suspension of the Cottonwood GIA.<sup>25</sup> Cottonwood states that it subsequently received a letter from SPP on January 12, 2016 alleging suspension of construction and stating that if Cottonwood did not provide notice to NPPD to proceed with the construction of the required upgrades, pursuant to article 17.1.2 of the Cottonwood GIA, SPP would consider Cottonwood in breach and terminate the Cottonwood GIA.<sup>26</sup> Cottonwood states that on February 9, 2016, it responded to SPP's allegation of breach notifying SPP that it disagreed with SPP's allegation. Cottonwood states that on that same day, it informed NPPD that NPPD was in breach of the Cottonwood GIA because of NPPD's unauthorized construction of the Guide Rock Upgrades and requested a refund of the amounts NPPD spent in violation of the Cottonwood GIA.<sup>27</sup>

12. Cottonwood adds that on February 12, 2016, NPPD filed its Application to Terminate Mandatory Purchase Obligation under PURPA in Docket No. QM16-1,<sup>28</sup> and on February 25, 2016, NPPD sent Cottonwood a response to the February 9, 2016 notice of breach, contending that Cottonwood had authorized NPPD to proceed with construction when it took the Cottonwood GIA out of suspension.<sup>29</sup>

13. Cottonwood asserts that NPPD violated the Cottonwood GIA by spending Cottonwood's funds without obtaining Cottonwood's authorization to proceed. Cottonwood 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.<sup>30</sup> While Cottonwood admits that there is no date specified for this milestone in Appendix B, it contends that the absence of such a date does not trump the requirements of article 5.6.3 that the interconnection customer has authority to determine when it wishes to provide authorization to proceed.<sup>31</sup> Cottonwood notes that article 30.2 of the Cottonwood GIA

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 10.

<sup>28</sup> NPPD's Application to Terminate Mandatory Purchase Obligation under PURPA is currently pending before the Commission.

<sup>29</sup> Complaint at 10.

<sup>30</sup> *Id.* at 11.

<sup>31</sup> *Id.*

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, and Cottonwood notes that article 5.6.3 is in the body of the Cottonwood GIA.<sup>32</sup> Therefore, Cottonwood concludes that, although it cannot indefinitely delay authorization, it must provide authorization to begin construction, which NPPD did not seek before it spent Cottonwood's funds to build the Guide Rock Upgrades.<sup>33</sup>

14. Next, Cottonwood alleges that NPPD's subsequent conduct indicates that it knew it must obtain authorization to construct. Noting that the facts that gave rise to the Complaint occurred in late 2014, Cottonwood states that the sequence of events at that time might suggest that NPPD was either ignorant of the terms of the Cottonwood GIA or chose to overlook them. Cottonwood states that either way, this conduct contrasts with NPPD's actions in 2015, when it sought authorization from Cottonwood to construct the remaining network upgrades, i.e., the Rosemount Upgrades.<sup>34</sup>

15. Cottonwood requests that the Commission find that NPPD violated the Cottonwood GIA due to its failure to comply with article 5.6.3 to obtain authorization from Cottonwood before commencing construction and to order that NPPD provide a refund to Cottonwood of the amount spent to construct the Guide Rock Upgrades without authorization. Noting that under Appendix A of the GIA, the estimated cost of the Guide Rock Upgrades is \$2.3 million, Cottonwood states that it has not received any accounting from NPPD on how much it spent on the Guide Rock Upgrades.<sup>35</sup>

16. Finally, Cottonwood requests that the Commission consolidate the Complaint with SPP's Notice of Cancellation in Docket No. ER16-1350-000.<sup>36</sup> Cottonwood notes that the issues raised in this proceeding have also been raised in Docket No. ER16-1350-000 and that it filed a protest in that proceeding in order to highlight NPPD's conduct under the Cottonwood GIA. However, Cottonwood states that while each proceeding involves the Cottonwood GIA and the three parties' actions under the agreement, the two

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<sup>32</sup> *Id.* at 12.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 13.

<sup>35</sup> *Id.* at 14.

<sup>36</sup> An order rejecting SPP's notice of cancellation was issued on June 3, 2016. Order Rejecting Cancellation, 155 FERC ¶ 61,240.

proceedings differ in their scope and potential outcomes. Cottonwood states that while the two proceedings involve issues regarding the conduct of the parties under the Cottonwood GIA, it filed this Complaint to obtain the appropriate resolution because the Commission will not treat a protest as a complaint.<sup>37</sup> Additionally, Cottonwood asserts that consolidation will help the Commission evaluate the issues raised by each proceeding and facilitate its decision making.<sup>38</sup>

### **III. Notice of Filings**

17. Notice of the Complaint was published in the *Federal Register*, 81 Fed. Reg. 34,332 (2016), with answers, interventions and protests due on or before June 20, 2016. NPPD filed an expedited motion to dismiss the Complaint on May 26, 2016. Cottonwood filed an answer to NPPD's expedited motion to dismiss on June 6, 2016. NPPD filed an answer to Cottonwood's answer on June 8, 2016.

### **IV. NPPD's Motion for Dismissal**

18. NPPD requests that the Commission exercise its discretion to decline primary jurisdiction over the Complaint and dismiss the Complaint. NPPD disputes the allegations in the Complaint and states that it will show the Complaint to be meritless. However, NPPD requests that the Commission address, as a threshold matter, whether it will exercise primary jurisdiction over the Complaint, which NPPD asserts presents a straightforward breach of contract claim seeking monetary damages.<sup>39</sup> NPPD asserts that the Commission's jurisdiction is not exclusive where a dispute involves interpretation and application of contract terms and does not challenge the reasonableness of rates or a term or condition of service.<sup>40</sup> Rather, NPPD states that "[i]n cases of contract interpretation, the Commission has concurrent jurisdiction with the courts and whether to exercise primary jurisdiction is a matter solely with the Commission's discretion."<sup>41</sup> NPPD asserts that the Complaint asks the Commission to interpret and apply the terms of

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<sup>37</sup> Complaint at 15.

<sup>38</sup> *Id.* at 2.

<sup>39</sup> Motion to Dismiss at 2-3.

<sup>40</sup> *Id.* at 3 (citing *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009, at 61,021 (1995)).

<sup>41</sup> *Id.* (quoting *S. Md. Elec. Coop., Inc. v. J.P. Morgan Ventures Energy Corp.*, 155 FERC ¶ 61,164, at P 21 (2016) (*SMECO*)).

the Cottonwood GIA and does not challenge any aspect of the Cottonwood GIA itself.<sup>42</sup> Therefore, NPPD asserts that the Complaint falls within the Commission's concurrent rather than exclusive jurisdiction.<sup>43</sup>

19. NPPD argues that the Commission should dismiss the Complaint because the Complaint does not meet any of the three requirements of the Commission's three factor test to assert jurisdiction.<sup>44</sup> NPPD states that with respect to the first *Arkla* factor, the Commission's special expertise, there is no technical issue for the Commission to address, and resolving the dispute will involve analyzing the parties' course of conduct under the Cottonwood GIA and determining whether there were communications between Cottonwood and NPPD that constituted an authorization to construct network upgrades.<sup>45</sup> Furthermore, NPPD states that when the requested remedy is monetary damages, the Commission has generally left the issue to be decided in court.<sup>46</sup>

20. With regard to the second *Arkla* factor, NPPD asserts that the Commission should not assert jurisdiction because resolving the dispute over the interpretation and application of the Cottonwood GIA does not appear to have an impact on parties to other GIAs, and parties would continue to be governed by the terms of their own agreements. Concerning the third *Arkla* factor, NPPD asserts that the Complaint does not present any issues that are of special importance to the Commission's regulatory responsibilities because it does not seek to change the Cottonwood GIA or the Commission's interconnection policies.<sup>47</sup> Finally, NPPD states that while it disagrees with the allegations in the Complaint and believes that there is no basis for Cottonwood's contention that NPPD breached the Cottonwood GIA, the Complaint proceeding presents a straightforward breach of contract claim that is squarely in the expertise of a court applying Nebraska state law.<sup>48</sup>

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<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 4-5 (citing *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*)).

<sup>45</sup> *Id.* at 5.

<sup>46</sup> *Id.* (quoting *SMECO*, 155 FERC ¶ 61,164 at P 23).

<sup>47</sup> *Id.* at 6.

<sup>48</sup> *Id.* at 7.

21. NPPD requests expedited action on its motion to dismiss because the Commission's decision to exercise jurisdiction over this breach of contract is a threshold question that would obviate the need for future pleadings, including its answer on the merits of the Complaint.<sup>49</sup>

## V. Cottonwood's Answer

22. Cottonwood contends that NPPD's motion ignores that the disputed contract involves a *pro forma* agreement approved by the Commission, rather than a unique, bilaterally-negotiated agreement between parties, which the Commission often leaves other adjudicatory bodies to resolve. Cottonwood states that NPPD does not explain whether it views the matter raised in the Complaint as involving a factual or legal dispute, but instead argues that the Commission should not exercise jurisdiction because the dispute arises under a contract. Cottonwood emphasizes that the provisions in dispute in the Complaint—including articles 5.6 and 5.6.3 of the SPP *pro forma* GIA—are identical to provisions the Commission included in the *pro forma* Large Generator Interconnection Agreement in Order No. 2003.<sup>50</sup> Cottonwood contends that the Commission consistently distinguishes between cases involving disputes arising under *pro forma* agreements and related tariffs, which it chooses to adjudicate, and bilaterally negotiated agreements without similar importance to the Commission's regulatory role.<sup>51</sup> Therefore, Cottonwood asserts that the cases raised by NPPD as support for its motion are not applicable because they are bilateral agreements, not standardized contracts created by the Commission.<sup>52</sup>

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<sup>49</sup> *Id.* at 7-8.

<sup>50</sup> Cottonwood Answer at 2 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 11 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *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), *cert. denied*, 552 U.S. 1230 (2008)).

<sup>51</sup> *Id.* at 3 (citing *S. Cal. Edison Co.*, 151 FERC ¶ 61,273, at P 24 (2015) (*So. Cal. Edison*)).

<sup>52</sup> *Id.* at 3-4.

23. Cottonwood states that this proceeding concerns whether a transmission owner can disregard the requirements of the *pro forma* GIA by undertaking work at the interconnection customer's expense without having received authorization to proceed, and Cottonwood contends that resolution requires interpretation of the same provisions at issue in the Notice of Cancellation proceeding.<sup>53</sup> Cottonwood states that NPPD concedes that the Complaint requires interpretation of article 5.6.3 of the Cottonwood GIA and, therefore, asserts that NPPD's "argument fails on its face, and the *Arkla* test should not even have to be applied."<sup>54</sup>

24. Furthermore, Cottonwood argues that, even if *Arkla* applies, the Commission should retain jurisdiction. With regard to the first *Arkla* factor, Cottonwood contends that the Commission has expertise in interpreting a *pro forma* agreement, and no entity has better expertise than the Commission in addressing the implications of actions under article 5.6.3 of the Cottonwood GIA.<sup>55</sup> With regard to the second *Arkla* factor, Cottonwood notes that the Commission has found that disputes fall under its jurisdiction when there is need for uniformity in interpreting provisions that relate to the Commission's regulatory responsibilities.<sup>56</sup> Cottonwood asserts that this dispute raises industry-wide implications because article 5.6 of the Cottonwood GIA represents *pro forma* language propagated by the Commission and applicable to other GIAs. Cottonwood argues that the Commission has a policy interest in uniformly determining how *pro forma* language in GIAs are applied, rather than having different courts reach various conclusions about the GIA's meaning, which could lead to confusion and inconsistency on what communications must occur before a transmission owner is authorized to proceed with construction.<sup>57</sup> With regard to the third *Arkla* factor, Cottonwood disagrees with NPPD that the Complaint does not raise issues pertinent to the Commission's regulatory responsibilities, emphasizing that the Commission has retained jurisdiction over disputes involving *pro forma* interconnection agreements

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<sup>53</sup> *Id.* at 4 (citing Order Rejecting Cancellation, 155 FERC ¶ 61,240 at P 19).

<sup>54</sup> *Id.* at 4-5.

<sup>55</sup> *Id.* at 5.

<sup>56</sup> *Id.* at 5-6 (citing *Linden VFT, LLC v. Brookfield Energy Marketing L.P.*, 143 FERC ¶ 61,109, at P 21 (2013) (*Linden*)).

<sup>57</sup> *Id.* at 6.

specifically because it would help promote regulatory certainty by clarifying aspects of the *pro forma* Large Generator Interconnection Agreement.<sup>58</sup>

## **VI. NPPD's Answer**

25. NPPD maintains that this proceeding presents a contract dispute that is most appropriately resolved in court, rather than by the Commission.<sup>59</sup> NPPD contends that Cottonwood's answer does not provide any compelling reason for the Commission to exercise its discretion to assert primary jurisdiction, further stating that, to the best of its knowledge, the Commission has not limited the applicability of its *Arkla* precedent to breach of contract claims involving non-*pro forma* agreements.<sup>60</sup> NPPD asserts that, unlike *So. Cal. Edison Co.* and *Linden*, which did not involve breach of contract disputes, the Complaint simply seeks to enforce terms in the GIA and the issues involve whether NPPD breached the Cottonwood GIA by constructing upgrades, whether NextEra consented to construction, and what damages, if any, are owed.<sup>61</sup> NPPD argues that the Complaint does not involve matters of general industry relevance, does not require the Commission to announce a new policy interpretation of the GIA's terms, and does not involve reconciling or interpreting regulations or policies in reference to a transmission tariff.<sup>62</sup> Finally, NPPD contends that the Commission's decision to reject the Notice of Cancellation is not germane to whether the Commission should assert jurisdiction over Cottonwood's breach of contract claim in the Complaint.<sup>63</sup>

## **VII. Discussion**

### **A. Procedural Matters**

26. 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 an answer unless otherwise ordered by the

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<sup>58</sup> *Id.* (citing *So. Cal. Edison*, 151 FERC ¶ 61,273 at P 24).

<sup>59</sup> NPPD Answer at 2-3.

<sup>60</sup> *Id.* at 2.

<sup>61</sup> *Id.* at 5-6.

<sup>62</sup> *Id.* at 6 (distinguishing the Complaint from *So. Cal Edison* and *Linden*).

<sup>63</sup> *Id.*

decisional authority. We will accept NPPD's answer to Cottonwood's answer because it has provided information that assisted us in our decision-making process.

## **B. Substantive Matters**

27. We decline to exercise primary jurisdiction over this contractual dispute and therefore grant NPPD's motion to dismiss the Complaint. As a threshold matter, we disagree with Cottonwood's assertion that the Commission does not need to determine if it should assert primary jurisdiction because the dispute involves the interpretation of a *pro forma* agreement. While the Commission may find that addressing the interpretation of a *pro forma* agreement will promote regulatory certainty, the fact that a dispute arises under *pro forma* terms of a GIA does not compel the Commission to assert jurisdiction over allegations of breach of contract.<sup>64</sup> Moreover, although interconnection agreements are subject to the Commission's jurisdiction, the allegations in the Complaint present contractual disputes that rest on interpretation of the Cottonwood GIA in light of the parties' actions. In cases of contract interpretation, the Commission has concurrent jurisdiction with the courts,<sup>65</sup> and whether to exercise primary jurisdiction is a matter solely within the Commission's discretion.<sup>66</sup> In determining whether to assert its primary jurisdiction over disputes concerning jurisdictional contracts, the Commission considers three factors: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.<sup>67</sup>

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<sup>64</sup> See *So. Cal. Edison*, 151 FERC ¶ 61,273 at P 24 ("We also find that addressing the issue raised in this proceeding will help promote regulatory certainty by clarifying this aspect of the *pro forma* LGIA. However, we do not address the merits of any breach of contract claim brought by any particular party here and leave that issue to the state court.").

<sup>65</sup> *SMECO*, 155 FERC ¶ 61,164 at P 21; *Ky. Util. Co.*, 109 FERC ¶ 61,033, at PP 14-16 (2004), *reh'g denied*, 110 FERC ¶ 61,285 (2005); *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009 at 61,021.

<sup>66</sup> *SMECO*, 155 FERC ¶ 61,164 at P 21; *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009 at 61,021-22.

<sup>67</sup> *Arkla*, 7 FERC ¶ 61,175 at 61,322.

28. We conclude that under all three *Arkla* factors, it is appropriate for the Commission to decline to assert primary jurisdiction over this matter. First, while the Commission is, in general, no more expert than a court in deciding non-technical contract questions, interpretation of some types of contractual clauses may involve examination of technical issues which are within the Commission's special expertise.<sup>68</sup> However, we do not find that any special, technical expertise is needed to determine whether NPPD constructed the Guide Rock Upgrades without the required authorization, whether Cottonwood authorized NPPD to incur those costs, and if Cottonwood is entitled to monetary damages. Though the dispute arises under *pro forma* language, the outcome of this matter depends on review of the parties' course of conduct and communications rather than any determination requiring our special expertise.<sup>69</sup>

29. Second, there is no need for uniformity of interpretation of the type of question raised here. This complaint proceeding is not a dispute about the interpretation of provisions of the GIA, but rather whether the parties' course of conduct under the Cottonwood GIA and the communications between them authorized NPPD to proceed with construction of network upgrades. The outcome of this proceeding would not determine a general policy regarding the interpretation of all similar clauses in GIAs, and resolution of the contractual dispute here likely will have no impact beyond the parties involved.<sup>70</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *SMECO*, 155 FERC ¶ 61,164 at P 23.

<sup>70</sup> *See, e.g., id.* P 24 (finding that “[r]esolution of the contractual dispute therefore likely will have little impact beyond the parties involved and this particular issue involving PJM’s Capacity Performance construct would also not be applicable to entities operating in other RTOs.”); *BG Energy Merchants, LLC v. Crosstex LIG, LLC*, 136 FERC ¶ 61,098, at P 37 (2011) (finding no need for uniformity of interpretation when there is nothing to indicate that the interpretation of certain service agreements will affect anyone other than the parties to the agreements); *PPL Elec. Utilities Corp.*, 92 FERC ¶ 61,057, at 61,147 (2000) (finding there “does not appear to be a need for uniformity of interpretation of the type of question raised in this dispute, since an interpretation of this contract by the [court], even if different from other courts’ interpretations of similar contracts, will not impinge significantly on the operations of public utilities across the nation; and we are not, in fact, at this point aware of any contract disputes raising similar issues within [the RTO].”).

30. Finally, this matter does not significantly affect the Commission's regulatory responsibilities with respect to its interconnection policy or other regulatory responsibilities. Cottonwood does not request that the Commission find that any term of the Cottonwood GIA is unjust and unreasonable but only requests that the Commission interpret the meaning of particular provisions of the Cottonwood GIA in light of the parties' actions. Thus, the dispute does not involve policy questions but rather the parties' course of conduct under the Cottonwood GIA and the communications between them. Accordingly, we conclude that under all three *Arkla* factors, it is appropriate for the Commission to decline to assert primary jurisdiction over this matter, and because we decline to exercise our jurisdiction on this issue, we will not address the merits of Cottonwood's claim. Accordingly, we grant NPPD's motion to dismiss the Complaint and dismiss the Complaint, which renders Cottonwood's motion to consolidate moot.<sup>71</sup>

The Commission orders:

(A) NPPD's motion to dismiss the Complaint is hereby granted, as discussed in the body of this order.

(B) Cottonwood's Complaint is hereby dismissed, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>71</sup> As noted above, an order on SPP's Notice of Cancellation in Docket No. ER16-1350-000 was issued on June 3, 2016. Order Rejecting Cancellation, 155 FERC ¶ 61,240.