

164 FERC ¶ 61,013  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;  
Cheryl A. LaFleur, Neil Chatterjee,  
Robert F. Powelson, and Richard Glick.

Duke Energy Florida, LLC

Docket No. ER18-1551-000

ORDER REJECTING NOTICE OF TERMINATION

(Issued July 6, 2018)

1. On May 7, 2018, Duke Energy Florida, LLC (Duke) filed, pursuant to section 205 of the Federal Power Act,<sup>1</sup> and Part 35 of the Commission's regulations,<sup>2</sup> a Notice of Termination of the Large Generator Interconnection Agreement (LGIA) between Duke and Hamilton Energy Resource Opportunities, LLC, Inc. (HERO). In this order, as discussed below, we reject Duke's Notice of Termination. We also clarify section 4.4.2 of Duke's Large Generator Interconnection Procedures (Duke's LGIP), and find that HERO has thirty days from the issuance of this order within which it must execute the Facilities Study Agreement and pay the required \$100,000 deposit or forfeit its queue position.

**I. Background and Overview of Notice of Termination**

2. HERO is developing a 69 MW solar photovoltaic electric generation facility in Hamilton County, Florida (the HERO Project). In March 2010, HERO submitted a generator interconnection request to connect the proposed project to Duke's transmission system. Subsequently, Duke assigned the HERO Project a Queue Position and conducted the required interconnection studies. On October 18, 2012, Duke and HERO executed an LGIA (the HERO LGIA), establishing the terms and conditions for the interconnection of the HERO Project. Duke states that the HERO LGIA conforms to the *pro forma* LGIA

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<sup>1</sup> 16 U.S.C. § 824d (2012).

<sup>2</sup> 18 C.F.R. pt. 35 (2017).

in Duke's Open Access Transmission Tariff (OATT) and therefore was not filed with the Commission.<sup>3</sup>

3. On October 17, 2012, HERO informed Duke that it was exercising its right, as of the effective date of the HERO LGIA, under Article 5.16 of the LGIA to suspend all work associated with its interconnection request.<sup>4</sup> According to Duke, HERO acknowledged the possibility within its notice of suspension that, due to passage of time during the suspension period, changes to Duke's transmission system or activities related to other interconnection requests may result in conditions that differ materially from those used as inputs for the interconnection studies performed in response to HERO's initial generator interconnection request.<sup>5</sup> HERO also acknowledged that, should a re-study be necessary, it would bear responsibility for providing the requisite funding at that time. Duke states, furthermore, that HERO acknowledged that the results of a future re-study could indicate that the interconnection facilities or network upgrades necessary for interconnection (or both) may have changed from those anticipated at the time of initial interconnection studies, and therefore that HERO's interconnection-related costs may change as well. HERO also stated that such matters regarding recommencement, including revisions to the milestones under Appendix B of the LGIA, "will need to be worked out by the parties at the time performance under the LGIA resumes."<sup>6</sup> According to Duke, as neither the HERO LGIA nor Duke's LGIP contains specific provisions for re-study procedures following suspension of the work required under the HERO LGIA, after HERO informed Duke that the requested suspension was over,<sup>7</sup> Duke and HERO

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<sup>3</sup> Duke Notice of Termination, Transmittal at 2. *See* Joint Open Access Transmission Tariff between Duke Energy Carolinas, LLC, Duke Energy Florida, LLC, and Duke Energy Progress, LLC, Service Agreement No. TF-183.

<sup>4</sup> *See* Duke Notice of Termination, at Ex. B. Article 5.16 of the LGIA provides that an Interconnection Customer the right to suspend work on Interconnection Facilities and any associated Network Upgrades for up to three years. Therefore, HERO had until October 17, 2015, to request that work required under its LGIA recommence.

<sup>5</sup> Duke Notice of Termination, Ex. B at 3.

<sup>6</sup> *Id.*, Ex. B at 2.

<sup>7</sup> HERO informed Duke that it wished to suspend its LGIA as of the effective date of the LGIA, October 18, 2012. HERO chose to end suspension on October 14, 2015. *Id.*, Transmittal at 3-4.

agreed to proceed with recommencement of work according to the initial study timelines set out in sections 6 through 8 of Duke's LGIP.<sup>8</sup>

4. On October 14, 2015, HERO notified Duke that it was ending the suspension.<sup>9</sup> HERO states that on January 9, 2017, it reached out to Duke requesting an update on the status of the recommencement of work on the HERO Project. Subsequently, consistent with their discussions prior to the suspension, and based on the procedures for initial Interconnection System Impact Studies outlined in section 7.1 of Duke's LGIP, Duke and HERO executed a new System Impact Study Agreement. On March 6, 2018, Duke issued a System Impact Re-Study of the HERO Project. In the re-study report, HERO states that it learned of a new network upgrade that would be assigned to the HERO Project, the Jasper-Burnham Line. According to HERO, the network upgrade would increase the HERO Project cost by \$20 million.<sup>10</sup>

5. HERO states that, in order to more carefully consider the HERO Project in light of the newly-assigned upgrade, it requested from Duke a 30-day extension of its deadline to execute the new Facilities Study Agreement.<sup>11</sup> This extension, if granted, would have pushed the deadline for executing the Facilities Study Agreement from April 5, 2018 to May 5, 2018. Duke denied this request.<sup>12</sup>

6. Duke states it did not receive the executed Facilities Study Agreement or the appropriate re-study deposit in the amount of \$100,000 from HERO within 30 days of its tender of the Facilities Study Agreement, as required under section 8.1 of Duke's LGIP.<sup>13</sup>

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<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.*; Motion to Intervene and Protest of Hamilton Energy Resource Opportunities, LLC, at 9, Docket No. ER18-1551-000 (filed May 28, 2018) (HERO Protest).

<sup>10</sup> HERO Protest at 1.

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

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

<sup>13</sup> Duke Notice of Termination, Transmittal at 4. *See also* Duke's LGIP § 8.1, which states ("Interconnection Customer shall execute the Interconnection Facilities Study Agreement and deliver the executed Interconnection Facilities Study Agreement to Transmission Provider within thirty (30) Calendar Days after its receipt, together with the required technical data and the greater of \$100,000 or Interconnection Customer's

Therefore, on April 6, 2018, Duke provided a notice of breach of the HERO LGIA (Notice of Breach) to HERO.<sup>14</sup> The Notice of Breach stated, pursuant to Article 17.1.1 of the HERO LGIA, that “the breaching Party shall have thirty (30) Calendar Days from receipt of the Default notice within which to cure the Breach.”<sup>15</sup> According to Duke, the breach was capable of being cured within 30 calendar days from receipt of the notice if HERO provided Duke with (a) an executed Facilities Study Agreement and (b) the re-study deposit of \$100,000 by May 6, 2018, in accordance with Article 17.1.1 of the HERO LGIA.<sup>16</sup>

7. Duke states that, on May 3, 2018, in response to the Notice of Breach, HERO sent Duke a notice of dispute under Article 27 of the LGIA (Notice of Dispute).<sup>17</sup> HERO also requested that Duke allow it to reduce the planned output of the HERO project by 15 percent,<sup>18</sup> in accordance with section 4.4.2 of Duke’s LGIP.<sup>19</sup> In addition, HERO attempted to cure the breach by proposing to place the re-study deposit and the executed Facilities Study Agreement in escrow until the dispute regarding HERO’s request to reduce the size of the HERO Project had been resolved. Duke denied these requests on the grounds that HERO already had executed an LGIA and that, therefore, according to Duke, HERO was not entitled to project modification under section 4.4.2 during the re-study process.<sup>20</sup>

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portion of the estimated monthly cost of conducting the Interconnection Facilities Study”). Duke notes that, in this case, \$100,000 was the greater amount. Duke Notice of Termination, Transmittal at 4.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*, citing LGIA Article 17.1.1.

<sup>16</sup> Duke Notice of Termination, Transmittal at 4.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> The reduction in electrical output requested by HERO would have reduced the project size from 69 MW to approximately 59 MW.

<sup>19</sup> *Id.* at 7. LGIP § 4.4.2 states that “[p]rior to the return of the executed Interconnection Facility Study Agreement to Transmission Provider, the modifications permitted under this Section shall include specifically: (a) additional 15 percent decrease in electrical output (MW)....”

<sup>20</sup> Duke Notice of Termination, Transmittal at 8-9.

8. Duke argues that the termination of the HERO LGIA is not unjust, unreasonable, unduly discriminatory, or preferential, and is in the public interest.<sup>21</sup> Duke argues that the Commission should accept the Notice of Termination because HERO has failed to satisfy its obligation to recommence work under the HERO LGIA, has not complied with agreed upon re-study timelines necessary to avoid delays, and has not made a good faith effort to cure the breach resulting in such default. Also, Duke contends that HERO's decision to suspend work on the HERO Project does not entitle HERO to entirely re-start the interconnection study process, such that HERO is able to reduce the expected electrical output of the HERO Project by 15 percent pursuant to section 4.4.2 of Duke's LGIP, after an LGIA has been executed. Duke asserts that the re-study is triggered by HERO's suspension and that the opportunity to decrease the size of the HERO Project was limited to the initial interconnection request and not to the re-study. Furthermore, Duke asserts that HERO's proposal to put the executed Facilities Study Agreement and \$100,000 deposit in escrow does not cure the breach.<sup>22</sup>

## **II. Notice of Filing and Responsive Pleadings**

9. Notice of Duke's May 7, 2018 filing was published in the Federal Register, 83 Fed. Reg. 22,476 (2018), with interventions and protests due on or before May 29, 2018. On May 28, 2018, HERO filed a timely motion to intervene and protest. On June 5, 2018, Duke filed an answer to HERO's protest. On June 11, 2018 HERO filed an answer to Duke's answer.

10. In its protest, HERO asserts that Duke has improperly denied it the right, provided under section 4.4.2 of Duke's LGIP, to reduce the electrical output of the HERO Project by up to 15 percent at any point in the study process prior to the execution of a Facilities Study Agreement.<sup>23</sup> HERO contends that in section 8.5 of Duke's LGIP, which governs re-study of projects impacted by modifications to a higher-queued project, cross-references section 4.4 of Duke's LGIP and therefore contemplates that projects undergoing re-study are due the same modification rights as projects being studied for the first time.<sup>24</sup> HERO asserts that restarting the interconnection study process after a

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<sup>21</sup> *Id.* at 6-7 (citations omitted).

<sup>22</sup> *Id.* at 8-9.

<sup>23</sup> HERO Protest at 2.

<sup>24</sup> *Id.* at 3. Duke's LGIP § 8.5 states, "[i]f Re-Study of the Interconnection Facilities Study is required due to a higher queued project dropping out of the queue or a modification of a higher queued project pursuant to Section 4.4, Transmission Provider shall so notify Interconnection Customer in writing."

suspension provides it the opportunity to modify its proposed HERO Project based on the need for—and results of—the new System Impact Study.

11. HERO argues that it could not cure the breach without first resolving whether it could reduce the size of the output of the generation facility to be studied. More specifically, HERO acknowledges that curing the breach in accordance with Article 17.1.1 of the HERO LGIA would have required HERO to execute the Facilities Study Agreement tendered by Duke on March 6, 2018, effectively waiving HERO's ability to reduce the output of the HERO Project, since section 4.4.2 of Duke's LGIP provides the Interconnection Customer this right only prior to the return of the executed Facilities Study Agreement.<sup>25</sup> HERO states that, on April 30, 2018, it reached out to the Commission's Hotline to discuss Duke's refusal of HERO's request to reduce the HERO Project's output by 15 percent. HERO notes that, on May 14, 2018, FERC Hotline staff communicated to HERO that in light of Duke's Notice of Termination filing pending at the Commission, the Commission Hotline would take no further action.<sup>26</sup> HERO argues that it was acting in good faith because it proposed to Duke to place the executed Facilities Study Agreement and \$100,000 deposit in escrow before the period for curing the breach expired.<sup>27</sup>

### **III. Discussion**

#### **A. Procedural Issues**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will reject Duke's and Hero's answers because they did not provide information that assisted us in our decision making process.

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<sup>25</sup> HERO Protest at 2-3.

<sup>26</sup> *Id.* at Ex. A.

<sup>27</sup> *Id.* at 2-3.

## B. Substantive Issues

14. As discussed below, given the facts of this case, we find that Duke has failed to demonstrate that its proposed Notice of Termination is just and reasonable, and not unduly discriminatory or preferential and therefore we reject it.<sup>28</sup>

15. As an initial matter, we find that HERO is in breach of its LGIA with Duke and that it failed to pay the \$100,000 deposit and return to Duke a signed Facilities Study Agreement. Duke initiated re-studies in order to recommence work on the HERO Project following HERO's suspension of its LGIA. Upon recommencement of work, Duke and HERO agreed to proceed with the timelines described in sections 6 through 8 of Duke's LGIP, which govern the timelines for completing the System Impact and Facilities Studies. Pursuant to section 7.1 of Duke's LGIP,<sup>29</sup> Duke and HERO executed a new System Impact Study Agreement and Duke issued a System Impact Re-Study of the HERO Project on March 6, 2018. Pursuant to section 8.1 of Duke's LGIP,<sup>30</sup> HERO was required to execute and deliver to Duke the Facilities Study Agreement and the \$100,000 study deposit within 30 days of the receipt of the Agreement. HERO failed to meet these obligations and, therefore, HERO was in breach of its LGIA.<sup>31</sup>

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<sup>28</sup> See, e.g., *Allegheny Power System, Inc.*, 102 FERC ¶ 61,318, at P 9 (2003).

<sup>29</sup> Section 7.1 of Duke's LGIP states, "[u]nless otherwise agreed...simultaneously with the delivery of the Interconnection Feasibility Study to Interconnection Customer, Transmission Provider shall provide to Interconnection Customer an Interconnection System Impact Study Agreement.... The Interconnection System Impact Study Agreement shall provide that Interconnection Customer shall compensate Transmission Provider for the actual cost of the Interconnection System Impact Study."

<sup>30</sup> Section 8.1 states that an "Interconnection Customer shall execute the Interconnection Facilities Study Agreement and deliver the executed Interconnection Facilities Study Agreement to Transmission Provider within thirty (30) Calendar Days after its receipt, together with the required technical data and the greater of \$100,000 or Interconnection Customer's portion of the estimated monthly cost of conducting the Interconnection Facilities Study."

<sup>31</sup> In its protest, HERO maintains that Duke should have granted an extension of the 30 day timeline to execute the Facilities Study Agreement and pay the \$100,000 deposit. However, nothing in the Duke LGIP or the HERO LGIA requires Duke to grant such an extension.

16. Nonetheless, we find that it would not be just and reasonable to grant the termination of the interconnection agreement. At the heart of the dispute between HERO and Duke is whether HERO is entitled to modify the size of the HERO Project in accordance with section 4.4.2 of Duke's LGIP. As discussed further below, we find that Duke's LGIP is ambiguous as to whether the provisions of section 4.4.2 apply to restudies following suspension and recommencement of work. Additionally, we recognize that, in the case of suspending and recommencing work, the Commission has not previously determined whether section 4.4.2 of Duke's LGIP applies. We also recognize that HERO was proceeding as though it did apply. Thus, given this ambiguity, we find that HERO acted in good faith in asking to place the \$100,000 study deposit and the unexecuted Facilities Study Agreement in escrow to work out the dispute pursuant to Article 27 of the HERO LGIA.<sup>32</sup> HERO was in the position of having requested a modification to the output of its facility and was unable to cure the breach of the HERO LGIA in a timely manner without foregoing its pursuit of that modification request. We agree with HERO that the execution of the Facilities Study Agreement tendered by Duke on March 6, 2018, would have effectively waived HERO's right to reduce the output of the HERO Project, because section 4.4.2 of the Duke LGIA provides the Interconnection Customer this right only prior to the return of the executed Facilities Study Agreement.<sup>33</sup> To preserve this right, HERO submitted a Notice of Dispute in which it proposed curing the breach by putting the executed Facilities Study Agreement and study deposit in escrow while continuing to pursue a reduction in the output of the HERO Project. We find that, given the aforementioned ambiguity and HERO's good faith attempt to cure the breach, the termination of the HERO LGIA would not be just and reasonable.

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<sup>32</sup> LGIA Article 27.1 states, "[i]n the event either Party has a dispute, or asserts a claim, that arises out of or in connection with this LGIA or its performance, such Party (the "disputing Party") shall provide the other Party with written notice of the dispute or claim ("Notice of Dispute"). Such dispute or claim shall be referred to a designated senior representative of each Party for resolution on an informal basis as promptly as practicable after receipt of the Notice of Dispute by the other Party. In the event the designated representatives are unable to resolve the claim or dispute through unassisted or assisted negotiations within thirty (30) Calendar Days of the other Party's receipt of the Notice of Dispute, such claim or dispute may, upon mutual agreement of the Parties, be submitted to arbitration and resolved in accordance with the arbitration procedures set forth below. In the event the Parties do not agree to submit such claim or dispute to arbitration, each Party may exercise whatever rights and remedies it may have in equity or at law consistent with the terms of this LGIA."

<sup>33</sup> HERO Protest at 2-3.

17. Because we find section 4.4.2 of Duke's LGIP to be ambiguous, we take this opportunity to clarify its implementation. We find that projects undergoing re-study following suspension and recommencement of work are precluded from making modifications pursuant to section 4.4.2 of Duke's LGIP. This interpretation is consistent with the Commission statement in Order No. 2003 that "the modifications that are permitted under Section 4.4 occur early enough in the study process that their effect on Interconnection Customers lower in the queue should be limited."<sup>34</sup> For purposes of section 4.4.2, where an Interconnection Customer such as HERO has proceeded through the interconnection process, received and executed an LGIA and suspended and recommenced its project, it is no longer a reasonable assumption that it is "early" in the study process. Thus, HERO is not entitled to modify the size of the HERO Project pursuant to section 4.4.2 of Duke's LGIP. In the event that HERO does not wish to maintain its originally-proposed project size in light of the results of the re-study following suspension and recommencement of work, it may terminate the existing LGIA and submit a new interconnection request.<sup>35</sup> We find that interpreting section 4.4.2 of Duke's LGIP in this way will provide more certainty for the transmission provider and interconnection customers, including those with lower-queued projects. This interpretation balances the rights of the interconnection customer against the benefit of certainty to the interconnection process.

18. We find that, with our clarification above on the proper application of section 4.4.2 of Duke's LGIP, HERO has 30 days from the issuance of this order, pursuant to Article 17.1.1 of the HERO LGIA,<sup>36</sup> within which it must either execute the Facilities Study Agreement and pay the required \$100,000 deposit or forfeit its queue position.

The Commission orders:

(A) The Notice of Termination is hereby rejected, as discussed in the body of this order.

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<sup>34</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 171 (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>35</sup> As HERO notes in its Protest, HERO may file a complaint pursuant to section 206 of the Federal Power Act if it chooses. HERO Protest at 2.

<sup>36</sup> *See supra* P 6.

(B) HERO is hereby directed to either execute its Facilities Study Agreement with Duke and pay the required \$100,000 deposit within thirty (30) days of the date of this order, or inform Duke that it will forfeit its queue position.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.