

165 FERC ¶ 61,230  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Cheryl A. LaFleur and Richard Glick.

Duke Energy Florida, LLC

Docket Nos. ER19-125-000  
EL19-23-000

ORDER REJECTING NOTICE OF TERMINATION,  
INSTITUTING SECTION 206 PROCEEDING AND  
ESTABLISHING HEARING AND SETTLEMENT PROCEDURES

(Issued December 14, 2018)

1. On October 17, 2018, Duke Energy Florida, LLC (Duke Energy) filed, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> and Part 35 of the Commission's regulations,<sup>2</sup> a notice of termination (Notice of Termination) of the Large Generator Interconnection Agreement (LGIA) between Duke Energy and U.S. EcoGen Polk, LLC (USEG Polk) (USEG Polk LGIA),<sup>3</sup> to become effective December 17, 2018. As discussed below, we reject Duke Energy's Notice of Termination.
2. We also institute a proceeding under section 206 of the FPA,<sup>4</sup> in Docket No. EL19-23-000, because we preliminarily find that Duke Energy's increased estimate, from \$1,720,000 to over \$6 million in an approximately two-year period, to procure, install and construct the interconnection facilities and network upgrades (USEG Polk Costs) for the USEG Polk LGIA may be unjust and unreasonable. We establish hearing

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<sup>1</sup> 16 U.S.C. § 824d (2012).

<sup>2</sup> 18 C.F.R. pt. 35 (2018).

<sup>3</sup> Duke Energy Florida, LLC, Tariffs, Rate Schedules and Service Agreements, [OATT SA No. 180, U.S. EcoGen Polk LGIA-CANCELLED, 3.0.0.](#)

<sup>4</sup> 16 U.S.C. § 824e(b) (2012).

and settlement procedures to investigate whether the increased estimate for the USEG Polk Costs is just and reasonable.

## **I. Background**

3. USEG Polk has been developing a 62.5 MW summer/68.4 MW winter biomass electric generation facility (Project) located in Polk, Florida, since 2010. On March 28, 2011, USEG Polk and Duke Energy executed a Renewable Energy Power Purchase Agreement (PPA) that provides for Duke Energy to purchase 100 percent of the Project's output for a 29.5 year term beginning on the Project's expected commercial operation date. On June 1, 2015, Duke Energy and USEG Polk entered into the USEG Polk LGIA to provide the terms and conditions for the interconnection of the Project to Duke Energy's transmission system.<sup>5</sup>

4. On June 15, 2018, Duke Energy filed its first notice of termination of the USEG Polk LGIA with the Commission, arguing that USEG Polk was in default of the USEG Polk LGIA for failure to pay certain invoices. Duke Energy stated that it provided a written notice of the breach to USEG Polk, and USEG Polk failed to cure the breach of nonpayment.<sup>6</sup> Thus, Duke Energy argued that, pursuant to Article 17.1.2 of the USEG Polk LGIA, it had the right to declare a default and terminate the USEG Polk LGIA by written notice.<sup>7</sup> On October 5, 2018, the Commission rejected Duke Energy's proposed

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<sup>5</sup> Duke Energy states that the USEG Polk LGIA conforms to Duke Energy's *pro forma* LGIA contained in its Joint Open Access Transmission Tariff (Joint OATT) and it was not required to file the USEG Polk LGIA with the Commission. However, on January 13, 2017, Duke Energy filed the USEG Polk LGIA with the Commission as Service Agreement No. 180. In that submission, Duke Energy stated that, since the execution of the USEG Polk LGIA, USEG Polk had experienced delays in constructing the Project. Duke Energy January 13, 2017 Transmittal, Docket No. ER17-791-000 at 3. Duke Energy stated that, for this reason, among others described in the same transmittal, the parties planned on exercising their rights in the future under Article 30.10 of the USEG Polk LGIA to amend the appendices of the USEG Polk LGIA to reflect new milestone dates. *Id.* On March 7, 2017, the Commission accepted the USEG Polk LGIA. *Duke Energy Florida, LLC*, Docket No. ER17-791-000 (Mar. 17, 2017) (delegated order).

<sup>6</sup> Article 17.1.1 of the USEG Polk LGIA provides: “. . . the breaching party shall have thirty (30) Calendar Days from receipt of the Default notice within which to cure such Breach . . . .”

<sup>7</sup> Article 17.1.2 provides: “If a Breach is not cured as provided in this article, or if a Breach is not capable of being cured within the period provided for herein, the non-breaching Party shall have the right to declare a Default and terminate this LGIA by

notice of termination, finding that USEG Polk had provided sufficient payment and security to cover the December 31, 2017 and April 9, 2018 invoices at issue in the notice of termination.<sup>8</sup>

## II. Notice of Termination

5. On October 17, 2018, Duke Energy filed its second Notice of Termination of the USEG Polk LGIA. Duke Energy states that USEG Polk failed to pay invoices dated May 14, 2018 and June 12, 2018, for the estimated costs to procure, install and construct the interconnection facilities and network upgrades (USEG Polk Costs) identified in the USEG Polk LGIA.<sup>9</sup> Duke Energy asserts that, with respect to the May 14, 2018 invoice, it sent USEG Polk a notice of breach on June 15, 2018 and the 30-day cure period has expired with no payment received. Duke Energy also asserts that with respect to the June 12, 2018 invoice, it sent USEG Polk a notice of breach on August 2, 2018 and the 30-day cure period has expired with no payment received.<sup>10</sup>

6. Duke Energy states that, in Order No. 2003, the Commission found that the terms of the LGIA are intended to “ensure[] that the Transmission Provider is always adequately protected against its cost exposure” and “that only a financially sound generation project will advance to the point where a Transmission Provider must make an irreversible financial commitment on its behalf.”<sup>11</sup>

7. Duke Energy contends that it has now reached the point where the payment and security USEG Polk had previously provided is not enough to cover the May 14, 2018 and June 12, 2018 invoices, and that it would need to make irreversible financial commitments to continue with the procurement, installation, and construction of USEG Polk’s interconnection facilities and network upgrades. Duke Energy asserts that

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written notice at any time until cure occurs . . . .”

<sup>8</sup> *Duke Energy Florida, LLC*, 165 FERC ¶ 61,012, at P 25 (2018).

<sup>9</sup> Duke Energy Transmittal at 2.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 594 (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)).

termination of the USEG Polk LGIA is not unjust, unreasonable, or unduly discriminatory or preferential and is consistent with the public interest because USEG Polk's continued breach and failure to pay creates unjust and unreasonable cost exposure for Duke Energy and its ratepayers without a concomitant demonstration from USEG Polk that its Project is financially sound and able to proceed toward completion.<sup>12</sup>

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

8. Notice of Duke Energy's October 17, 2018 filing was published in the *Federal Register*, 83 Fed. Reg. 53,470 (2018), with interventions and protests due on or before November 7, 2018. USEG Polk filed a timely motion to intervene and protest (Protest). On November 16, 2018, Duke Energy filed an answer (Answer).

#### **A. USEG Polk's Protest**

9. USEG Polk asserts that Duke Energy's request to terminate the USEG Polk LGIA is unjust, unreasonable, unduly discriminatory, and preferential; inconsistent with the public interest; and inconsistent with the Commission's open access transmission policies, its promotion of competitive wholesale markets, and its policy of favoring dispute resolution and settlements.<sup>13</sup>

10. In response to Duke Energy's assertion that USEG Polk is in default for nonpayment of invoices, USEG Polk contends that it has not refused to pay any invoices rendered by Duke Energy in accordance with the USEG Polk LGIA on file, and claims that Duke Energy insists on billing USEG Polk based on Duke Energy's "unilateral and unreasonable" escalated costs of over \$6 million, which are more three times the contractual amount of \$1,720,000.<sup>14</sup> USEG Polk argues that the underlying dispute between the parties is a disagreement over the estimated costs to procure, install and construct the interconnection facilities and network upgrades for the USEG Polk LGIA. USEG Polk states that \$1,720,000 is the total amount specified in the USEG Polk LGIA as USEG Polk's cost responsibility for interconnection facilities. USEG Polk contends that, in March 2017, Duke Energy notified USEG Polk that it had increased the costs to \$3,912,709, due to rising costs since 2015. USEG Polk also asserts that Duke Energy again increased the costs to \$6,151,346, in a new Facilities Study Report, dated August

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<sup>12</sup> *Id.* at 3-4.

<sup>13</sup> USEG Polk Protest at 18.

<sup>14</sup> *Id.* at 5-6. As part of its Protest of the Notice of Termination, USEG Polk incorporates the arguments from its protest of the first notice of termination in Docket No. ER18-1791-000.

28, 2017, which reflects a revised Facilities Study and which was received by USEG Polk in February, 2018.<sup>15</sup> USEG Polk states that Duke Energy explained that the cost increases were due, in part, to Duke Energy's decision to use outside contractors, rather than company personnel, to construct the facilities necessary to interconnect the Project.<sup>16</sup>

11. USEG Polk asserts that it has no means of verifying the amounts billed, assuming the escalated costs were proper, because Duke Energy has not responded to multiple requests for any data and workpapers that underlie the revised cost estimate.<sup>17</sup> USEG Polk also introduces an affidavit, in Appendix 2 of its Protest, from a third-party contractor, Energy And Transit Engineering Inc. (E&T Engineering), in which E&T Engineering provided a \$1,991,115 estimate for the construction of the interconnection facilities and network upgrades for the Project beginning in 2018.<sup>18</sup>

12. USEG Polk states that because the invoices rendered according to the revised cost estimate violate the terms of the USEG Polk LGIA, USEG Polk has refused to pay invoices rendered since May 2018.<sup>19</sup> USEG Polk asserts that it has properly paid or secured all of its \$1,720,000 payment obligations under the USEG Polk LGIA and that it stands ready to pay additional amounts the Commission may find appropriate. USEG Polk also states that termination of the USEG Polk LGIA is completely unacceptable to USEG Polk and would threaten its ability to finance the Project, causing significant financial harm to USEG Polk. USEG Polk estimates that the total cost of the Project will be \$400 million and that it has already spent more than \$50 million toward development and construction of the Project.<sup>20</sup> USEG Polk states that it seeks to resolve the dispute in a manner that allows both parties to continue to perform under the USEG Polk LGIA.<sup>21</sup>

13. USEG Polk maintains that Appendix C specifies a capped price for the interconnection work that is subject to limited adjustment if changes to the Appendix C

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<sup>15</sup> *Id.* at 10.

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

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 10-11, Appendix 2. USEG Polk states that the \$1,991,115 estimate is within 20 percent of Duke Energy's original estimate of \$1,720,000. *Id.* at 11.

<sup>19</sup> *Id.* at 10.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.* at 6-7.

assumptions occur at the time of construction. Appendix C to the USEG Polk LGIA provides a detailed project cost estimate, which totals \$1,720,000, and a statement of cost assumptions, which reads “[t]he +/- 20% cost estimate provided by Duke Energy is based on the following assumptions. Should these assumptions change at the time of construction, the actual costs may change accordingly.”<sup>22</sup> Thus, USEG Polk argues that any changes to cost estimates should stay within the +/- 20 percent cap as noted in Appendix C.<sup>23</sup>

14. USEG Polk asserts that the cost estimate provided under Appendix C could be revisited, should certain “assumptions” listed therein change, but argues that there has been no change in the Appendix C assumptions that would serve to increase the capped costs. USEG Polk states that changing the costs or the Appendix C assumptions requires that either both Duke Energy and USEG Polk execute an amendment to Appendix C, or Duke Energy unilaterally file an amended LGIA with the Commission, subject to USEG Polk’s right to protest the filing. USEG Polk asserts that Article 12 of the USEG Polk LGIA, which addresses invoices, does not permit billing extra, non-contractual costs in lieu of complying with the USEG Polk LGIA terms that address amendment or modification.<sup>24</sup> USEG Polk therefore requests that the Commission resolve the contractual dispute by finding that Duke Energy must honor the Appendix C costs in the USEG Polk LGIA.

15. USEG Polk states that, on May 30, 2018, it provided Duke Energy with a written notice of dispute and notice of breach to initiate dispute resolution under Article 27 of the USEG Polk LGIA<sup>25</sup> for billing amounts in excess of the estimate-related costs and failing

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<sup>22</sup> USEG Polk LGIA, Appendix C.

<sup>23</sup> USEG Polk Protest at 12-13.

<sup>24</sup> *Id.* at 13-14.

<sup>25</sup> Article 27.1 of the USEG Polk LGIA addresses dispute resolution and provides:

In 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

to provide invoices that fully describe the services and equipment associated with the estimate-based amounts being billed. USEG Polk states that Duke Energy has refused to participate in any meaningful manner in a dispute resolution process and that, by filing the Notice of Termination, Duke Energy seeks to foreclose the possibility of any other resolution that the parties might have been able to achieve.<sup>26</sup> USEG Polk states that senior representatives from both USEG Polk and Duke Energy participated in a single, one-hour conference call prior to the 30-day period expiring, but asserts that Duke Energy refused further efforts to resolve the dispute and failed to provide detailed supporting cost data to explain its claim of increased costs.<sup>27</sup>

16. USEG Polk argues that Duke Energy's failure to comply with the terms of the USEG Polk LGIA voids its claim of breach. USEG Polk contends that, because Duke Energy seeks to collect unreasonable costs and amounts in excess of the capped costs, Duke Energy's position that USEG Polk is in default is incorrect. USEG Polk states that its alleged default is the sole justification raised by Duke Energy in its Notice of Termination, and because that justification is incorrect, there is no justification for the Commission to accept the Notice of Termination. Accordingly, USEG Polk argues that the Commission must reject Duke's Energy's Notice of Termination.<sup>28</sup> In addition, USEG Polk states that it has requested information and requested supporting details and explanations of amounts invoiced, but Duke Energy has failed or refused to respond fully or provide information USEG Polk maintains that Duke Energy is obligated to provide under Articles 12.1 and 25.1 of the USEG Polk LGIA.<sup>29</sup>

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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>26</sup> USEG Polk Protest at 14.

<sup>27</sup> *Id.* at 35.

<sup>28</sup> *Id.* at 14.

<sup>29</sup> In its Protest at 7, USEG Polk claims that it has repeatedly asked Duke Energy to provide support for the increased costs and its position that it is entitled to collect them, but that Duke Energy has refused to respond fully to these requests and, as a result, USEG Polk has no means of verifying the amounts billed. USEG Polk continues that all

17. USEG Polk states that Commission precedent permits cure prior to termination, and it is willing to cure any breaches. Should the Commission reject USEG Polk's interpretation of the Appendix C costs, USEG Polk argues the Commission should suspend action on the Notice of Termination of the USEG Polk LGIA for 90 days to permit parties time to resolve their PPA dispute,<sup>30</sup> and allow USEG Polk to cure any then-existing breach of invoice payments, pursuant to Article 12 or post security pursuant to the provision of security procedures of Article 11.5,<sup>31</sup> for verifiable amounts Duke Energy has actually expended in accordance with the USEG Polk LGIA toward construction of the network upgrades and interconnection facilities.

18. USEG Polk adds that the Commission recently rejected a notice of termination between Duke Energy and Hamilton Energy Resource Opportunities, LLC, Inc. (HERO) finding that Duke Energy had "failed to demonstrate that its proposed notice of termination is just and reasonable, and not unduly discriminatory or preferential" in light of certain unclear provisions in Duke Energy's Large Generator Interconnection Procedures (LGIP).<sup>32</sup> USEG Polk asserts that the Commission found that although HERO was in breach of its LGIA, the Commission declined to terminate the LGIA because HERO had acted in good faith within HERO's interpretation of the ambiguous

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of the invoices Duke Energy has rendered violate the terms of the USEG Polk LGIA. In its Protest at 20, USEG Polk asserts that all of the information that it has requested is information that Duke Energy is obligated to provide under the Articles of the USEG Polk LGIA. Article 12.1 of the USEG Polk LGIA addresses payment of invoices and states that: "Each Party shall submit to the other Party, on a monthly basis, invoices of amounts due for the preceding month. Each invoice shall state the month to which the invoice applies and fully describe the services and equipment provided." Article 25.1 of the USEG Polk LGIA addresses information access and states, in relevant part, that: "Each Party (the 'disclosing party') shall make available to the other Party information that is in the possession of the disclosing Party and is necessary in order for the other Party to: (i) verify the costs incurred by the disclosing Party for which the other Party is responsible under this LGIA; and (ii) carry out its obligations and responsibilities under this LGIA."

<sup>30</sup> USEG Polk states that, on October 3, 2018, Duke Energy served USEG Polk with a notice of termination of the PPA. USEG Polk Protest at 4.

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *Id.* at 16 (citing *Duke Energy Florida, LLC*, 164 FERC ¶ 61,013, at PP 14-16 (2018)).

LGIP provisions.<sup>33</sup> Accordingly, the Commission rejected Duke Energy's notice of termination and directed HERO to "either execute the Facilities Study Agreement with [Duke Energy] and pay the required \$100,000 deposit within thirty (30) days of the date of this order, or inform [Duke Energy] that it will forfeit its queue position."<sup>34</sup>

19. USEG Polk also asserts that Duke Energy is unfairly managing the USEG Polk LGIA to force the termination of the PPA, which calls for Duke Energy to purchase the Project's output. USEG Polk alleges that during much of 2017 and 2018, rather than act as a transmission provider seeking to build a strong relationship with a transmission interconnection customer, Duke Energy's transmission function and marketing function personnel appear to have colluded to prevent the construction of the Project in violation of the Commission's Standards of Conduct requirements.<sup>35</sup>

20. USEG Polk notes that terminating PPAs with non-affiliated renewable generation companies is becoming a pattern for Duke Energy.<sup>36</sup> USEG Polk states that despite Duke Energy's filing of the Notice of Termination and the ongoing dispute resolution process regarding the PPA, USEG Polk intends to continue development of its biomass generation facility and that the USEG Polk LGIA will facilitate such development.

#### **B. Duke Energy's Answer**

21. Duke Energy states that USEG Polk presents several new arguments in its Protest, including that: (1) Duke Energy has manipulated the estimated costs of network upgrades under the USEG Polk LGIA to force a termination of both the USEG Polk LGIA and PPA with Duke Energy; (2) Duke Energy's termination of its PPAs with two other biomass developers indicates that Duke Energy does not wish to purchase power from any biomass developer, including USEG Polk; and (3) Duke Energy may have shared non-public transmission and customer information with its affiliated generation marketing personnel.<sup>37</sup> Duke Energy argues that the Commission should reject the aforementioned allegations, which it states are not based on the facts presented in the record for this filing.

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<sup>33</sup> *Id.* at 17 (citing *Duke Energy Florida, LLC*, 164 FERC ¶ 61,013 at P 16).

<sup>34</sup> *Id.* (citing *Duke Energy Florida, LLC*, 164 FERC ¶ 61,013 at ordering Para. (B)).

<sup>35</sup> *Id.* at 4. *See* 18 C.F.R. pt. 358 (2018).

<sup>36</sup> USEG Polk Protest at 24.

<sup>37</sup> Duke Energy Answer at 1.

22. Duke Energy first denies the allegation that it has manipulated the estimated costs of the interconnection facilities and network upgrades under the USEG Polk LGIA to force a termination of the USEG Polk LGIA and ultimately the PPA. Duke Energy states that it has invoiced USEG Polk based on the cash flow estimate (monthly draw schedule) that it developed in 2017. With respect to the allegation that Duke Energy is attempting to force a termination of its PPA with USEG Polk by terminating the USEG Polk LGIA, Duke Energy states that “this allegation reveals a failure to recognize that the PPA and [USEG Polk] LGIA are two distinct and separate contracts.”<sup>38</sup>

23. Duke Energy next denies the allegation that it is targeting biomass PPAs for termination, including the USEG Polk PPA. Duke Energy asserts that the PPA terminations to which USEG Polk refers are distinguishable from USEG Polk’s situation because each of the other two biomass developers fully constructed their generation facilities and were performing their contractual obligations under their specific PPAs. Duke Energy adds that each of the biomass developers engaged Duke Energy in lengthy negotiations that led to mutual agreements to terminate the PPAs in a way that ultimately benefitted Duke Energy customers, subject to the Florida Public Service Commission’s review and approval. Duke Energy states that USEG Polk has correctly noted that Duke Energy has provided a notice of termination to its PPA with USEG Polk as well, on the basis that USEG Polk is “years away from reaching the point at which it could have fully constructed a biomass facility and at present day has failed to pay Duke Energy for interconnection work.”<sup>39</sup> Duke Energy argues that the terminations of two other PPAs involving fully constructed biomass facilities, on behalf of Duke Energy customers, cannot serve as the legal or factual basis for USEG Polk’s allegation that Duke Energy is systematically targeting all biomass PPAs for termination.

24. Finally, Duke Energy refutes USEG Polk’s Standards of Conduct allegation that it may have shared non-public transmission and customer information with its affiliated generation marketing personnel. Duke Energy argues that USEG Polk’s claim cannot be true because the two Duke Energy employees in question are not “marketing function employees” under the Commission’s Standards of Conduct definition<sup>40</sup> and instead are classified as “regulated utility non-marketing” in Duke Energy’s company classification system for Standards of Conduct purposes.<sup>41</sup> Further, with respect to the potential sharing of non-public transmission function information, Duke Energy argues that none

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<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> 18 C.F.R. §358.3(d) (2018).

<sup>41</sup> Duke Energy Answer at 5.

of the information that USEG Polk submitted as Appendices 5 and 6 to its Protest is non-public transmission function information, and therefore that Duke Energy could not have improperly shared USEG Polk's non-public transmission function information.<sup>42</sup> In addition, in response to USEG Polk's Standards of Conduct allegation that Duke Energy transmission function personnel have colluded with Duke Energy marketing function employees to terminate the PPA, Duke Energy argues that there is no collusion because the two employees in question are not marketing function employees.<sup>43</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), USEG Polk's timely, unopposed motion to intervene serves to make it a party to this proceeding.

26. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Duke Energy's Answer because it has provided information that assisted us in our decision-making process.

##### **B. Substantive Matters**

27. As discussed below, given the facts of this case, we find that Duke Energy has failed to demonstrate that its proposed Notice of Termination is just and reasonable, and not unduly discriminatory or preferential.<sup>44</sup> The underlying basis for the Notice of Termination and the heart of the dispute between Duke Energy and USEG Polk is what the customer should pay for the USEG Polk Costs under the USEG Polk LGIA, i.e., whether the increased estimate, from \$1,720,000 to over \$6 million in an approximately two-year period, is just and reasonable. We preliminarily find that Duke Energy's increased estimate for the USEG Polk Costs may be unjust and unreasonable. Accordingly, we reject the Notice of Termination, institute a section 206 proceeding under the FPA, in Docket No. EL19-23-000, to investigate whether the increased

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<sup>42</sup> *Id.* at 7-8.

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *See, e.g., Allegheny Power Sys., Inc.*, 102 FERC ¶ 61,318, at P 9 (2003) (finding that before it can approve a notice of termination, the Commission must, under Section 205 of the FPA, determine that the proposed termination is not unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful).

estimate for the USEG Polk Costs is just and reasonable, and establish hearing and settlement procedures on that issue.

28. USEG Polk has raised issues of material fact as to whether the estimate of the USEG Polk Costs under the USEG Polk LGIA is just and reasonable, and we are unable to resolve these issues with the information in the record. The record shows that the estimate increased substantially, from \$1,720,000 to over \$6 million, in an approximately two-year period. The record also shows that USEG Polk asserted its right to request information regarding the increased estimate from Duke Energy, under Articles 12 and 25 of the USEG Polk LGIA. In its Answer, Duke Energy does not respond to this allegation or describe the information that it provided to USEG Polk. USEG Polk states that, in March 2017, Duke Energy notified USEG Polk that it had increased the estimate to \$3,912,709 due to rising costs since 2015. USEG Polk also states that Duke Energy again increased the estimate to \$6,151,346 in a Facilities Study Report dated August 28, 2017, which USEG Polk received in February 2018. USEG Polk states that Duke Energy explained that the increased estimate was due, in part, to Duke Energy's decision to use outside contractors, rather than company personnel, to construct the interconnection facilities and network upgrades. USEG Polk provided an affidavit of a third-party contractor, E&T Engineering, which routinely constructs similar facilities; the affidavit provides an estimate of \$1,991,115 for the USEG Polk Costs, were construction to begin in 2018.<sup>45</sup> We find that USEG Polk has taken reasonable steps to verify the basis for the cost increase but has been unable to do so. Because we do not have a sufficient factual basis in this record to determine the appropriate amount of the USEG Polk Costs, we cannot determine whether Duke Energy has satisfied its section 205 burden to show that the Notice of Termination is just and reasonable. In addition, given the material issues of fact regarding the cost estimates under the USEG Polk LGIA, we are instituting a section 206 proceeding under the FPA to investigate whether the increased estimate for the USEG Polk Costs is just and reasonable, and we establish hearing and settlement procedures on that issue.<sup>46</sup>

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<sup>45</sup> See *supra* P 11.

<sup>46</sup> We also find that USEG Polk's Standards of Conduct allegations against Duke Energy are beyond the scope of this proceeding. Nonetheless, based on Duke Energy's representation that the two Duke Energy employees in question are not marketing function employees under the Commission's Standards of Conduct requirements, we agree with Duke Energy that there is no improper collusion or sharing of non-public transmission or customer information between Duke Energy's transmission and marketing function employees and therefore there is no Standards of Conduct violation. See 18 C.F.R. Part 358 (2018).

29. We note, however, that USEG Polk is in breach of the USEG Polk LGIA with Duke Energy. USEG Polk does not dispute that it failed to pay the May 14, 2018 and June 12, 2018 invoices and that USEG Polk failed to cure the breaches within the 30-day cure period under Article 17.1 of the USEG Polk LGIA. Nevertheless, because of the material issues of fact discussed in the previous paragraph, we cannot determine at this time whether Duke Energy has met its burden to show that the Notice of Termination is just and reasonable and not unduly discriminatory or preferential.

30. Finally, we note that USEG Polk is incorrect that there is a fixed price or cost cap for the estimate of the USEG Polk Costs in Appendix C of the USEG Polk LGIA.<sup>47</sup> The Commission's precedent is clear that the costs in an LGIA are simply estimates and that interconnection customers are responsible for paying the actual costs of interconnection facilities and network upgrades.<sup>48</sup> While a transmission provider may volunteer to adopt a fixed price or cost cap for its estimate, we find that there is no language in the USEG Polk LGIA to support that Duke Energy voluntarily adopted a fixed price or cost cap for its estimate.<sup>49</sup>

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<sup>47</sup> “The +/- 20% cost estimate provided by DEF is based on the following assumptions. Should these assumptions change at the time of construction, the actual costs may change accordingly.” USEG Polk LGIA, Appendix C at 77.

<sup>48</sup> In Order No. 2003, the Commission stated that: “[t]he prices quoted for interconnection in the LGIA are estimates based on the results of studies conducted during the [Standard Large Generator Interconnection Procedures] phase of the interconnection process.” Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 409. In Article 12 of the *pro forma* LGIA, the Commission required the transmission provider to provide an invoice for the final cost of the construction of the transmission provider's interconnection facilities and network upgrades within six months of the completion of those facilities, in sufficient detail to enable the interconnection customer to compare actual costs with estimates. *Id.* P 601. See *Ontelaunee Pwr. Operating Co., LLC v. Metropolitan Edison Co.*, 119 FERC ¶ 61,181, at P 41 (2007) (stating that the interconnection customer would be responsible for the actual costs of the interconnection facilities and network upgrades to the extent that they were extensions of the estimated costs under the executed interconnection agreement).

<sup>49</sup> Recently, in Order No. 845, the Commission specifically declined to implement cost caps for actual network upgrade costs that exceeded cost estimates, stating that there was “insufficient evidence in the record to support cost caps as a preferred solution to reducing variances from cost estimates.” *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043, at P 189 (2018).

31. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than the date of publication by the Commission of notice of its intention to initiate such proceeding nor later than five months after the publication date. In such cases, in order to give maximum protection to customers, and consistent with our precedent, we have historically tended to establish the section 206 refund effective date at the earliest date allowed by section 206, and we do so here as well.<sup>50</sup> That date is the date of publication of notice of initiation of the section 206 proceeding in Docket No. EL19-23-000 in the Federal Register.

32. Section 206(b) of the FPA also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. As we are setting the section 206 proceeding in Docket No. EL19-23-000 for hearing and settlement procedures, we expect that, if the proceeding does not settle, we would be able to render a decision within five months of the date of filing of briefs opposing exceptions to the Initial Decision. Thus, if the Presiding Judge were to issue an Initial Decision by June 14, 2019, we expect that, if the proceeding does not settle, we would be able to render a decision by January 14, 2020.

33. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>51</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.<sup>52</sup> The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with

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<sup>50</sup> See, e.g., *Idaho Power Co.*, 145 FERC ¶ 61,122 (2013); *Canal Elec. Co.*, 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

<sup>51</sup> 18 C.F.R. §385.603 (2018).

<sup>52</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Duke Energy's Notice of Termination is hereby rejected, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), the Commission hereby institutes a proceeding in Docket No. EL19-23-000, concerning the justness and reasonableness of the increased estimate for the USEG Polk Costs under the USEG Polk LGIA, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (F), (G) and (H) below.

(C) Any interested person desiring to be heard in Docket No. EL19-23-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), within 21 days of the date of issuance of this order. The Commission encourages electronic submission of interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and three copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

(D) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL19-23-000.

(E) The refund effective date in Docket No. EL19-23-000 established pursuant to section 206 of the FPA shall be the date of publication in the Federal Register of the notice discussed in Ordering Paragraph (D) above.

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2018), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(G) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(H) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner McIntyre is not voting on this order.  
Commissioner McNamee is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.