

143 FERC ¶ 61,280
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Arizona Public Service Company

Docket Nos. ER13-447-001

TGP Development Company, LLC
TGP Flying Cloud Holdings, LLC
WEC TX Company, LLC

EL13-45-000

v.

Arizona Public Service Company

ORDER DENYING LATE INTERVENTION, DISMISSING REQUEST FOR
REHEARING AND DENYING COMPLAINT

(Issued June 27, 2013)

1. On January 25, 2013, TGP Development Company, LLC, TGP Flying Cloud Holdings, LLC and WEC TX Company, LLC (collectively TGP Parties) filed an out-of-time motion to intervene and request for rehearing or clarification of the December 27 Letter Order that accepted revisions to Arizona Public Service Company's (APS) open access transmission tariff (OATT).¹ On February 1, 2013, TGP Parties filed a complaint pursuant to section 206 of the Federal Power Act (FPA)² and Rule 206³ of the Commission's Rules of Practice and Procedure, arguing that certain of APS' OATT provisions on creditworthiness, loss compensation for real power losses and commercial operation dates are unjust and unreasonable. For the reasons discussed below, the Commission denies the complaint. The Commission also denies TGP Parties' out-of-time motion to intervene, and dismisses TGP Parties' request for rehearing of the December 27 Letter Order.

¹ *Arizona Public Service Company*, Docket No. ER13-447-000, (December 27, 2012) (delegated letter order) (December 27 Letter Order).

² 16 U.S.C. § 824e (2006).

³ 18 C.F.R. § 385.206 (2012).

I. Background

2. On November 21, 2012, APS submitted a number of revisions to its OATT in Docket No. ER13-447-000. In its filing, APS detailed the specific transmission services available under its OATT, added a three-year term for short-term service, added language to reflect its Advanced Metering Infrastructure program, and made other ministerial changes.

3. APS also included revisions to its creditworthiness procedures in Attachment I of its OATT. APS proposed requiring a non-creditworthy customer to post collateral prior to APS' acceptance of its transmission service request instead of requiring the customer to post collateral at least five days prior to commencement of service.

4. Additionally, APS proposed revisions to its Standard Form of Network Operating Agreement in Attachment G and its Standard Form of Retail Network Operating Agreement in Attachment K. APS proposed requiring financial loss compensation instead of requiring the customer to schedule energy for physical compensation of losses.

5. Finally, APS proposed revisions to its Large Generator Interconnection Procedures (LGIP) in Attachment O of its OATT, to specify that an interconnection customer's commercial operation date must occur within seven years of its interconnection request, not within seven years of its in-service date.

6. Pursuant to delegated authority, the Director, Division of Electric Power Regulation – West, accepted the revisions to APS' OATT in the December 27 Letter Order, effective January 22, 2013.

II. TGP Parties' Request for Rehearing in Docket No. ER13-447-001

7. On January 25, 2013, TGP Parties filed an out-of-time motion to intervene and request for rehearing or clarification of the December 27 Letter Order. In their request for rehearing, TGP Parties argue that good cause exists to grant their out-of-time motion to intervene because APS mischaracterized its filing as merely clarifying language rather than as making substantive changes to creditworthiness and other procedures.⁴ TGP Parties also argue that APS failed to demonstrate that its proposed revisions were just and reasonable under section 205 of the FPA. TGP Parties specifically challenge APS' creditworthiness provisions in Attachment I of its OATT. Under those provisions, non-creditworthy transmission customers on APS' system are required to post security equal to the charge of three months of firm transmission service prior to the acceptance of a transmission service request. TGP Parties argue that this requirement is the equivalent of an additional reservation fee on transmission customers who have reserved transmission

⁴ TGP Parties' January 25, 2013 Rehearing Request at 5.

service for future use.⁵ TGP Parties request that the Commission reconsider acceptance of these provisions, or alternatively clarify that the creditworthiness provisions apply exclusively to new transmission service requests.⁶ TGP Parties also challenge APS' OATT revisions requiring financial compensation for real power losses as the sole methodology for compensation.⁷ Finally, TGP Parties challenge the reasonableness of APS' OATT revisions to clarify the deadline by which an interconnection customer must achieve commercial operation in section 3.3.1 of APS' LGIP.⁸

III. TGP Parties' Complaint in Docket No. EL13-45-000

8. On February 1, 2013, TGP Parties filed a complaint reasserting the arguments in their request for rehearing, arguing that: (1) APS' revised creditworthiness provisions in Attachment I of its OATT are unjust and unreasonable; (2) APS' revisions to Attachments G and K of its OATT to require financial, rather than in-kind, compensation of real power losses are unjustified and inconsistent with Order No. 888⁹ and Commission precedent; and (3) APS' changes to its LGIP to require that a generator achieve commercial operation within seven years of its commercial operation date are not consistent with or superior to the *pro forma* LGIP.

IV. Notice of Filing and Responsive Pleadings (in Docket Nos. ER13-447-001 and EL13-45-000)

A. Docket No. ER13-447-001

9. Notice of APS' initial filing in Docket No. ER13-447-000 was published in the *Federal Register*, 77 Fed. Reg. 71,408 (2012), with interventions and protests due on or before December 12, 2012. After the initial filing was accepted in the December 27 Letter Order, on January 25, 2013, TGP Parties filed an out-of-time motion to intervene

⁵ *Id.* at 7-9.

⁶ *Id.* at 9-10.

⁷ *Id.* at 11.

⁸ *Id.* at 14-16.

⁹ Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,749 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,180 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

and request for rehearing or clarification in Docket No. ER13-447-001. On February 11, 2013, APS filed an answer to TGP Parties' out-of-time motion to intervene. On February 25, 2013, TGP Parties filed an answer to APS' answer. On March 12, 2013, APS filed an additional answer.

B. Docket No. EL13-45-000

10. Notice of the complaint was published in the *Federal Register*, 78 Fed. Reg. 9907 (2013), with interventions and protests due on or before March 4, 2013. On March 4, 2013, APS filed an answer to the complaint. On March 12, 2013, TGP Parties filed an answer to APS' answer. On March 22, 2013, APS filed an additional answer.

V. Discussion

A. Procedural Matters

1. Answers

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept APS' and TGP Parties' answers because they have provided information that assisted us in our decision-making process.

2. TGP Parties' Request for Rehearing

12. In their request for rehearing, TGP Parties argue that good cause exists to grant their out-of-time motion to intervene because APS mischaracterized its filing as merely clarifying language rather than making substantive changes to creditworthiness and other procedures. TGP Parties contend that no disruption will result from the Commission permitting this late intervention because the Commission has not yet addressed the issues raised by TGP Parties and because there are no other intervenors in this proceeding.

13. In its initial answer to TGP Parties' request for rehearing, APS argues that TGP Parties failed to articulate good cause for late intervention.¹⁰ Additionally, APS generally argues that TGP Parties lack standing to challenge the December 27 Letter Order as non-parties to the proceeding.¹¹ TGP Parties and APS reiterate most of their arguments in their subsequent answers.

¹⁰ APS' February 11, 2013 Answer to TGP Parties' Rehearing Request at 3, 6.

¹¹ *Id.* at 8 (citing 16 U.S.C. § 8251 (a) (1994); *City of Tacoma, Washington*, 135 FERC ¶ 61,155, at P 17 (2011)).

14. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. TGP Parties have not met this higher burden of justifying late intervention.¹²

15. In light of our decision to deny TGP Parties' late motion to intervene, we will dismiss TGP Parties' request for rehearing.¹³ Because TGP Parties are not parties to the proceeding in Docket No. ER13-447-000, they lack standing to seek rehearing of the December 27 Letter Order under the FPA and the Commission's regulations.¹⁴

B. Complaint

1. Creditworthiness Procedures (Posting of Security or Collateral)

16. TGP Parties challenge APS' creditworthiness OATT provisions, loss compensation for real power losses OATT provisions, and the LGIP provisions in section 3.3.1 of APS' OATT as being unjust and unreasonable. The Commission finds that TGP Parties have failed to show that APS' OATT provisions are unjust and unreasonable, and therefore will deny the complaint.

¹² See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹³ The Commission also notes that in TGP Parties' rehearing request, TGP Parties impermissibly request that the Commission treat their request for rehearing as a complaint. The Commission has clearly articulated that complaints need to be made in separate pleadings, and not included in interventions/protests or requests for rehearing. See *Louisiana Power & Light Co.*, 50 FERC ¶ 61,040, at 61,062-63 & n.3 (1990); *Entergy Services, Inc.*, 52 FERC ¶ 61,317, at 62,270 (1990) (holding that complaints must be filed separately from motions to intervene and protests); *Consol. Edison Co. of N.Y.*, 97 FERC ¶ 61,241, at 62,092 & n.14 (2001) (explaining that the Commission has consistently rejected efforts to treat various filings as section 206 complaints); *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,248, at P 5 (2004) (noting that the Commission has consistently rejected efforts to combine complaints with other types of filings); *Southwest Power Pool, Inc.*, 128 FERC ¶ 61,116, at P 16 & n.22 (2009) (holding that it is impermissible to bring a section 206 complaint in the form of a protest).

¹⁴ See 16 U.S.C. § 8251(a) (1994); 18 C.F.R. § 385.713(b) (2012); and *Southern Company Services, Inc.*, 92 FERC ¶ 61,167 (2000).

i. TGP Parties' Arguments

17. TGP Parties argue that requiring the posting of security equal to the charge of three months of firm transmission service for non-creditworthy customers prior to the acceptance of a transmission service request is unjust and unreasonable because it imposes a second reservation fee on transmission customers who have reserved transmission service for future use.¹⁵ According to TGP Parties, the purpose of the security requirement in Attachment I is to ensure that APS has adequate funds in the event that a non-creditworthy customer defaults on its payment obligations for used transmission service.

18. TGP Parties therefore assert that the required security is directly tied to the customer's actual use of the APS transmission system, and not to the reservation of transmission service. TGP Parties further argue that, pursuant to section 17.6 of APS' OATT, a transmission customer seeking to postpone transmission service must pay a non-refundable annual reservation fee equal to one-month's charge for firm transmission service for each year or fraction of a year that the service is postponed. TGP Parties insist that, if a transmission customer is paying a charge to defer the start of transmission service, it should not also be required to provide security equal to three times the deferral charge for the transmission service it is not taking. TGP Parties contend that such a requirement will give APS access to transmission customer's capital for significant periods of time. TGP Parties also argue that APS' creditworthiness provisions create barriers to entry for new generation seeking to use APS' transmission system.¹⁶ TGP Parties conclude that APS has not demonstrated that this change to its OATT is just and reasonable and that it is, in fact, unjust and unreasonable.¹⁷

ii. APS' Answer

19. In its answer, APS argues that TGP Parties failed to meet the burden under section 206 of the FPA, because TGP Parties have not shown that APS' OATT provisions are unjust and unreasonable and TGP Parties have not demonstrated the justness and reasonableness of the replacement tariff provisions they propose.¹⁸

20. APS also argues that its security requirement is intended to ensure that adequate

¹⁵ Complaint at 5-7.

¹⁶ *Id.*

¹⁷ *Id.* at 7, 17. *See also* TGP Parties' March 12, 2013 Answer at 3-6.

¹⁸ APS' March 4, 2013 Answer to Complaint at 4.

funds are available to APS if a non-creditworthy customer defaults on its payment obligations and in the event that a non-creditworthy customer abandons transmission capacity after executing a transmission service agreement.¹⁹ APS challenges TGP Parties' arguments about the timing of the security posting, arguing that the obligation to begin paying for service arises when a transmission service agreement is accepted, not five days before the commencement of service.²⁰ APS also challenges TGP Parties' assertions that APS' security requirements create barriers to entry. According to APS, allowing speculative projects that are unlikely to be built to tie up transmission capacity, without providing security, would actually erect greater barriers to new transmission.²¹

iii. Commission Determination

21. We disagree with TGP Parties that requiring the posting of security equal to the charge of three months of firm transmission service prior to the acceptance of a transmission service request from non-creditworthy customers is unjust and unreasonable.

22. More specifically, we disagree that the requirement under Attachment I of APS' OATT for a non-creditworthy transmission customer to provide collateral or security prior to the acceptance of its transmission service request imposes a second reservation fee on the transmission customer. TGP Parties improperly characterize the security requirement as a reservation fee because of the time that the security must be posted (i.e., posting security prior to acceptance of the transmission service request in lieu of five days prior to commencement of service). The Commission notes, however, that the mere act of posting security prior to acceptance of a transmission service request does not give rise to the presumption of a reservation fee. The requirement for security or collateral in Attachment I under APS' OATT is not a reservation fee.

23. We also disagree with TGP Parties' contention that APS' security requirements create unnecessary barriers to new entry. As APS notes, the absence of a security requirement posting by non-creditworthy customers could enable speculative projects that are unlikely to be built to potentially tie up or delay viable projects from executing a transmission service agreement.

24. We understand the need to balance the ability of customers to participate in the market with the risk of default. TGP Parties and APS acknowledge that a purpose of the security requirement is to ensure adequate funds are available to APS if a non-

¹⁹ *Id.* at 5-6.

²⁰ *Id.* at 6.

²¹ *Id.* at 6-7. *See also* APS' March 22, 2013 Answer to Complaint at 3-4.

creditworthy customer defaults on its payment obligations for transmission service. Accordingly we find that TGP Parties have not shown that APS' creditworthiness provisions are unjust and unreasonable.

2. Loss Compensation for Real Power Losses

i. TGP Parties' Arguments

25. TGP Parties argue that APS' provisions concerning loss compensation for real power losses in its Network Operating Agreement (Attachment G) and its Retail Network Operating Agreement (Attachment K) are unjust and unreasonable because they provide exclusively for financial, not physical, compensation of losses. According to TGP Parties, APS' OATT provisions are inconsistent with the Commission's directives in Order No. 888, which do not support the use of a financial settlement mechanism to the exclusion of in-kind replacement.²²

26. TGP Parties further assert that APS' loss compensation provisions are inconsistent with the OATT of every other transmission provider in the western region that is not a member of a regional transmission operator (RTO). TGP Parties note that each of the OATTs of the other non-RTO transmission providers in the western region provides for either physical compensation of losses or, at the transmission customer's option, either physical or financial compensation of losses. TGP Parties argue that a Transmission Customer may be able to purchase power to physically replace its losses at a price below the Hourly Pricing Proxy and that there is no justification for limiting Transmission Customers to financial compensation for losses, and forcing them to settle real power losses at a predetermined index price.²³ Accordingly, TGP Parties conclude that APS' provisions unduly restrict a Transmission Customer's ability to determine the most appropriate commercial arrangements to address real power losses associated with its transactions in the most cost-effective manner.

ii. APS' Answer

27. APS argues that TGP Parties have not demonstrated that APS' loss repayment provisions are unjust and unreasonable. According to APS, Order No. 888 merely requires that transmission customers make provisions for real power losses, but does not expressly require in-kind repayment of losses.²⁴ Furthermore, APS argues that permitting

²² Complaint at 8-10 n.13 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at PP 217-218).

²³ *Id.* at 9-10.

²⁴ APS' March 4, 2013 Answer at 9 n.21 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at PP 217-218).

customers to repay real power losses on a physical basis may increase APS' risk of experiencing financial inequities.²⁵

iii. Commission Determination

28. We find that Order Nos. 888 and 890²⁶ do not preclude the use of a financial settlement mechanism to the exclusion of in-kind replacement. In Order No. 888, the Commission allowed a transmission customer's service agreement to include the party responsible for supplying real power losses.²⁷ The Commission further provided that the agreement could indicate what the energy and capacity loss factors would be for any transmission service, so that potential customers will know the amount of losses to replace.²⁸ As such, the Commission contemplated that losses would be made-up in some form, but left the specific form to the transmission provider to propose.

29. In the *pro forma* OATT included in Order No. 890, the Commission expressly concluded that transmission providers are not obligated to provide real power losses. Instead, the Commission concluded that the network customer is responsible for replacing losses associated with all transmission service as calculated by the transmission provider.²⁹ Order No. 890 further provides that the applicable real power loss factors are to be completed by the transmission provider. Read in tandem, we find Order Nos. 888 and 890 enable APS to use a financial settlement mechanism for compensation for real power losses. While other means of providing reimbursement for real power losses are reasonable too, we conclude that TGP Parties have not demonstrated that APS' OATT provisions are unjust and unreasonable.

²⁵ *Id.* at 9-10 (arguing that APS may be disadvantaged if customers incur losses while power prices are high but repay those losses when power prices are low, and arguing that the financial settlement of transmission losses also protects APS' transmission customers from potentially repaying losses with higher priced power).

²⁶ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

²⁷ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at PP 217-218.

²⁸ *Id.*

²⁹ *See* section 15.7 of the Order 890 *pro forma* OATT (Original Sheet 61).

3. **Section 3.3.1 of APS' LGIP (Interconnection Customer's In-Service Date Requirements)**

i. **TGP Parties' Arguments**

30. According to TGP Parties, APS' requirement that an interconnection customer's Commercial Operation must occur within seven years of its interconnection request is unjust and unreasonable. TGP Parties contend that APS has not demonstrated that this provision is consistent with or superior to the *pro forma* LGIP language, as required by Order No. 2003.³⁰ TGP Parties assert that APS' *pro forma* LGIP requires the in-service date, rather than the commercial operation date, to occur within the seven-year period.³¹ TGP Parties also argue that APS' currently effective section 3.3.1 undermines an interconnection customer's right to extend the commercial operation date for up to three cumulative years, as expressly permitted in Section 4.4.5 of APS' OATT.³²

ii. **APS' Answer**

31. APS points out that section 3.3.1 of the Commission's *pro forma* LGIP specifies that:

[t]he expected In Service Date of the new Large Generating Facility or increase in capacity of the existing Generating Facility shall . . . not exceed seven years from the date the Interconnection Request is received by the Transmission Provider, unless Interconnection Customer demonstrates that engineering, permitting and construction of the new Large Generating Facility or increase in capacity of the existing Generating Facility will take longer than the regional expansion planning period.³³

³⁰ See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (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).

³¹ Complaint at 10-11. See also TGP Parties' March 22, 2013 Answer at 6-9.

³² *Id.* at 11.

³³ APS' March 4, 2013 Answer at 15.

32. APS concludes that, under this language, generators are required to put at least a portion of their generating capacity in-service within seven years of their interconnection request. APS notes, however, that the *pro forma* LGIP does not specify a particular date required to achieve commercial operation.³⁴ To rectify this omission and corresponding ambiguity, APS modified its LGIP to clarify the deadline by which an interconnection customer must achieve commercial operation and to eliminate any confusion regarding the handling of multiphase projects.³⁵ APS also argues that the use of the commercial operation date, rather than the in-service date, in section 3.3.1 of APS' LGIP ensures that the provision is internally consistent. Finally, APS notes that the seven-year period can be extended if an interconnection customer demonstrates that engineering, construction, or permitting of a large generator facility will take longer than the regional expansion planning period.³⁶

iii. Commission Determination

33. Section 3.3.1 of APS' OATT provides that a customer's commercial operation date may succeed the date the interconnection request is received by the transmission provider by a period up to ten years, or longer where the interconnection customer and transmission provider agree, such agreement not to be unreasonably withheld. Section 4.4.5 of APS' OATT provides that extensions of less than three cumulative years in the commercial operation date of a customer's facility are not material and should be handled through construction sequencing.

34. We are persuaded by APS' assertions that the LGIP provisions in section 3.3.1 are compatible with the provisions in section 4.4.5 of the LGIP. Furthermore, we find that APS' use of the commercial operation date is consistent with or superior to the language in the *pro forma* LGIP because it provides clarity regarding the timing requirements for all projects, including multi-phase projects.

³⁴ *Id.*

³⁵ *Id.* at 16.

³⁶ *Id.*

The Commission orders:

(A) TGP Parties' complaint is hereby denied, as discussed in the body of this order.

(B) TGP Parties' out-of-time motion to intervene is hereby denied, and their request for rehearing or clarification of the December 27 Letter Order is hereby dismissed, as discussed in the body of this order.

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.