

170 FERC ¶ 61,009
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Milligan 3 Wind LLC

Docket No. ER20-494-000

ORDER GRANTING REQUEST FOR LIMITED WAIVER

(Issued January 13, 2020)

1. On November 27, 2019, pursuant to Rule 207(a)(5) of the Commission’s regulations,¹ Milligan 3 Wind LLC (Milligan) submitted a request for a one-time, limited waiver of articles 11.2 and 2.3.2 in the Generator Interconnection Agreement (GIA) among Southwest Power Pool, Inc. (SPP), Nebraska Public Power District, and Aksamit Resource Management, LLC, which was Milligan’s predecessor in interest, in order to permit an eight-month extension of the date required by the GIA for Milligan’s planned wind generating facility (Facility) to achieve commercial operation. As discussed below, we grant the requested waiver.

I. Background

2. Article 11.2 in the GIA provides that “Interconnection Customer shall install the Generating Facilities in Appendix C within three (3) years of the Commercial Operation Date(s) specified in Appendix B.”² Appendix B specifies a November 1, 2017 Commercial Operation Date. In addition, article 2.3.2 in the GIA provides that “[i]f the Generating Facility fails to achieve Commercial Operation for three (3) consecutive years following the Commercial Operation Date, this GIA may be terminated by the Transmission Provider after giving the Interconnection Customer ninety (90) Calendar Days advance written notice.”³

¹ 18 C.F.R. § 385.207(a)(5) (2019).

² Waiver Request at Attachment A (GIA), art. 11.2 (Performance Obligation – Generating Facility).

³ *Id.* at Attachment A (GIA), art. 2.3.2 (Termination Procedures).

3. Milligan states that it began development of the Facility in 2014 and executed the GIA with SPP on January 19, 2016.⁴ Milligan further states that it worked to develop the project and achieve commercial operation by November 1, 2017.⁵ However, Milligan explains that delays in securing a purchaser of the Facility's output, which was necessary to assure the Facility's financial stability, required Milligan to extend the Commercial Operation Date three years to November 1, 2020. Milligan states that, since that time, it has invested over \$23 million in project development costs; has complied with all financial requirements of the GIA, under which all required network upgrades have been or will soon be completed; has completed all permitting required to construct the Facility; and has entered into a 12-year power purchase agreement (PPA) for the entire output of the Facility.⁶

4. Milligan states that it arranged to purchase 17 Vestas V150 4.2 MW wind turbines from Vestas Wind Systems A/S (Vestas) to be delivered in August 2020, giving Milligan ample time to meet the GIA deadline of November 1, 2020.⁷ However, Milligan explains that on September 3, 2019, it learned that the Vestas wind turbines would not be available until the first quarter of 2021, making it impossible for the Facility to achieve commercial operation by the GIA deadline of November 1, 2020. Milligan insists that were it not for the delay in the delivery of the wind turbines, it would be fully capable of complying with the requirements of articles 11.2 and 2.3.2 in the GIA.

5. Milligan contends that it is fully prepared to place a firm order for delivery of the Vestas wind turbines in the first quarter of 2021 and would like to do so immediately.⁸ However, Milligan explains that it cannot become contractually obligated to purchase the wind turbines, and pay the required \$6.5 million non-refundable deposit, until it is certain that its GIA with SPP will not be terminated for failure to achieve commercial operation by the GIA deadline of November 1, 2020. Milligan states that it contacted SPP and requested an extension of the Commercial Operation Date, but SPP notified Milligan that

⁴ *Id.* at 3.

⁵ *See id.* at Attachment A (GIA), app. B, item 18.

⁶ *Id.* at 1-2.

⁷ *Id.* at 5.

⁸ *Id.* at 6.

it was unable to extend the Commercial Operation Date without Milligan obtaining a waiver of article 11.2 from the Commission.⁹

II. Waiver Request

6. Milligan requests a one-time, limited waiver of articles 11.2 and 2.3.2 of the GIA in order to permit installation of the Facility by July 1, 2021, three years and eight months after the Commercial Operation Date specified in Appendix B to the GIA.¹⁰ Milligan requests that the Commission issue an order regarding its waiver request on or before January 13, 2020 (i.e., 45 days after filing), which will provide it with the certainty necessary to finalize the supply agreement with Vestas and receive delivery of the wind turbines in time to complete construction of the Facility by the requested GIA deadline of July 1, 2021.¹¹

7. Milligan asserts that its request satisfies the criteria that the Commission evaluates when determining whether to authorize waiver of tariff requirements: (1) the waiver will remedy a concrete issue; (2) the entity seeking the waiver is acting in good faith; (3) the waiver will not have undesirable consequences, such as harming third parties; and (4) the waiver is of limited scope.¹² First, Milligan asserts that a waiver will solve a concrete issue because it will enable Milligan to receive the Vestas wind turbines in early 2021 and complete installation of the Facility by July 1, 2021. Milligan argues that without waiver, the unavailability of the wind turbines before the first quarter of 2021 will result in Milligan's failure to meet the existing GIA Commercial Operation Date requirement, putting Milligan in default of the terms of the GIA, which would permit SPP to terminate the GIA.

8. Second, Milligan contends that it is acting in good faith and has made every effort to bring the Facility online by the GIA deadline of November 1, 2020.¹³ Milligan points to its expenditure of over \$23 million to purchase equipment, acquisition of all required permits, execution of a PPA, and payment for all facilities and upgrades needed to interconnect the Facility as demonstration of its good faith commitment to have the Facility in service by the GIA deadline. Milligan argues that the sole obstacle to the

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 6-7.

¹¹ *Id.* at 6.

¹² *Id.* at 7.

¹³ *Id.* at 7-8.

Facility's completion - the unavailability of the wind turbines from the manufacturer before the first quarter of 2021 - was outside of its control. If the Commission grants the requested waiver, Milligan commits to finalize its purchase of the wind turbines and meet all remaining milestones in the GIA.¹⁴

9. Third, Milligan argues that no third parties will be harmed if the Commission grants waiver.¹⁵ According to Milligan, SPP has confirmed that all necessary network upgrades specified in the GIA have already been paid for and substantially completed, and no other parties in the SPP interconnection queue are relying on the upgrades required by the Facility. Therefore, Milligan contends that no other parties in the interconnection queue will be affected by extending the installation date of the Facility to July 1, 2021. Unlike those cases where the Commission has refused to extend interconnection agreement milestones,¹⁶ Milligan emphasizes that it has made a \$23 million commitment to the completion of the Facility and only requires an eight-month extension to achieve commercial operation.¹⁷ In addition, Milligan asserts that SPP is not opposed to a waiver of articles 11.2 and 2.3.2 of the GIA.¹⁸

10. Milligan argues that the Commission has granted extensions in similar circumstances.¹⁹ Furthermore, Milligan asserts that the types of harm to lower-queued customers that has concerned the Commission in other milestone extension cases – such as uncertainty, cascading restudies, and shifted costs²⁰ – are not present here, as SPP has confirmed that there are no customers in the queue behind Milligan. To the contrary,

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ *Id.* (citing *Stonegate Power v. PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,019, at P 40 (2019); *PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,243, at P 19, *reh'g denied*, 164 FERC ¶ 61,206 (2018); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,172, at P 35 (2016); *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198, at P 29 (2014)).

¹⁷ *Id.* at 8-9.

¹⁸ *Id.* at 9.

¹⁹ *Id.* (citing *Va. Elec. & Power Co.*, 104 FERC ¶ 61,249, at PP 15-16 (2003)).

²⁰ *Id.* (citing *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,053, at P 30 (2014)).

Milligan argues it will likely suffer significant economic hardship in the loss of its \$23 million investment in the Facility if the request for waiver is not granted.

11. Finally, Milligan contends that the waiver is limited in scope.²¹ Milligan seeks a one-time waiver of a single requirement of the GIA – the deadline to install the Facility within three years of the Commercial Operation Date specified by item 18 of Appendix B in the GIA. Milligan notes that if the waiver is granted and it fails to meet the extended deadline, the provisions of articles 11.2 and 2.3.2 will apply and SPP may seek termination of the GIA. Milligan argues that its request for an eight-month extension is likewise limited in time. Milligan explains that its extension request is only for the short period of time needed to obtain and install the Vestas wind turbines when they become available from the manufacturer. Milligan asserts that such an extension bears no relation to the indefinite extension requests that have concerned the Commission in the past.²²

III. Notice of Filing and Responsive Pleadings

12. Notice of Milligan’s filing was published in the *Federal Register*, 84 Fed. Reg. 66,893 (2019), with interventions and protests due on or before December 16, 2019. None was filed.

IV. Discussion

13. We grant the requested waiver of articles 2.3.2 and 11.2 in the GIA. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.²³ We find that the requested waiver satisfies these criteria.

14. First, we find that Milligan has acted in good faith. Milligan asserts that the delay in delivery of the Facility’s wind turbines was the sole obstacle to the Facility’s timely completion, and such delay was outside of Milligan’s control.²⁴ Milligan avers that it has invested significant resources and effort to complete the Facility by the GIA deadline of

²¹ *Id.* at 10.

²² *Id.* (citing *Consol. Edison Co. of N.Y.*, 101 FERC ¶ 61,185, at P 36 (2002); *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,124, at P 25 (2010)).

²³ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

²⁴ Waiver Request at 8.

November 1, 2020, and, were it not for the delay in the delivery of the wind turbines, it would be fully capable of complying with the requirements of articles 2.3.2 and 11.2 in the GIA.²⁵

15. Second, we find that the requested waiver is limited in scope because it is a one-time waiver of one deadline found in articles 2.3.2 and 11.2 of the GIA to achieve commercial operation of the Facility by November 1, 2020. Furthermore, we find that Milligan's request is limited to the eight-month extension of time needed to obtain and install the Vestas wind turbines when they become available from the manufacturer.

16. Third, we find that granting the requested waiver will remedy a concrete problem caused by the unavailability of the Vestas wind turbines in time to complete the Facility before the GIA deadline, which will result in Milligan's breach of the terms of the GIA and permit SPP to terminate the GIA. Conversely, an eight-month extension of the GIA's deadline to install the Facility will provide Milligan the additional time needed to receive the wind turbines in early 2021 and complete the installation of the Facility by the requested, revised GIA deadline of July 1, 2021.

17. Finally, we find that, based on the record here, granting the requested waiver will not create undesirable consequences or harm third parties. Milligan contends that there are no customers in the SPP interconnection queue that will be negatively affected by extending the Facility's completion date to July 1, 2021.²⁶ More specifically, Milligan asserts that all necessary network upgrades required by the GIA have been paid for and are substantially complete, and no parties in the SPP interconnection queue are relying on the Facility's required network upgrades to interconnect to the transmission system.²⁷ No objections were filed in response to Milligan's waiver request. For these reasons, we grant Milligan's request for waiver.

²⁵ *Id.* at 5.

²⁶ *Id.* at 8.

²⁷ *Id.*

The Commission orders:

The requested waiver is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.