

151 FERC ¶ 61,198
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NextEra Desert Center Blythe, LLC

v.

Docket No. EL15-47-000

California Independent System Operator Corporation

ORDER DENYING COMPLAINT

(Issued June 3, 2015)

1. On February 18, 2015, NextEra Desert Center Blythe, LLC (NextEra) filed a complaint against the California Independent System Operator Corporation (CAISO) pursuant to section 206 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's Rules of Practice and Procedure.² In the complaint, NextEra asks the Commission to require CAISO to allocate to NextEra the Congestion Revenue Rights (CRRs) created by its investment in the Interim West of Devers upgrades (Interim Project). Alternatively, in the event that the Commission does not find that NextEra has a right to CRRs under the CAISO tariff, NextEra requests that the Commission find the CAISO tariff to be unjust and unreasonable and should be revised to allow NextEra to receive CRRs. This order denies the complaint, as discussed below.

¹ 16 U.S.C. § 824e (2012).

² 18 C.F.R. § 385.206 (2014).

I. Background

2. NextEra is an interconnection customer under a large generator interconnection agreement (LGIA) among SoCal Edison, NextEra, and CAISO.³ The LGIA governs the interconnection of the 250 MW Genesis solar plant near Desert Center, California and the 250 MW McCoy solar plant near Blythe, California (collectively referred to as the Genesis McCoy Solar Project). The LGIA identified certain high voltage transmission upgrades known as the West of Devers Upgrades to safely and reliably interconnect the Genesis McCoy Solar Project and to enable it to attain full capacity deliverability status.⁴ The West of Devers upgrades consist of removing and replacing approximately 48 miles of an existing 220 kV transmission line with a new double-circuit 220 kV transmission line between SoCal Edison's Devers, Vista, and San Bernardino Substations.⁵

3. After executing the LGIA in 2011, NextEra became concerned that it would be considered in default under its existing power purchase agreements if it did not achieve full capacity deliverability status on the date it was scheduled to begin selling its power, because the permanent West of Devers upgrades would not be completed by this date.⁶ At the request of NextEra and other interconnection customers, CAISO and SoCal Edison identified the Interim Project as a temporary solution to provide 1,050 MW of

³ The Commission accepted the original LGIA as a non-conforming LGIA under SoCal Edison and CAISO's tariffs. *Cal. Indep. System Operator Corp.*, 137 FERC ¶ 61,055 (2011).

⁴ Full capacity deliverability status allows the full capacity of a generator to be counted for resource adequacy purposes. SoCal Edison March 10, 2015 Comments (SoCal Edison Comments) at 16.

⁵ SoCal Edison Comments at 4.

⁶ At the time the parties executed the LGIA, SoCal Edison anticipated that the West of Devers upgrades would be completed in 2018. NextEra entered into a power purchase agreement with Pacific Gas and Electric Company for sales that began in November 2013 for the Genesis solar plant's output, and a power purchase agreement with SoCal Edison for sales commencing no earlier than December 2016 for the McCoy solar plant's output. *Id.* at 3-4.

deliverability capability to NextEra and other generators prior to the completion of the permanent West of Devers Upgrades.⁷

4. In January 2012, NextEra agreed, through a Letter Agreement with SoCal Edison, to pay the entire cost of the Interim Project in order to gain accelerated full capacity deliverability status for the Genesis McCoy Solar Project by November 2013.⁸ The Letter Agreement states that the Interim Project would be installed as an interim solution to provide full capacity deliverability status and would be removed after the completion of the permanent West of Devers Upgrades. The Letter Agreement also establishes that the Interim Project would not be considered a network upgrade and that NextEra's payments would not be subject to refund under Article 11.4.1 of the LGIA.⁹ Additionally, the Letter Agreement provides that if certain elements of the Interim Project remain in service following the installation of the permanent West of Devers Upgrades, they would be identified as network upgrades at that time and NextEra would receive refunds under Article 11.4.1. The parties subsequently amended the LGIA to reflect the terms of the Letter Agreement.¹⁰

5. In December 2014, CAISO informed NextEra that it planned to issue a market notice stating that it would release any incremental CRRs created by the Interim Project in its 2016 annual CRR allocation process and would begin preparation for that release in

⁷ The Interim Project consists primarily of 4 series reactors on the existing 220 kV transmission lines out of SoCal Edison's Devers Substation and a special protection system to curtail generation and load under certain conditions. None of the other affected generators chose to participate in the funding of the Interim Project. *Id.* at 4; Complaint at 3.

⁸ Letter Agreement Between NextEra Desert Center Blythe, LLC and Southern California Edison Company (Letter Agreement). *Southern Cal. Edison Co.*, Docket No. ER12-804-000, accepted by delegated letter order on March 7, 2012. The LGIA was recently amended to reflect a revised estimated cost of the Interim Project of \$31,700,000. SoCal Edison Comments at 5.

⁹ Article 11.4.1 of the LGIA provides that Interconnection Customers are entitled to a repayment equal to the total amount paid to the Participating Transmission Owner for the costs of network upgrades for which it is responsible.

¹⁰ On November 20, 2013, SoCal Edison and CAISO's filing of identical amended LGIAs in Docket Nos. ER14-101-000 and ER14-56-000, respectively, were accepted by delegated letter order. On April 8, 2015, additional revisions to the LGIA in Docket Nos. ER15-1058-000 and ER15-1124-000, were accepted by delegated letter order.

June 2015.¹¹ On February 18, 2015, NextEra filed the instant complaint against CAISO, arguing it has a right to receive the incremental CRRs created by the Interim Project.

II. NextEra's Complaint

6. NextEra asks the Commission to find that it is eligible to receive Merchant Transmission CRRs, retroactive to the in-service date of the Interim Project, pursuant to CAISO tariff section 36.11.¹² NextEra asserts that the Interim Project constitutes a Merchant Transmission Facility, because it is a “transmission facility or upgrade” that is subject to CAISO’s operational control and paid for by a party who is not reimbursed through regulatory cost recovery. NextEra argues that it is a Project Sponsor because it is an entity that proposed the construction of a transmission addition or upgrade in accordance with the transmission planning process in section 24 of the CAISO tariff, which process includes “any effects on the CAISO Controlled Grid of the interconnection of Generating Units, including the deliverability of such Generating Units.”¹³ Further, NextEra reasons that since CAISO has included the Interim Project series reactors in its 2012-2013 Transmission Plan, it must be considered as having been proposed in accordance with section 24 of CAISO’s tariff, which governs the development of the transmission plan.¹⁴

¹¹ Complaint at 15.

¹² CAISO tariff section 36.11 provides that Project Sponsors of Merchant Transmission Facilities who turn the facilities over to CAISO operational control and do not recover the cost of the transmission investment through CAISO’s Access Charge or other regulatory cost recovery mechanism may be allocated, at the Project Sponsor’s election, either CRR Options or CRR Obligations that reflect the contribution of the facility to grid transfer capacity.

¹³ A Project Sponsor is defined as “[a] Market Participant, group of Market Participants, a Participating TO or a project developer who is not a Market Participant or Participating TO that proposes the construction of a transmission addition or upgrade in accordance with Section 24.” CAISO tariff, Appendix A, Definitions. Section 24 sets forth CAISO’s transmission planning process, including requirements pertaining to the timing of submitting Merchant Transmission Project proposals and describing the criteria by which CAISO evaluates Merchant Transmission Facility proposals. Tariff section 24.2(e) provides that the transmission planning process shall account for the effects of the generator interconnection process, in a manner consistent with CAISO interconnection procedures. *Id.* at 16-17.

¹⁴ *Id.* at 18.

7. NextEra asserts that its right to receive Merchant Transmission CRRs is supported by Commission policy and precedent promoting the construction of new transmission facilities and ensuring that parties who pay for transmission upgrades receive the CRRs created by their investments. NextEra also argues that the origins of tariff section 36.11 support its position.¹⁵ NextEra states that CAISO proposed its process for allocating Merchant Transmission CRRs under tariff section 36.11 to comply with Guideline 3 of Order No. 681,¹⁶ which requires that long-term firm transmission rights must be made available upon request to “any party” that pays for upgrades, in accordance with CAISO’s prevailing cost allocation methods for upgrades or expansions.¹⁷

8. NextEra asserts that its position is also supported by the Commission’s recent rejection of Southwest Power Pool’s attempt to allocate long-term transmission rights only to transmission customers on the basis that Guideline 3 “plainly states that ‘any party’ that funds upgrades must be eligible for [Long-Term Congestion Rights].” Specifically, NextEra contends that this is evidence that the Commission intended for CRRs to be available to those who propose projects outside of the transmission planning process.¹⁸ NextEra further contends that the Commission has previously found that transmission upgrades made in the generator interconnection context can qualify as Merchant Transmission Facilities under section 36.11. Specifically, NextEra notes that the Commission found that transmission upgrades to SoCal Edison’s Blythe-Eagle Mountain transmission line on Path 59 funded by FPL Energy, LLC (FPL) to support an FPL generation project qualified as Merchant Transmission Facilities under tariff section 36.11.¹⁹

9. Next, NextEra argues that it did not surrender its tariff right to CRRs under the Letter Agreement or amended LGIA.²⁰ NextEra asserts that the fact that the parties

¹⁵ *Id.* at 20-24.

¹⁶ Complaint at 5, 20, *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226, *reh’g denied*, Order No. 681-A, 117 FERC ¶ 61,201 (2006).

¹⁷ The Commission found that CAISO’s proposal satisfied Guideline 3 of Order No. 681. *Cal. Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,023 at P 74 (2007).

¹⁸ *Id.* at 24 (citing *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,076 (2014), *reh’g pending* at P 33) (SPP Order).

¹⁹ See *California Independent System Operator, Inc.*, 125 FERC ¶ 61,328 at P 21 (2008) (FPL Energy), *reh’g denied*, 128 FERC ¶ 61,072 (2009). *Id.* at 19.

²⁰ *Id.* at 28.

agreed the Interim Project would not be considered a network upgrade does not restrict NextEra's right to Merchant Transmission CRRs under the tariff. According to NextEra, the express reference to the waiver of refund rights, but not CRR rights, in the Letter Agreement and LGIA, illustrates that the parties did not intend to exclude the Interim Project from Merchant Transmission CRR allocation.²¹

10. NextEra further argues that its request for Merchant Transmission CRRs should not be rejected on procedural grounds. According to NextEra, at the time it entered into the Letter Agreement and amended LGIA, it relied on the representation that NextEra was the "sole beneficiary" of the Interim Project and, therefore, was unaware that incremental CRRs would be created as a result of system-wide benefits. Because load on the CAISO controlled grid is currently receiving benefits in the form of lower energy rates from the installation of the Interim Project, NextEra requests a one-time waiver of the timing element of the notice and nomination requirements to the extent needed.²²

11. Finally, if the tariff does not permit NextEra's request, NextEra asserts the tariff is not just and reasonable. NextEra asks the Commission to require CAISO to revise the tariff if necessary to provide NextEra the Merchant Transmission CRRs it seeks.²³ NextEra asks for the Commission to rule on the complaint by June 1, 2015, prior to CAISO's 2016 CRR auction and allocation process.²⁴

III. Notice of Filing and Responsive Pleadings

12. Notice of NextEra's filing was published in the *Federal Register*, 80 Fed. Register 10,473 (2015), with interventions and protests due on or before March 10, 2015. Motions to intervene were filed by the NRG Companies, the Pacific Gas and Electric Company, Powerex Corporation, and Modesto Irrigation District. SoCal Edison filed a motion to intervene and comments. On March 10, 2015, CAISO filed an answer to the complaint, and on March 26, 2015, NextEra filed a motion for leave to answer and answer to CAISO's answer and SoCal Edison's comments. On April 10, 2015, CAISO filed a

²¹ *Id.* at 29.

²² Project Sponsors are to submit requests for Merchant Transmission CRRs no less than forty-five days prior to the in-service date of a Merchant Transmission Facility or nominations for Merchant Transmission CRRs at least twenty-one days prior to the In-Service Date of the facility. CAISO tariff sections 36.11.2 and 36.11.3.1. *Id.* at 32.

²³ *Id.* at 25-27.

²⁴ *Id.* at 34.

motion for leave to answer and answer to NextEra's answer. On April 24, 2015, NextEra filed an answer in response to CAISO's motion for leave to answer and answer.

A. CAISO's Answer and SoCal Edison's Comments

13. CAISO and SoCal Edison dispute NextEra's assertion that it is eligible to receive Merchant Transmission CRRs. SoCal Edison and CAISO contend that the Interim Project fails to meet the definition of a Merchant Transmission Facility, and that NextEra fails to meet the definition of a Project Sponsor. CAISO and SoCal Edison emphasize that the Interim Project was not identified, evaluated, or approved in accordance with the very explicit procedures encompassed in CAISO tariff section 24, which sets forth CAISO's transmission planning process.²⁵ According to SoCal Edison, the Interim Project was neither submitted during the transmission planning request window nor approved through the transmission planning process. SoCal Edison argues that such requirements are not merely procedural and may not be ignored now that NextEra is claiming a right to Merchant Transmission CRRs.²⁶ CAISO also disagrees that NextEra could qualify for Merchant Transmission CRRs under section 36.11 as a generator interconnection customer, as those provisions are inapplicable given that NextEra agreed that the Interim Project is not a network upgrade.²⁷ CAISO asserts that the Interim Project was not identified through the transmission planning process or even the interconnection process, but rather a separate and unique effort among the parties.

14. Even if the Commission finds that NextEra is eligible to receive CRRs, CAISO and SoCal Edison argue that the Commission should reject NextEra's request for retroactive CRR payments back to the Interim Project's in-service date, as market participants have not been given notice of this potential reallocation.²⁸ Further, in order to provide retroactive CRR revenues to NextEra, CAISO claims that it would have to rerun the market to recover the value of congestion paid to load serving entities, which would violate the filed-rate doctrine and rule against retroactive ratemaking.²⁹

²⁵ SoCal Edison Comments at 9-11, 16; CAISO March 9, 2015 Answer (CAISO Answer) at 9-12.

²⁶ SoCal Edison Comments at 11.

²⁷ CAISO Answer at 15-16.

²⁸ SoCal Edison Comments at 18-19; CAISO Answer at 5, 24-26.

²⁹ SoCal Edison Comments at 18-21; CAISO Answer at 24.

15. CAISO and SoCal Edison disagree with NextEra that the Commission's previous acceptance of CAISO's proposal to add a tariff section allowing the allocation of Merchant Transmission CRRs to FPL Energy is relevant to NextEra's situation.³⁰ CAISO states that at the time of that Commission order, its new market structure and tariff limited eligibility for Merchant Transmission CRRs to sponsors of new merchant transmission projects. In contrast to NextEra's situation, SoCal Edison argues, FPL Energy already possessed existing financial transmission rights that needed to be replaced with CRRs—the legal and logical replacement of financial transmission rights when CAISO's new market was implemented. SoCal Edison also asserts that neither precedent nor cost causation principles lend support to NextEra's case.³¹

16. Finally, CAISO and SoCal Edison dispute NextEra's argument that the CAISO tariff should be found to be unjust and unreasonable if the Commission finds that the tariff does not permit the allocation of CRRs to NextEra.³² SoCal Edison states that the Commission-approved tariff processes are necessary to ensure a just and reasonable outcome to Merchant Transmission Facility Project Sponsors that have followed the rules to receive CRRs. CAISO asserts that these tariff processes are not unjust and unreasonable simply because they do not address unique situations like the Interim Project. However, CAISO notes that it does not take a position on whether NextEra is entitled to receive any CRRs associated with the Interim Project pursuant to the Commission's financial transmission rights policy.³³ At the same time, CAISO cautions that it is unsure what, if any, incremental system capability has been created by the Interim Project or when CRRs associated with the Interim Project would expire.³⁴

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make

³⁰ SoCal Edison Comments at 12-13; CAISO Answer at 16-17.

³¹ SoCal Edison Comments at 13, 16.

³² SoCal Edison Comments at 8-9; CAISO Answer at 20-23.

³³ CAISO Answer at 20.

³⁴ CAISO has not included the Interim Project in its CRR network model pending the resolution of the complaint. *Id.* at 8.

the NRG Companies, the Pacific Gas and Electric Company, Powerex Corporation, Modesto Irrigation District, and SoCal Edison parties to this proceeding.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We are not persuaded to accept NextEra's answers or CAISO's answer to NextEra's answer, and will, therefore, reject them.

B. Substantive Matters

19. We deny the complaint. We find, as evidenced by the Letter Agreement and its incorporation into the LGIA, the parties to the LGIA have expressly agreed that the Interim Project would not be treated as a network upgrade. As discussed below, based on the LGIA, we find that the Interim Project is not eligible to be allocated CRRs.

20. It is well-settled that when the terms of a contract are clear and unambiguous, the terms of the contract control and the Commission will not consider parol evidence that alter the contract's express terms.³⁵ To determine whether an agreement is ambiguous, the Commission has looked within the four corners of the agreement and not to outside sources.³⁶

21. Based on the plain language of the three-party LGIA providing that the Interim Project shall not be considered a network upgrade, the Commission finds that it is inappropriate for CAISO to allocate incremental CRRs associated with the Interim Project to any party. Specifically, section 9(b) of Appendix A to the LGIA states:

³⁵ See, e.g., *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 547 (D.C. Cir. 2010) (when a contract is unambiguous, that language controls and the court "must give effect to the unambiguously expressed intent of the parties"); *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154, at P 19 (2004) (stating "when the language of a contract is explicit and clear . . . then the court may ascertain the intent from its written terms and not go further"); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000) (stating when a contract's terms are clear, it is to be construed according to its literal terms and extrinsic evidence cannot be used to alter or contradict the contract's express terms); accord *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991) (stating when an instrument is clear on its face, the court is not to consider parol evidence to interpret its intentions).

³⁶ See *Pioneer Transmission, LLC v. N. Ind. Pub. Serv. Co.*, 140 FERC ¶ 61,057 at P 97 (2013); see also *Ophthalmic Surgeons, Ltd. v. Paychex, Inc.*, 632 F.3d 31, 35 (1st Cir. 2011).

Interconnection Customer also understands and acknowledges that the Participating TO intends to physically remove the Interim WOD Project from its transmission system following the date on which the Participating TO's Delivery Network Upgrades are constructed and placed in service. Accordingly, the Parties agree that, subject to Section 9(c) below, *the Interim WOD Project shall not be considered a Network Upgrade* and the Interim WOD Project Payments received from Interconnection Customer shall not be subject to refund in accordance with Article 11.4.1 of the LGIA [emphasis added].

22. In addition, section 9(c) of Appendix A to the LGIA provides:

If, following the date on which the Participating TO's Delivery Network Upgrades are constructed and placed in service, the Participating TO, in consultation with the CAISO, determines, in their sole discretion, that any elements of the Interim WOD Project are to remain in service and become part of the CAISO Controlled Grid, then the Parties agree to further amend this LGIA to identify and reclassify any such elements as Network Upgrades and payments received for such elements will be subject to refund as follows.

We find that the foregoing language is clear and unambiguous. Under the express terms of the LGIA, until such time as SoCal Edison, in consultation with CAISO, determines that certain elements of the Interim Project shall remain in service, the Interim Project may not be treated as a network upgrade. Therefore, it is inconsistent with the express terms of sections 9(b) and (c) of the LGIA for CAISO to treat the Interim Project as a network upgrade for purposes of CRR network modeling. The effect of the agreement in section 9(b) of the LGIA that the Interim Project is not being treated as a network upgrade is that any associated CRRs should not be allocated prior to the completion of the permanent West of Devers upgrades or prior to the time at which any elements of the Interim Project are deemed to be network upgrades.

23. The result of the parties' agreement that the Interim Project would not be considered an addition, modification, or upgrade to the CAISO controlled grid at or beyond the point of interconnection is that CAISO may not treat any incremental capability created by the Interim Project as though it is derived from an upgrade to the CAISO controlled grid. Consequently, CAISO's CRR network model must reflect the result of the parties' agreement under the LGIA, which is that the Interim Project's capacity should not be treated as a network upgrade and, as a result, is not eligible to create incremental CRRs to be allocated to any party. Therefore, we find that until such time as the permanent West of Devers upgrades are in service and any elements of the

Interim Project are designated as network upgrades, consistent with the LGIA, CAISO may not treat the Interim Project as though it is a network upgrade for CRR network modeling purposes in order to allocate incremental CRRs to any party. Given that the LGIA states that the Interim Project is not considered a network upgrade at this time, we need not address NextEra's arguments regarding its right to be allocated CRRs.

24. Because we find that the terms of the LGIA discussed above control, and because those terms expressly state that the Interim Project is not being treated as a network upgrade, we need not address whether NextEra should be allocated CRRs associated with the Interim Project because it meets the definition of a Merchant Transmission Facility under the CAISO tariff. The result of the bargain reached among the parties that the Interim Project is not being treated as a network upgrade at this time is that no incremental CRRs will be allocated to any party, including NextEra. Consequently, whether or not NextEra could be allocated incremental CRRs associated with the Interim Project under the CAISO tariff at this time is not relevant because NextEra agreed to a particular treatment of the Interim Project in this case. Moreover, because of our finding that no CRRs from the Interim Project should be allocated, CAISO's statement that it is unsure what, if any, incremental system capability has been created by the Interim Project should no longer be of concern at this time

25. Similarly, we need not address NextEra's argument that, if it were ineligible to receive incremental CRRs associated with the Interim Project, then the relevant CAISO tariff provisions are unjust and unreasonable and are inconsistent with Order No. 681. Because we are not considering whether NextEra could have been eligible for incremental CRRs under the CAISO tariff, as discussed above, this case does not present, and the record does not reflect, a basis for us to make such a determination.

26. Finally, we deny NextEra's request for a one-time waiver of CAISO's timing requirements for nominating and requesting Merchant Transmission CRRs in CAISO tariff section 36.11.2 and 36.11.3.1. Specifically, we deny NextEra's waiver request because: (1) the parties agreed the Interim Project would not be treated as a network upgrade pursuant to the LGIA; (2) the parties agreed that NextEra would be compensated by refunds if the Interim Project is reclassified as a network upgrade in the future; and (3) it would be inappropriate for CAISO to treat the Interim Project as a network upgrade for purposes of its CRR network model in order to allocate any CRRs based on the Interim Project's capability. Because we base our decision on the terms of the LGIA, the timing of NextEra's request for Merchant Transmission CRRs under tariff sections 36.11.2 and 36.11.3.1 is inconsequential to our decision. We also deny NextEra's request for its payment stream for the CRRs to be "retroactive back to the In-Service Date" of the Interim Project, given our finding that it would be inappropriate for CAISO to allocate CRRs associated with the Interim Project to any party.

The Commission orders:

The complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.