120 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Illinois Power Company — Docket Nos. ER07-762-000, ER07-762-001

ORDER REJECTING NOTICE OF TERMINATION

(Issued September 14, 2007)

1. In this order, we reject Illinois Power Company's (Illinois Power's) notice of termination of its First Revised Interconnection and Operating Agreement (Agreement)[1] with Franklin County Power of Illinois, LLC (Franklin County). Illinois Power argues that Franklin County is in default of the Agreement. We find that it is just and reasonable for the Agreement to remain in suspension.

Notice of Termination

2. On April 17, 2007, as amended on July 16, 2007, Illinois Power submitted to the Commission for filing, under section 205 of the Federal Power Act (FPA),[2] a proposed notice of termination canceling the Agreement.

3. Under the Agreement, Franklin County is required to pay Illinois Power for the construction of upgrades to Illinois Power's transmission system needed to interconnect Franklin County's planned 600 MW coal fired power plant in Benton, Illinois to the system. The Agreement requires Franklin County to start making payments to Illinois Power in October 2003, and Illinois Power was to complete construction of the necessary

[1] The Commission conditionally approved the Agreement in *Illinois Power Co.*, 103 FERC ¶ 61,032, *order denying reh'g*, 104 FERC ¶ 61,261 (2003).

[2] 16 U.S.C. § 824d (2000).

interconnection facilities and any necessary network upgrades by December 31, 2004. In addition, Franklin County is required to provide a parental guarantee, surety bond or a letter of credit. However, Franklin County requested that the Agreement be suspended, and Illinois Power honored that request.

4. In a letter dated September 6, 2006, Illinois Power and Midwest Independent Transmission System Operator, Inc. (Midwest ISO), which now administers the Agreement as the Transmission Provider controlling Illinois Power's transmission system, notified Franklin County that the suspension period would soon total three years, which is the maximum length of suspension allowed by Midwest ISO's *pro forma* Large Generator Interconnection Procedures (LGIP).[3] As a result, by October 10, 2006, Franklin County needed to: (1) provide a parental guarantee, surety bond or a letter of credit; and (2) make the first payment to Illinois Power for construction of the needed facilities. Illinois Power states that Franklin County has not done so.

5. Therefore, in a letter dated November 10, 2006, Illinois Power and Midwest ISO provided notice to Franklin County that Franklin County is in default of the Agreement, that a notice of termination of the Agreement would be filed with the Commission, and that Franklin County's planned generating project would be removed from the Midwest ISO's generation interconnection queue.[4] Illinois Power then submitted the notice of termination to the Commission.

Notice of Filing and Responsive Pleadings

6. Notice of Illinois Power's filing was published in the *Federal Register*, 72 Fed. Reg. 23,812 (2007), with interventions and protests due on or before May 8, 2007. Franklin County filed a timely motion to intervene and protest. On May 17, 2007, Illinois Power filed an answer to the protest. On June 13, 2007, Franklin County filed an answer to Illinois Power's answer.

7. Commission staff sent Illinois Power a deficiency letter on June 15, 2007. On July 16, 2007, Illinois Power filed a response to the deficiency letter.

8. Notice of Illinois Power's Deficiency Letter Response was published in the *Federal Register*, 72 Fed. Reg. 41,724 (2007), with interventions and protests due on or before August 6, 2007. On August 6, 2007, Franklin County filed a response to Illinois

[3] Illinois Power's membership in Midwest ISO took effect on September 30, 2004.

[4] The Agreement at section 18.2 provides for termination upon the default of a party, effective after written notice by the non-defaulting party and acceptance by the Commission of a notice of termination.

Power's response to the deficiency letter. On August 20, 2007, Midwest ISO submitted a motion to intervene out of time and comments.[5]

9. In its protest, Franklin County states that the notice of termination must be held in abeyance pending the outcome of federal court litigation that, for the time being, enjoins Franklin County from taking the precise steps required by Illinois Power and Midwest ISO. It argues that it has fully complied with Illinois Power's and Midwest ISO's requests, to the extent permitted by law. Franklin County asserts that the November 10, 2006 letter sent to it by Illinois Power and Midwest ISO incorrectly states that Franklin County's failure to comply is due to "economic exigencies." Rather, Franklin County argues that it is barred by a federal court injunction from taking the steps requested.

10. Franklin County explains that on May 20, 2005, the Sierra Club filed a lawsuit in the United States District Court for the Southern District of Illinois alleging that Franklin County's environmental permit to construct the planned coal-fired generation plant had automatically expired.[6] As a result, Franklin County stopped taking steps to engage in construction of the plant, because the Clean Air Act[7] imposes criminal sanctions against those who take affirmative steps to construct a power plant without a valid permit. On October 17, 2006, the United States District Court imposed an injunction against construction.[8] In addition, due to the lawsuit, the closing process for the construction financing for Franklin County has been suspended. Franklin County asserts that several provisions in the Agreement support its argument that the required performance schedule is suspended due to the Sierra Club litigation.[9]

11. In its answer to the protest, Illinois Power contends that Franklin County is using the court order as an excuse for not fulfilling its obligations under the Agreement. According to Illinois Power, in order for Franklin County to fulfill its obligations under

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[5] Midwest ISO supports the termination.

[6] *Sierra Club v. Franklin County Power of Illinois, LLC* (S.D. IL Case No. 05-4095-JPG).

[7] Clean Air Act, 42 U.S.C. § 7413(c) (2000).

[8] Franklin County has appealed to the Unites States Court of Appeals for the Seventh Circuit. *See Sierra Club v. Franklin County Power of Illinois, LLC* (7th Cir. Case No. 06-045).

[9] *See* Franklin County's May 2 Filing at Exhibit 1 (October 10, 2006 letter from Ameren Services Company to Midwest ISO), *citing* Agreement at section 3.2 (related to Scope of Service); section 1.7 and 11.2 (related to Force Majeure).

the Agreement, it must (1) provide a parental guarantee, surety bond, or letter of credit in a form acceptable to Illinois Power in the amount of $11,243,190, and (2) submit the first and second monthly payments, totaling $458,000. Illinois Power argues that the court order forbids Franklin County to actually construct the generating plant, but does not prevent Franklin County from fulfilling either of these obligations.

12. Illinois Power proposes that if Franklin County truly believes that the injunction prevents it from fulfilling its obligations under the Agreement, Franklin County should allow the Agreement to terminate. Franklin County could then re-enter the Midwest ISO interconnection queue if the injunction is lifted. Illinois Power states that Franklin County is using the Sierra Club litigation as an excuse to obtain an indefinite extension of its obligation under the Agreement, to the detriment of all the projects in the interconnection queue behind Franklin County. Such an extension is well beyond what is permitted for generator interconnection customers under Midwest ISO's *pro forma* LGIP, which, in accordance with the Commission's Order No. 2003[10] requirements, limits suspensions to a cumulative maximum of three years. According to Illinois Power, this three year period ended for Franklin County in October 2006, at which point Franklin County was obligated, but refused, to begin making payments. Therefore, Illinois Power argues that the termination of the Agreement after three years is simply the result of even-handed administration of the interconnection queue. It also claims that it and Midwest ISO are required to enforce the *pro forma* generator interconnection procedures.

13. Illinois Power also argues that allowing termination is good public policy. In Order No. 2003, the Commission established a standard, non-discriminatory interconnection process for large generating facilities, and Illinois Power and Midwest ISO are following the process. Illinois Power states that if Franklin County receives an exception to this process, this would "open the floodgates" for requests from other customers for similar exceptions.

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[10] *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 (2004), *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), *affirmed sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F3.d 1277 (D.C. Cir. Jan. 12, 2007).

Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214 (2007), Franklin County's timely, unopposed motion to intervene serves to make it a party to this proceeding.

15. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R § 385.214(d) (2007), the Commission will grant the Midwest ISO's late-filed motion to intervene, given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed in the proceeding because they have provided information that assisted us in our decision-making.

B. Analysis

17. As discussed below, we find that although the Agreement was filed with the Commission before Order No. 2003 became effective, the Commission's three-year policy on extensions as outlined in Order No. 2003 applies to the commercial operation date specified in the Agreement. However, because Illinois Power has not shown that allowing the Agreement to remain suspended will harm generators lower than Franklin County in the interconnection queue, and because Franklin County has made and is actively seeking to continue to make progress toward construction of its proposed generating plant, we will reject the notice of termination.

a. Three Year Limit

18. The Agreement pre-dates the January 20, 2004 effective date for Order No. 2003, and the Commission in Order No. 2003 did not abrogate existing interconnection agreements (such as this Agreement).[11] While the Agreement at issue in this proceeding pre-dates Order No. 2003, the rule nevertheless offers useful guidance as to interconnection terms and conditions that the Commission considers just and reasonable.[12] In Order No. 2003, the Commission explained that it favors extensions of the commercial operation date for a cumulative period of three years, without regard to

[11] Order No. 2003 at P 187.

[12] *See, e.g., PSEG Power In-City I, LLC*, 109 FERC ¶ 61,189 at P 14 (2004).

the cause of the delays.[13] In *Southern Montana*,[14] the Commission considered an extension to a pre-Order No. 2003 interconnection agreement that, as is the case here, did not specify a limit for extensions of the milestones. In that order, the Commission found that if an interconnection agreement was filed with the Commission before the effective date of Order No. 2003, then the three year limit applies to the commercial operation date in the interconnection agreement that was in effect before Order No. 2003.[15]

19. In this case, when Order No. 2003 became effective, the initial payment date for which Franklin County seeks an extension was October 2003, as set forth in the Agreement (moreover, any extension to the payment and construction schedule leading up to the in-service date for the generator is likely to cause a corresponding delay to the generator's ultimate commercial operation date).[16] Therefore, as noted above, the three year limit applies to extensions beyond October 2003. Because the three year limit

[13] The rules provide, at section 4.4.5 of the LGIP, that extensions of less than three cumulative years in the Commercial Operation Date of the Generating Facility are not considered material modifications requiring a customer to withdraw from the interconnection queue and submit a new interconnection request. Rejecting arguments that a three year period is too long a period for such extensions, the Commission recognized "that such flexibility places a burden on the Transmission Provider's expansion planning process, but these extensions in most cases are well within the scope of other unforeseen changes that affect the planning process." Order No. 2003 at P 177. Rejecting a request for rehearing of this finding, the Commission found that extensions are appropriate because "a planning process inevitably is affected by a variety of changes in circumstances." Order No. 2003-A at P 134.

[14] *Southern Montana Electric Generation & Transmission Cooperative, Inc.*, 113 FERC ¶ 61,023 at P 26-27 (2005) (*Southern Montana*).

[15] The request for an extension in this case applies to the due date for Franklin County's initial payment to Illinois Power for Illinois Power to construct necessary facilities. The expected commercial operation date for the Franklin County generator is listed in the Agreement, at Appendix B, as Spring of 2006.

[16] The initial payment date, listed at Appendix A section 11.0 of the Agreement, is October 2003. Illinois Power and Franklin County agree that on November 10, 2003, Franklin County requested, and Illinois Power granted, an extension to April 2004. *See* Illinois Power's Deficiency Letter Response at 6 (listing a timeline of events) and Franklin County's August 3 response at 3 (stating that Illinois Power's timeline is correct).

applies to the Agreement, and because that three year period expired in October 2006, we must consider whether Franklin County should be granted a further extension.[17]

b. Harm to Lower Queued Generators

20. Even before establishing its policy in Order No. 2003 of allowing requests to extend milestones for up to three years, the Commission favored granting reasonable extensions in certain circumstances to create an opportunity for generation to develop.[18] The Commission allowed milestones to be extended based on a number of factors, including whether the extension would harm generators lower in the interconnection queue.[19] In this case, we find that Illinois Power has not shown that allowing Franklin County to extend its milestones beyond three years will harm lower queued generators.

21. Illinois Power states that there is a lower queued generator that will have to pay for network upgrades if the Franklin County generator is built, since Franklin County has a claim on existing capacity that the lower queued generator could use instead of paying for those network upgrades.[20] However, Illinois Power also states that while the Agreement is suspended, the lower queued generator does not need and will not have to pay for the network upgrades.[21] Thus, the lower queued generator will not be harmed if an additional suspension period is granted to Franklin County.

22. Furthermore, Illinois Power does not allege that the lower queued generator is relying on any of the network upgrades needed for the Franklin County interconnection request. In fact, Illinois Power states that it does not plan to build the facilities outlined

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[17] *See Southern Montana*, 113 FERC ¶ 61,023 at P 27 (2005) (finding that an extension beyond three years may not be available without being a material modification).

[18] *See, e.g., Virginia Electric and Power Co.*, 103 FERC ¶ 61,318, *order on reh'g*, 104 FERC ¶ 61,249 (2003) (*Virginia Electric*); *Consolidated Edison Company of New York, Inc.*, 101 FERC ¶ 61,185 (2002), *order on reh'g*, 102 FERC ¶ 61,254 (2003); *Duke Energy Corp.*, 100 FERC ¶ 61,251 (2002) (*Duke Energy*); *Florida Power & Light Co.*, 98 FERC ¶ 61,226, *order on reh'g*, 99 FERC ¶ 61,318 (2002) (*Florida Power*).

[19] *See Southern Montana*, 113 FERC ¶ 61,023 at P 24.

[20] The generator project is listed as G436. It is a request to interconnect 50 MW associated with an increase to the generation output of an existing coal-fired generation facility.

[21] Illinois Power Deficiency Letter Response at 2.

in the Agreement if the Franklin County generator is not ultimately built.[22] The Commission has found in past cases that a customer that requests an extension can protect lower queued generators by committing to fund network upgrades that lower queued generators will rely upon.[23] Here, no such commitment is necessary; it appears that the lower queued generator will not be harmed if Franklin County remains in the queue but is later withdrawn because the lower queued generator is not relying on any of the network upgrades that would be built to accommodate Franklin County.[24] In addition, Illinois Power states there are no safety and reliability concerns or costs associated with the continued suspension of the Agreement and that the only costs associated with such a suspension are administrative in nature.[25]

c. Use of Existing Transmission Capacity

23. Illinois Power argues that a lower queued generator (project G436) will be harmed if the Agreement is not terminated because the lower queued generator could use existing capacity reserved for Franklin County instead of paying for certain network upgrades. We disagree. In *Virginia Electric*, the Commission addressed what to do when an existing transmission system's ability to support interconnections is sufficient to accommodate only the generator that holds the higher queue position. In this situation, if existing transmission capability has been "set aside" and the next generator in the queue is ready to interconnect before the higher queued customer, the lower queued generator can interconnect using (to the extent it can) the transmission capability that had been set aside for the higher queued generator's interconnection.[26] As discussed above, the lower queued generator can use the capacity "set aside" for Franklin County while the

[22] Illinois Power Deficiency Letter Response at 4.

[23] *See, e.g., Virginia Electric*, 104 FERC ¶ 61,249 at P 15; *Duke Energy*, 100 FERC ¶ 61,251 at P 24; *Florida Power*, 98 FERC ¶ 61,226, at 61,896.

[24] Franklin County also states that it fully intends to pay for all necessary studies, reports, and analyses that must be undertaken to interconnect its proposed generation plant to the transmission system. Franklin County June 13 answer at 6.

[25] Illinois Power Deficiency Letter Response at 3-4. Franklin County must pay all reasonable costs that the Illinois Power and Midwest ISO incur in suspending work on its interconnection facilities. *See* Order No. 2003 at P 411.

[26] *Virginia Electric*, 104 ¶ 61,249 at P 18-19. *See also*, Order No. 2003-A at P 318.

Agreement is suspended and will not be required to build the network upgrades needed to replace the existing capacity unless the Franklin County generator is built.[27]

d. Speculative Projects

24. We find that in this case, notwithstanding its request to extend the milestones, Franklin County has made substantial commitments to its proposed generation project. For instance, Franklin County states that it has spent tens of millions of dollars in the development of the project and has: (1) a Development Loan Agreement with the El Paso Corporation so that construction of the generator can be aggressively and timely undertaken as soon the Sierra Club litigation is cleared; (2) all of the required equity and debt financing for the plant; and (3) a power purchase agreement for 366 MW of the available 530 MW capacity of the project.[28] Franklin County states that it fully intends to complete construction of its proposed generator and meet all of the requirements of the Agreement.[29] Franklin County is also actively pursing an appeal in the Sierra Club litigation. In other words, it appears that the injunction is the only reason the project is not going forward.

25. Franklin County has thus made progress toward construction of its proposed generating plant, and is actively seeking to continue to make progress through its appeal in the Sierra Club litigation. Because of this, and because it has not been shown that lower queued generators will be harmed, we find that it is reasonable for the Agreement to remain suspended while the Sierra Club litigation is pending.[30] However, while the Commission allows interconnection customers flexibility with respect to interconnection milestones, it has also found that it is important to ensure that interconnection queues do

[27] The Commission has also explained that if and when the higher queued generator completes its project, the lower queued generator will have to fund the network upgrades needed for the higher queued generator's interconnection to the extent that the need for the upgrades is due to the lower queued generator's use of the excess transmission capability and the lower queued generator's decision to have its interconnection completed ahead of the higher-queued generator. *Virginia Electric*, 104 FERC ¶ 61,249 at P 19.

[28] Franklin County Protest, Exhibit 1 at 2-3.

[29] *Id.* at 7.

[30] Franklin County also argues that its request to continue the suspension should be granted under specific provisions of the Agreement. *See supra* fn. 9. We do not address this contract interpretation issue in this order because of our finding that the continued suspension is warranted for other reasons.

not become clogged with speculative projects.[31] Therefore, we will require Franklin County to file in this docket, every six months from the date of this order, an informational report documenting its progress toward meeting its obligations under the Agreement. This informational report will be noticed and an opportunity for comments will be provided. Further, our finding here is without prejudice to a new request to remove the Agreement from the interconnection queue based on additional information or changed circumstances showing that lower-queued generators will be harmed if the Agreement remains suspended. To the extent the Commission receives similar requests in the future, we will evaluate those requests based on the specific facts in those instances.

The Commission orders:

Illinois Power's notice of termination is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

[31] *Virginia Electric*, 104 FERC ¶ 61,249 at P 17.