

UNITED STATES OF AMERICA 95 FERC ¶ 61,302
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

Duke Electric Transmission

Docket No. ER01-1763-000

ORDER ACCEPTING AND SETTING FOR HEARING AMENDMENT
TO INTERCONNECTION AND OPERATING AGREEMENT

(Issued May 30, 2001)

On April 9, 2001, Duke Electric Transmission (Duke ET) filed an Amendment to an Interconnection and Operating Agreement (IOA) with Broad River Energy, LLC (Broad River), under Duke ET's Open Access Transmission Tariff (OATT). Duke ET states that it and Broad River are in agreement and are prepared to accept the amended IOA, except for a dispute over network upgrades. In this order, we accept the amended IOA, but set for hearing the disputed network upgrade assignment.

Background

Duke ET and Broad River are parties to an IOA governing the interconnection of Broad River's three-unit, 525 MW generating facility located in Gaffney, South Carolina to Duke ET's transmission system. The executed IOA has been accepted for filing by the Commission.¹ The Amendment addresses the addition of two new 175 MW units, known as Units 4 and 5, to the existing three units at the facility. The original phase of the Broad River Project (Units 1, 2, and 3) has been interconnected since Spring 2000 through the Riverview Switching Station, which Duke ET constructed on Broad River's site. Broad River requested a new Generation Interconnection study for the addition of Units 4 and 5. Duke performed a Generation Impact Study and a Generation Facility Study. According to Duke ET, the studies identified the need for approximately \$12.6 million in network upgrades that will need to be completed prior to the summer peak of 2005.

¹Duke Electric Transmission, Docket No. ER00-1885-000 (May 4, 2000) (unpublished letter order).

Due to the potential overloads identified in the Generation Impact Study, the Amendment requires Duke ET to construct, and Broad River to pay for, the network upgrades. However, because the overloads will not occur until 2005, the Amendment defers commencement of engineering and construction until June 1, 2003. The Amendment also provides for a periodic review of the timing of, and need for, the upgrades. Duke ET states that these provisions are necessary because such review may show that the upgrades may need to be installed sooner or later than anticipated, or that they are not needed at all. If, however, the need for upgrades is pushed beyond Summer 2005, Duke ET has agreed to submit a Section 205 filing with the Commission in order to recover the cost of the upgrades from Broad River. Duke ET further states that this accommodation is being made to protect Broad River from having to pay earlier for the cost of facility upgrades that may not be needed until later, if at all.

Because Units 4 & 5 will be an integral part of the Facility, Duke ET and Broad River have agreed to amend the existing IOA, rather than enter into a new one. Several provisions regarding the needed upgrades and terms and conditions of payments (Duke ET filing, Exhibit 7) remain in dispute. Duke asserts that the upgrades are necessary because its transmission lines will be thermally overloaded in year 2005 as a result of the addition of Units 4 & 5.

Duke ET requests that the Amendment be made effective as of April 10, 2001 and requests waiver of Section 35.3(a) and other applicable sections of the Commission's regulations that may be necessary to permit such an effective date. Duke ET also anticipated Broad River's objections to the Amendment and has responded to them in its filing, as discussed below.

Notice, Comments, and Protests

Public notice of Duke ET's filing was published in the Federal Register, 66 Fed. Reg. 20,146 (2001) with comments, interventions, and protests due on or before April 30, 2001. Broad River timely filed a motion to intervene and protest. On May 15, 2001, Duke ET filed a motion for leave to answer and answer. On May 22, 2001, Broad River filed a motion to reject the answer and answer.

Broad River states that the Commission has held that a generator may apply for interconnection service separately from any request for transmission (delivery) service, citing Tennessee Power Company, 90 FERC ¶ 61, 238 (2000), order on reh'g, 91 FERC ¶ 61, 271 (2000) (Tennessee Power) in support of its position. In Tennessee Power, the Commission decided that interconnection is an element of transmission service that is

distinct from the delivery component of transmission service under the pro forma² tariff, and therefore, independent of delivery costs. When a customer later applies for delivery, the transmission provider can evaluate whether existing upgrades are needed to accommodate delivery. Broad River alleges that Duke ET has presented it with an amended IOA that requires it to pay for potential future network upgrades that are necessary to ensure delivery service, even though Broad River has only requested interconnection service at this time.

Further, Broad River alleges that Duke ET has failed the "but for" test discussed in American Electric Power Service Corporation, 91 FERC ¶ 61, 308 (2000), in which the Commission held that the interconnection customer would pay only for system upgrades that would not be needed "but for" the interconnection request -- that is, those necessary to alleviate any direct impacts due to interconnection on the transmission system. The upgrades proposed by Duke ET do not meet the "but for" test as they are not necessary for interconnection, but rather are needed solely to deliver power on the Duke ET transmission system in the future.

In addition, Broad River states that the Commission has allowed interconnection customers the option to pay for network upgrades to enhance their ability to deliver power, as in Entergy Services, Inc., 91 FERC ¶ 61, 149 (2000), order on reh'g, 94 FERC ¶ 61, 257 (2001). While such upgrades are only optional, Broad River alleges that such upgrades are being required by Duke ET in this proceeding.

Broad River disagrees with Duke ET's position that the subsequent interconnection of higher-queued projects will cause overloads affecting the interconnection of Broad River's Units 4 and 5 when these higher-queued projects come on line. Broad River argues that the higher-queued projects will come on line prior to Summer 2003. Thus, the interconnections for both the higher-queued projects and Units 4 and 5 will coexist for two years, until Summer 2005, without the need for any network

²Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (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, Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3281 (U.S. Oct. 12, 2000) (No. 00-568).

upgrades. Broad River alleges an inconsistency, as Duke ET has not explained how all of these projects can be reliably interconnected in 2003, but significant system upgrades would be needed two years later to maintain this same interconnection.

Duke ET agrees with Broad River that it is the Commission's policy to require an interconnecting generator to pay for the cost of the network upgrades that would not be needed but for the presence of the generator. Duke ET states that an interconnection customer is responsible for system upgrades needed to establish an adequate, reliable interconnection to the transmission provider's system. Duke ET states that Broad River is only responsible for these "but for" interconnection costs, not for costs related to transmitting Broad River's output to load. Duke ET states that its commitment to undertake periodic review of the timing of, and need for, these facilities and to make a subsequent Section 205 filing to recover their cost if the need for these facilities slips beyond the Summer 2005 provides ample protection for Broad River that it will only pay for the costs that would not be incurred but for the construction of Units 4 and 5.

Discussion

A. Procedural Matters

Under Rule 214 of the Commission's Rules of Practice and Procedure³, Broad River's timely, unopposed motion to intervene serves to make it a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁴ prohibits the filing of an answer to a protest or answer unless permitted by the decisional authority. We find that neither Duke ET's answer nor Broad River's answer assists us in the decision-making process. Accordingly, Duke ET's answer and Broad River's answer are rejected.

B. Interconnection Agreement

We will accept the amended IOA, subject to refund, and set the issue of the need for system upgrades due to the interconnection for hearing. Duke ET and Broad River agree on where in the priority queue Broad River is situated and on the Commission's "but for" interconnection policy. The only dispute is, in meeting the Commission's "but for" test, whether the system upgrades are due to the interconnection of Broad River's Units 4 and 5 or due to the future delivery of power from Broad River's Units 4 and 5 or

³18 C.F.R. § 385.214 (2000).

⁴18 C.F.R. § 385.213(a)(2)(2000).

from some other source. We simply do not have enough information at this juncture to make a determination on the merits of the issue and therefore will set it for hearing. The burden will be on Duke ET to show that the transmission upgrades would not need to be built "but for" the interconnection of Broad River.

Bearing this in mind, we encourage the parties to hold continue discussions of this matter. While we are setting this proceeding for a trial-type hearing, we encourage the parties to settle their dispute. Accordingly, to aid the parties in their efforts at settlement, we will hold the hearing in abeyance and provide for a settlement judge to assist in arriving at a settlement.⁵ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding. Otherwise, the Chief Judge will select a settlement judge.⁶

In another order we concurrently issue today, Southern Operating Companies, Docket No. ER01-1698-000, we clarify our interconnection policy. In particular, we clarify that the right to inject a new generator's output into the transmission system is a component of transmission delivery service. During the hearing, Duke ET should show that its study is consistent with this standard.

The Commission orders:

(A) The Agreement between Duke ET and Broad River is accepted for filing⁷ and made effective on April 10, 2001, as requested, subject to the outcome of the hearing ordered below.

(B) Pursuant to the authority contained in and subject to the jurisdiction of the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held in this proceeding concerning the justness and reasonableness of Duke ET's unexecuted amendment to the Interconnection and Operating Agreement, as discussed in the body of

⁵18 C.F.R. § 385.603 (2000).

⁶If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone at 202-219-2500 within five days of the date of this order.

⁷Service Agreement designations have been provided on the Attachment.

this order. However, the hearing will be held in abeyance while the parties attempt to settle, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (1999), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 15 days of the date of this order. To the extent consistent with this order, the designated settlement judge shall have all power and duties enumerated in Rule 603 and shall convene an initial settlement conference as soon as practicable.

(D) Within 30 days of the date of this order, the settlement judge shall issue a report to the Commission and the Chief Judge on the status of the settlement discussions.

(E) If the settlement discussions fail, a presiding administrative law judge, to be selected by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within approximately 15 days of the date of the settlement judge's report to the Commission and the Chief Judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Such 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.

(S E A L)

David P. Boergers,
Secretary.

Attachment

Duke Electric Transmission
Docket No. ER01-1763-000

Rate Schedule Designations
Effective Date: April 10, 2001

<u>Designation</u>	<u>Description</u>
(1) First Revised Sheet Nos. 2, 5, 6, 9, 18, 37, 104 and 105 to Service Agreement No. 240 Under FERC Electric Tariff, Original Volume No. 4 (Supersede Original Sheet Nos. 2, 5, 6, 9, 18, 37, 104 and 105)	Amended Rate Schedule Pages to Interconnection and Operating Agreement between Duke ET and Broad River Energy LLC
(2) Original Sheet Nos. 2A, 5A, 9A, 18A, 37A, and 113 through 134 to Service Agreement No. 240 Under FERC Electric Tariff, Original Volume No. 4	Rate Schedule Pages to Interconnection and Operating Agreement between Duke ET and Broad River Energy LLC