

153 FERC ¶ 61,208
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NextEra Desert Center Blythe, LLC

v.

Docket No. EL15-47-001

California Independent System Operator Corporation

ORDER DENYING REHEARING

(Issued November 19, 2015)

1. On June 3, 2015, the Commission issued an order denying NextEra Desert Center Blythe, LLC's (NextEra) complaint against the California Independent System Operator Corporation (CAISO) requesting that the Commission require CAISO to allocate to NextEra Congestion Revenue Rights (CRRs) created by its investment in the Interim West of Devers upgrades (Interim Project).¹ In this order, we deny NextEra's request for rehearing of the June 3 Order, as discussed below.

I. Background

2. NextEra is an interconnection customer under a large generator interconnection agreement (LGIA) among Southern California Edison Company (SoCal Edison), NextEra, and CAISO, that governs the interconnection of the 250 MW Genesis solar plant near Desert Center, California and the 250 MW McCoy solar plant near Blythe, California. SoCal Edison and CAISO identified the Interim Project at the request of NextEra and other interconnection customers as a temporary solution to provide 1,050 MW of deliverability capability to NextEra and other generators prior to the

¹ *NextEra Desert Center Blythe, LLC v. California Independent System Operator Corp.*, 151 FERC ¶ 61,198 (2015) (June 3 Order).

completion of the permanent West of Devers facilities.² NextEra agreed, through a Letter Agreement with SoCal Edison, to pay the entire cost of the Interim Project, which was most recently estimated at approximately \$31.7 million, in order to gain accelerated deliverability for the Genesis McCoy Solar Project.³ The Letter Agreement establishes that the Interim Project would not be considered a Network Upgrade⁴ and that NextEra's payments would not be subject to refund under Article 11.4.1 of the LGIA.⁵ The Letter Agreement also 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

² The permanent 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. The Interim Project consists primarily of series reactor banks on the four existing 220 kV transmission lines out of SoCal Edison's Devers substation. June 3 Order, 151 FERC ¶ 61,198 at PP 2-3.

³ Letter Agreement Between NextEra Desert Center Blythe, LLC and Southern California Edison Company (Letter Agreement). *Southern Cal. Edison Co.*, Docket No. ER12-804-000, (March 7, 2012) (delegated letter order).

⁴ Network Upgrades are the additions, modifications, and upgrades to the CAISO Controlled Grid required at or beyond the Point of Interconnection to accommodate the interconnection of the Generating Facility to the CAISO Controlled Grid. Network Upgrades shall consist of Delivery Network Upgrades and Reliability Network Upgrades. Network Upgrades do not include Distribution Upgrades. CAISO tariff, Appendix A, Definitions.

⁵ In its rehearing request, NextEra asserts that the June 3 Order "conspicuously" uses the lower case term "network upgrade," while Section 8 of the Letter Agreement and Sections 9(b) and (c) of Appendix A of the amended LGIA consistently state that the Interim Project shall not be considered a "Network Upgrade." NextEra July 2, 2015 Rehearing Request (NextEra Rehearing Request) at 14. While we find that this distinction is irrelevant to our conclusions in this matter or the Commission's determinations in the June 3 Order, we will utilize the capitalized form of this term in this order to minimize any confusion.

Article 11.4.1. The parties subsequently amended the LGIA to reflect the terms of the Letter Agreement.⁶

3. On February 18, 2015, NextEra filed a complaint asking the Commission to find that it is eligible to receive CRRs, retroactive to the in-service date of the Interim Project, pursuant to CAISO tariff section 36.11, which provides a mechanism for project sponsors of Merchant Transmission Facilities to elect to receive CRRs. NextEra asserted that its right to receive 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 argued that it did not surrender its tariff right to CRRs under the Letter Agreement or amended LGIA and that its request for CRRs should not be rejected on procedural grounds. NextEra asked the Commission to either order CAISO to allocate to NextEra incremental CRRs resulting from the Interim Project, or require CAISO to revise its tariff to allow NextEra to receive CRRs created by its investment. Finally, NextEra requested a one-time waiver of the timing element of the notice and nomination requirements to the extent necessary to allow the CRR allocation.⁷

4. In the June 3 Order, the Commission denied NextEra's complaint, finding that it would be inconsistent with the terms of the three-party amended LGIA for CAISO to allocate incremental CRRs to any party prior to the time the permanent West of Devers upgrades are completed or prior to the time any elements of the Interim Project are deemed to be Network Upgrades. The Commission explained that, under the express terms of the amended 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. Specifically, the Commission found that 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 in order to allocate CRRs to any party.⁸

5. Because the Commission found that the terms of the amended LGIA control, the Commission did not address whether NextEra should be allocated CRRs associated with

⁶ On April 8, 2015, the most recent revisions to the amended LGIA were accepted for filing in Docket Nos. ER15-1058-000 and ER15-1124-000, by delegated letter order.

⁷ June 3 Order, 151 FERC ¶ 61,198 at PP 4-6.

⁸ *Id.* P 10.

the Interim Project as a Merchant Transmission Facility under the CAISO tariff. The Commission explained that it need not address NextEra's argument that CAISO's tariff provisions are unjust and unreasonable if the Commission found NextEra ineligible to receive CRRs under CAISO tariff section 36.11, because the June 3 Order implements the express terms of the amended LGIA. The Commission also denied 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, noting that the timing of NextEra's request for CRRs was not relevant to the decision to deny the complaint based on the terms of the amended LGIA. In addition, the Commission denied NextEra's request for a retroactive payment stream for CRRs, given the Commission's finding that CRRs associated with the Interim Project should not be allocated to any party.⁹

II. Request for Rehearing

6. On July 2, 2015, NextEra filed a request for rehearing seeking reversal of the Commission's June 3 Order. NextEra argues that the Commission misinterpreted the plain language of the Letter Agreement and amended LGIA, contradicted the CAISO tariff, and acted inconsistent with Commission precedent by finding that NextEra waived a tariff right to receive CRRs from the Interim Project.¹⁰ According to NextEra, under Commission precedent, the Commission will not find that a party has waived or surrendered a valuable right under a tariff or agreement unless there is clear proof that the party intended to waive the right.¹¹ In this case, NextEra argues that there is no clear or convincing evidence of NextEra's waiving CRR rights in either the Letter Agreement or amended LGIA. NextEra contends that the two agreements are silent about CRR allocation, and claims that the parties' agreement that the Interim Project would not be considered a Network Upgrade is irrelevant to the CRR allocation rules under the CAISO tariff.¹² NextEra also argues that the Commission's failure to respond to this argument that it raised in its Complaint is a failure of reasoned decision-making.

⁹ *Id.* P 11.

¹⁰ NextEra Rehearing Request at 11.

¹¹ *Id.* at 2 (citing *Sithe/Independence Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 76 FERC ¶ 61,285 at 62,458 (1996), *reh'g denied*, 81 FERC ¶ 61,071 (1997), *remanded on other grounds sub nom. Sithe/Independence Power Partners L.P. v. FERC*, 165 F.3d 944 (D.C. Cir. 1999)).

¹² *Id.* at 14-15.

7. NextEra further asserts that, according to the Commission's interpretation of the amended LGIA and Letter Agreement, the parties agreed that the Interim Project should be excluded from CAISO's CRR network models and that no party should receive the incremental CRRs made feasible by the Interim Project. NextEra asserts that the Commission decision is inconsistent with section 36.4 of the CAISO tariff, which requires that when allocating CRRs, CAISO must use the most up-to-date DC Full Network Model which is based on the AC Full Network Model used in the Day-Ahead Market.¹³ NextEra further argues that the Commission decision is inconsistent with the positions taken by the parties in this proceeding, noting that CAISO planned to release any incremental CRRs created by the Interim Project through its annual CRR allocation process.

8. Alternatively, NextEra argues, the Commission erred by finding that the Letter Agreement and amended LGIA were clear and unambiguous. NextEra asserts that, according to Commission precedent regarding contract interpretation, the Commission will not conclude that a written agreement is unambiguous if the language in the agreement is reasonably susceptible of a different interpretation.¹⁴ NextEra contends that the applicable language in these agreements is at least reasonably susceptible of a different interpretation than that found in the June 3 Order (i.e., NextEra's interpretation that the parties intended to exclude NextEra's investment from refunds, but not to contractually alter tariff rules regarding CRR allocation).¹⁵

9. NextEra argues that its interpretation is supported by the plain language of those agreements, including the parties' silence on CRR allocation. NextEra also notes that while the term "Network Upgrade" is critical to the issue of whether refunds are payable under Article 11.4.1 of the amended LGIA, the term is not found in the section of the CAISO tariff that governs CRR allocation nor in the CAISO Business Practice Manual that describes the process for creating and allocating CRRs. In essence, NextEra argues that there is no connection between the parties' agreement that the Interim Project is not a Network Upgrade and the method for CRR allocation under the tariff.

¹³ NextEra claims that CAISO has included the Interim Project in its Full Network Model. *Id.* at 4.

¹⁴ *Id.* at 4-5 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,090 at P 48 n.43 (2008) (quoting *Papago Tribal Utils. Auth. v. FERC*, 723 F.2d 950, 955 (D.C. Cir. 1983) ("The test for determining whether the language in a contract is ambiguous is whether the language at issue is 'reasonably susceptible of different constructions or interpretations.'")).

¹⁵ *Id.* at 20.

10. Further, NextEra argues that this alternative interpretation is supported by evidence of the parties' understanding of the Letter Agreement and amended LGIA. NextEra emphasizes that CAISO and SoCal Edison never mentioned in their filing letters accompanying those agreements that the parties intended to alter the tariff's CRR allocation rules that might be applicable to the Interim Project. According to NextEra, the fact that the parties did not mention this issue when filing the agreements is evidence that the parties did not intend to alter the otherwise applicable tariff rules regarding CRR allocation.

11. Finally, NextEra argues that the Commission erred to the extent it denied on the merits NextEra's request for waiver of the timing requirements in tariff sections 36.11.2 and 36.11.3.1. As mentioned above, in the June 3 Order, the Commission found that the timing requirements under section 36.11 were not relevant to the decision that no party should be allocated CRRs. Thus, the Commission did not address NextEra's arguments regarding the applicability or enforceability of the timing requirements under the circumstances. NextEra states that the Commission appeared to deny NextEra's request for limited waiver, but without addressing the Commission's criteria for granting limited waiver. NextEra believes that the Commission did not intend to address the merits of the waiver request, but rather denied the request on the grounds that the Commission did not have to reach the question of whether NextEra had a right to CRRs under section 36.11 to make its determination in the order. NextEra requests rehearing of this issue, arguing that the Commission failed to respond to its arguments, which constitutes a failure of reasoned decision-making.¹⁶

III. Discussion

12. We deny rehearing. We reiterate that the amended LGIA language is clear and unambiguous, and that under its express terms, until such time as SoCal Edison, in consultation with CAISO, determines that certain elements of the Interim Project shall remain in service as designated Network Upgrades, the Interim Project is not to be treated as such.¹⁷ As discussed below, we continue to find that until such a determination is made, 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. We also continue to affirm the Commission's finding that whether NextEra could be allocated incremental CRRs associated with the Interim Project under CAISO tariff

¹⁶ *Id.* at 22-23.

¹⁷ Sections 9(b) and 9(c) of Appendix A to the amended LGIA establish that the Interim Project is not designated as a Network Upgrade, as discussed in the June 3 Order, 151 FERC ¶ 61,198 at PP 21-22.

section 36.11 as a Project Sponsor of a Merchant Transmission Facility is not relevant here, because NextEra agreed to a particular treatment of the Interim Project under its amended LGIA in this case.¹⁸

13. As the Commission explained in the June 3 Order, it is well-settled that when the terms of a contract are clear and unambiguous, the terms of the contract control.¹⁹ To determine whether an agreement is ambiguous, the Commission looks within the four corners of the agreement and not to outside sources.²⁰ We affirm the June 3 Order's conclusion that the relevant terms of the amended LGIA and the Letter Agreement are clear. Specifically, and as discussed further below, these agreements plainly set forth how the Interim Project would be treated and that this treatment does not result in the allocation of Merchant Transmission CRRs to NextEra.

14. NextEra's position that it is eligible to receive Merchant Transmission CRRs, pursuant to CAISO tariff section 36.11 is inapposite in this instance as that section does not apply here. The Letter Agreement clearly states that NextEra would not receive any refunds unless the Interim Project became a permanent transmission facility after the West of Devers upgrades are installed. The parties thus decided to forego section 36.11 of the CAISO tariff and in fact expressly agreed that (1) the Interim Project is not a Network Upgrade; and (2) if, in the future, elements of the Interim Project are designated

¹⁸ June 3 Order, 151 FERC ¶ 61,198 at P 24.

¹⁹ 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 and 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. The 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).

²⁰ See *Pioneer Transmission, LLC v. N. Ind. Pub. Serv. Co.*, 140 FERC ¶ 61,057, at P 97 (2012); see also *Ophthalmic Surgeons, Ltd. v. Paychex, Inc.*, 632 F.3d 31, 35 (1st Cir. 2011).

as Network Upgrades, NextEra would receive repayment.²¹ Accordingly, based on the terms of the Letter Agreement it entered into with SoCal Edison and the terms of the three-party amended LGIA, we find that NextEra's argument that it is eligible to receive Merchant Transmission CRRs is unfounded.

15. Further, the cases to which NextEra cites affirm rather than contradict the contract interpretation principles applied in the June 3 Order. For instance, in *El Paso Natural Gas Co., L.L.C.*, the Commission gave effect not to extrinsic evidence, but to the negotiated agreement that was at issue.²² With respect to NextEra's complaint, the Commission found that the terms of the amended LGIA dictate that the Interim Project may not be considered a Network Upgrade at this time, thus preventing any incremental CRRs created by the Project to be allocated to any party. Specifically, looking within the four corners of the agreement, Article 11.4 of the amended LGIA provides:

No later than thirty (30) Calendar Days prior to the Commercial Operation Date, the Interconnection Customer *may make a one-time election by written notice to the CAISO and the Participating TO to receive Congestion Revenue Rights* as defined in and as available under the CAISO Tariff at the time of the election in accordance with the CAISO Tariff, *in lieu of a refund of the cost of Network Upgrades* in accordance with Article 11.4.1.²³

The amended LGIA is thus clear that CRRs would be available in lieu of a refund of the cost of Network Upgrades. Further, the amended LGIA clearly states that the Interim Project is not a Network Upgrade, and NextEra is not entitled to a refund, prior to the time the permanent West of Devers upgrades are completed and a determination is made at that time that some elements of the Interim Project are still needed. Therefore, we

²¹ As explained below, the amended LGIA gives interconnection customers the choice of receiving direct payments or an allocation of CRRs for costs associated with Network Upgrades.

²² 148 FERC ¶ 61,043, at P 49 (2014) (“As for El Paso's suggestion that the tariff takes precedence over the specific terms of the settlement, we find such an interpretation is unsupported and would inappropriately nullify the negotiated terms of the settlement.”)

²³ Amended LGIA Among NextEra Desert Center Blythe, LLC, Southern California Edison Company, and California Independent System Operator Corporation, Article 11.4, Transmission Credits.

reiterate that it would be in direct contradiction with the express terms of the amended LGIA for CRRs to be allocated to NextEra at this time since the Interim Project is not considered a Network Upgrade.

16. Also inapposite is NextEra's reference to *Cleveland Elec. Illuminating Co.*, finding that the presence of explicit exceptions to a party's obligation to provide transmission service strongly indicates there are no other implied exceptions.²⁴ In contrast to that case, here, the lack of mention of CRRs in the amended LGIA does not indicate that NextEra is necessarily entitled to CRRs; rather, we conclude that it was unnecessary to explicitly include a reference waiving CRR rights in the amended LGIA because NextEra expressly agreed that the Interim Project would not be considered a Network Upgrade during the interim period, meaning that it could not receive CRRs in lieu of Network Upgrade refunds under the amended LGIA. NextEra fails to explain why its explicit agreement to not treat the Interim Project as a Network Upgrade, and thereby eliminating the possibility of having Merchant Transmission CRRs allocated to it, necessitates a mention of such a possibility in the agreements.

17. Further, NextEra's circumstances are not comparable to the situation presented in *Sithe/Independence Power Partners, L.P.*, where the Commission found that relinquishment of a known claim or right must be clearly established and will not be inferred from doubtful or equivocal acts or language.²⁵ Once again, in this case, NextEra does not have the option to request CRRs in lieu of Network Upgrade refunds because it agreed that the Interim Project would not be treated as a Network Upgrade during the interim period.

18. Next, in declining to find that NextEra was entitled to CRRs under CAISO tariff section 36.11, the Commission adhered to the clear letter of the CAISO tariff rather than deviating from it. If, as NextEra alleges, the parties were silent on the matter of CRRs because they were specifically permitted, rather than excluded by virtue of not being mentioned, then NextEra was indeed aware of the potential creation of CRRs, and would have had the ability to apply in a timely manner for Merchant Transmission Facility

²⁴ 82 FERC ¶ 61,254 at 62,017.

²⁵ *Sithe/Independence Power Partners, L.P.*, 76 FERC ¶ 61,285 at 62,458.

status for the Interim Project²⁶ and Project Sponsor status.²⁷ NextEra did not take these steps.

19. Moreover, even if the Commission found it necessary to look outside the four corners of the document and consider extrinsic evidence as NextEra requests,²⁸ then it would be reasonable for the Commission to evaluate the relevant provisions of the CAISO tariff to assist it in interpreting the allegedly unclear language. Our review of the tariff would not persuade us to change course. The relevant provisions of the CAISO tariff provide in relevant part, “*For Network Upgrades*, for which the Interconnection Customer *did not receive repayment*, the Interconnection Customer will be eligible to receive Merchant Transmission Congestion Revenue Rights in accordance with the CAISO Tariff Section 36.11.”²⁹ The tariff further states that:

...unless the Interconnection Customer has provided written notice to the CAISO that it is declining all or part of such repayment, the Interconnection Customer shall be *entitled to a repayment* for the Interconnection Customer’s contribution *to the cost of Network Upgrades* in accordance with its cost responsibility[...] *Instead of direct payments*, the Interconnection Customer may elect to receive Merchant Transmission Congestion Revenue Rights in accordance

²⁶ 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.

²⁷ 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.

²⁸ NextEra Rehearing Request at 2-3.

²⁹ CAISO Tariff Appendix DD, Generator Interconnection and Deliverability Allocation Process, section 14.3.2.1, Repayment of Amounts Advanced Regarding Non-Phased Generating Facilities (emphasis added).

with the CAISO Tariff Section 36.11 associated with the Network Upgrades...³⁰

20. These tariff provisions clarify that interconnection customers have the choice of direct payments or CRRs for Network Upgrades. NextEra has agreed not only that the Interim Project is not a Network Upgrade, but that should it be designated a Network Upgrade in the future, it will receive repayment, not CRRs.³¹ The benefit of the bargain received by NextEra through the Letter Agreement and amended LGIA was accelerated deliverability, for which it will receive the full value, regardless of the allocation of any CRRs. Therefore, consistent with the terms of the amended LGIA and the CAISO tariff, we find that it would be inappropriate for CAISO to allocate CRRs to NextEra because NextEra has already agreed to receive repayment, not CRRs, if the Interim Project is reclassified as a Network Upgrade in the future.

21. With respect to NextEra's claim that the Commission's guidance contradicts the provisions of the CAISO tariff regarding the use of the Full Network Model when allocating CRRs, we continue to affirm the Commission's previous findings. As the Commission stated in the June 3 Order, "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.*"³² The June 3 Order focuses on the inappropriate nature of *allocating* CRRs to any party based on the terms of the amended LGIA, rather than the manner in which CAISO develops its models. NextEra's comment overlooks the June 3 Order's repeated emphasis that the Interim Project may not be treated as a Network Upgrade for CRR network modeling purposes *in order to allocate incremental CRRs to any party.*³³ The Commission expects CAISO to adhere to its tariff with regard to all requirements, including those set forth in section 36.4, pertaining to the various models utilized in developing the CRR Network Model.

22. Finally, with regard to NextEra's argument that the Commission erred to the extent it denied on the merits NextEra's request for limited waiver of the timing requirements in CAISO tariff sections 36.11.2 and 36.11.3.1, we reiterate the Commission's previous findings. As discussed above, our decision is based on the terms

³⁰ CAISO Tariff Appendix Y, section 12.3.2.1, Repayment of Amounts Advanced Regarding Non-Phased Generating Facilities (emphasis added).

³¹ *Southern California Edison Co.*, Docket No. ER12-804-000, at 3 (Mar. 7, 2012) (delegated letter order); Amended LGIA, App. A § 9(c).

³² June 3 Order, 151 FERC ¶ 61,198 at P 23 (emphasis added).

³³ *Id.* PP 22 - 26.

of the amended LGIA, not the timing of NextEra's request for Merchant Transmission CRRs under tariff sections 36.11.2 and 36.11.3.1. Therefore, we need not address the merits of NextEra's request for waiver of the timing requirements under CAISO's tariff, as the merits of the waiver request remain irrelevant to our decision.

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.