

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. EMP-116, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Application of Juno Solar, LLC for a)	
Conditional Certificate of Public)	
Convenience and Necessity to Construct a)	APPLICANT'S SUPPLEMENTAL
275-MW Solar Facility in)	BRIEF
Richmond County, North Carolina)	

**APPLICANT'S SUPPLEMENTAL POST-HEARING BRIEF ON
ENFORCEABILITY OF PROPOSED CPCN CONDITION**

Pursuant to the Commission's oral directives at the evidentiary hearing conducted in this docket on March 2, 2022 (the "Evidentiary Hearing"), Applicant Juno Solar LLC submits this brief regarding the enforceability of a proposed CPCN condition limiting Applicant's reimbursement for Network Upgrade costs.

BACKGROUND

At the Evidentiary Hearing, Applicant Juno Solar offered to support a CPCN condition under which Juno would agree to forego reimbursement of FERC-jurisdictional Network Upgrade costs to the extent such costs would cause the LCOT of those Upgrades to exceed \$4.00 / MWh ("the proposed condition"). Such a condition would constitute a partial waiver of Juno's rights under Section 11.4.1 of Duke's FERC-approved *pro forma* Large Generator Interconnection Agreement ("LGIA"), which gives Juno the right to obtain reimbursement for the entire cost of Network Upgrades. Consequently, the Commission directed the parties to file supplemental briefs on the question of whether such a condition would be enforceable, or whether an LGIA reflecting such a condition might

be disapproved by FERC in light of FERC's recent order rejecting an Affected System Operating Agreement between DEP and American Beech Solar, which did not provide for reimbursement of costs incurred by American Beech for upgrades to DEP's system (the "American Beech Order"). *Order Rejecting Affected System Operator Agreement, Duke Energy Progress, LLC*, 177 FERC ¶ 61,001, Docket No. ER21-1955-002 (Oct. 1, 2021).

ARGUMENT

A. The Proposed Condition is not inconsistent with the pro forma LGIA.

Juno Solar's proposed condition is permissible under the terms of DEP's *pro forma* LGIA, without approval by FERC, for several reasons.

Section 11.4.1 of the LGIA provides, in relevant part, that:

Interconnection Customer shall be entitled to a cash repayment, equal to the total amount paid to Transmission Provider . . . for the Network Upgrades . . . to be paid to Interconnection Customer on a dollar-for-dollar basis for the non-usage sensitive portion of transmission charges, as payments are made under Transmission Provider's Tariff and Affected System's Tariff for transmission services with respect to the Large Generating Facility.

But the mere fact that Juno is entitled to repayment from DEP does not compel it to seek reimbursement. To be "entitled" to something is to "hav[e] a right to certain benefits or privileges,"¹ but any right may be voluntarily waived. Section 30.6 of the LGIA clearly contemplates that a party may voluntarily waive its rights under the agreement and provides that "[a]ny waiver of this LGIA shall, if requested, be provided in writing."

It should also be noted that by default, Juno is merely entitled to a partial offset of its transmission charges, up to the cost of its Network Upgrades, not an actual cash reimbursement. Although Section 11.4.1 goes on to say that the Transmission Provider

¹ "Entitled." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/entitled>. Accessed 8 Mar. 2022.

and the Interconnection Customer “may adopt any alternative payment schedule that is mutually agreeable,” and it is DEP’s practice to provide cash reimbursement of Network Upgrade costs within five years, nothing would compel DEP or Juno to adopt such a payment arrangement here.

Even if the LGIA were somehow to require Juno to accept reimbursement of Network Upgrade costs, Section 11.4.1 also provides that the Interconnection Customer “may assign [its] repayment rights to any person.” Under this provision Juno would be absolutely free to assign its reimbursement rights back to DEP.

B. An LGIA providing for non-reimbursement of Network Upgrade costs would likely be approved by FERC under the circumstances.

Assuming for the sake of argument that Juno’s LGIA would have to deviate from the *pro forma* LGIA to permit the proposed condition, such an LGIA would likely be approved by FERC.

Non-conforming interconnection agreements (those whose provisions deviate from the form agreements in the utility’s tariff) must be filed with FERC for approval before going into effect. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,146, at ¶ 914 (2003). The filing party is responsible for explaining the unique circumstances of the interconnection and why these circumstances necessitate the filing of a nonconforming interconnection agreement. Order No. 2003-B, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,171, at ¶ 140 (2004); *Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61,252, 62,010 (2006). A nonconforming agreement may be approved by FERC if the filing party demonstrates that the deviations are just and reasonable under the specific facts and circumstances of the interconnection. *Edgecombe*

Solar Energy LLC, 177 FERC ¶ 61,122 (2021). Non-conforming filings may be accepted for specific interconnections where there are “specific reliability concerns, novel legal issues, or other unique factors” that justify the deviation. *Sw. Power Pool, Inc.*, 132 FERC ¶ 61,062, at ¶ 3 (2010).

Applicants’ research has identified only a few published orders in which FERC has considered LGIAs that were non-conforming because they did not provide for full reimbursement of Network Upgrade costs. Where a non-independent Transmission Owner has sought to revise the *pro forma* LGIA in its Open Access Transmission Tariff (“OATT”) to eliminate reimbursement, FERC has generally rejected the request. *See, e.g., Arizona Public Service Company*, Docket No. ER04-723-000, 107 FERC ¶ 61,257 (June 4, 2004). FERC has also disapproved non-conforming LGIAs that did not provide for reimbursement of Network Upgrade costs where the Interconnection Customer objected to the deviation. *See, e.g., El Paso Electric Company*, 133 FERC ¶ 61,085, Docket No. ER10-2599-000 (Oct. 6, 2010); *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,019, Docket No. ER05-215-000 (Jan. 14, 2005). However, the Applicant has been unable to identify a single instance in which FERC has disapproved a non-conforming LGIA that did not provide for reimbursement, where the Interconnection Customer consented to the change. And on at least one occasion, FERC has accepted an uncontested settlement under which an Interconnection Customer agreed to accept only partial reimbursement for the cost of Network Upgrades. *Arizona Public Service Company*, 140 FERC ¶ 63,004, at ¶ 16, Docket Nos. ER11-4352-000, ER11-4352-001 (July 19, 2012).

It is likely that FERC would also accept a non-conforming LGIA here. The facts and circumstances justifying the non-conforming LGIA include the following: first, the

deviation would be voluntarily proposed by the Interconnection Customer, without any coercion by the Transmission Provider. Indeed, Juno Solar has proposed this condition long before negotiations have even begun on an Interconnection Agreement (the project is still in System Impact Study). This is an important distinction from the American Beech ASOA, discussed below.

Second, the proposed condition would be agreed to by Juno Solar to address concerns expressed by the Public Staff and by Commissioners about whether the siting of the Juno Solar project is consistent with the public convenience and necessity. In its Order denying a merchant plant CPCN to Friesian Holdings, LLC (Docket No. EMP-105, Sub 0) (which Order was recently affirmed by the Court of Appeals, *State ex rel. Utilities Comm'n v. Friesian Holdings, LLC*, __ S.E. 2d ___, 2022-NCCOA-32 (N.C. App. Jan. 18, 2022)), the Commission held that “It is appropriate for . . . to consider the total construction costs of a facility, including the cost to interconnect and to construct any necessary transmission network upgrades, when determining the public convenience and necessity of a proposed new generating facility.” The Commission’s inclusion of Network Upgrade costs and associated ratepayer impacts in its siting analysis for merchant plants presents a “novel legal issue” that justifies Juno’s voluntary deviation from the *pro forma* reimbursement terms.

C. The American Beech Order is not controlling here.

At the Evidentiary Hearing, Commissioners and the Public Staff expressed concern as to the enforceability of the proposed condition in light of the American Beech Order. That Order is not controlling here.

In the American Beech Order, FERC rejected an Affected System Operating Agreement under which the Interconnection Customer would not be reimbursed for the cost of Affected System Upgrades on DEP's system, because DEP had not demonstrated that the terms of the ASOA were just and reasonable. 177 FERC ¶ 61,001, at ¶ 31. However, in that case the Interconnection Customer had not voluntarily consented to the conditions, and in fact contended that they were not just and reasonable. *Id.* at ¶ 11. Although American Beech had executed the ASOA, it contended that it was "forced into" signing the ASOA as proposed by Duke or accepting substantial delays in interconnection. This is very different from the situation presented here, where it is the Interconnection Customer itself which proposes the condition that might require deviation from the *pro forma* LGIA.

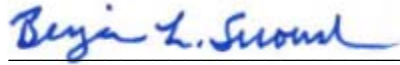
It is also important to note that in the American Beech case, DEP did not even attempt to demonstrate that the non-conforming terms of the ASOA were just and reasonable under the circumstances. Instead, DEP contended that the reimbursement terms of the *pro forma* LGIA were not applicable to the ASOA, which was not part of DEP's OATT; and that American Beech had effectively waived its objection to the terms by executing the ASOA.² Because DEP did not attempt to identify circumstances specific to American Beech's interconnection that would make non-reimbursement just and reasonable, FERC did not have occasion to consider whether an agreement not providing for reimbursement *could* be just and reasonable under other circumstances. Given the dissimilar circumstances there is no reason to expect a similar outcome here.

² DEP also made a general argument that "removing this reimbursement requirement eliminates adverse impacts to DEP's existing transmission customers," but FERC rejected this argument as unsupported by facts. *Id.* at ¶ 34.

CONCLUSION

For the reasons discussed above, Juno Solar submits that the proposed condition, as consented to by Juno Solar, is not inconsistent with DEP's *pro forma* LGIA; and that under the unique circumstances of this matter, a non-conforming LGIA reflecting the proposed condition would be just and reasonable, and therefore approvable by FERC.

Respectfully submitted, this the 9th day of March 2022.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing APPLICANT'S SUPPLEMENTAL BRIEF, filed in Docket EMP-116, Sub 0 has been served on parties of record as shown on the Commission's Service List for this docket, either by electronic mail or by depositing same in the U. S. Mail, first class delivery, postage prepaid.

This the 9th day of March, 2022.

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