

130 FERC ¶ 61,249
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

ConocoPhillips Company

Docket No. OA10-5-000

ORDER GRANTING REQUEST FOR WAIVER

(Issued March 26, 2010)

1. This order grants a request by ConocoPhillips Company (ConocoPhillips) for waiver of Order Nos. 888,¹ 889,² and 890³ (as implemented in Section 35.28 and Part 37 of the Commission's Regulations), and Part 358 of the Commission's regulations.⁴

¹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *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 sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

² *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

⁴ 18 C.F.R. Part 358 (2009). *See also Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008) *order on reh'g and*

(continued...)

I. Background

2. ConocoPhillips is a Delaware corporation that owns and operates oil and gas refineries in the United States and around the world. Among its refineries is the Bayway Refinery which is located in Linden, New Jersey. The Bayway Refinery was constructed in 1908 and produces approximately 276,000 barrels per day of finished petroleum products, including gasoline, diesel fuel, jet fuel, and heating oil.

3. On January 7, 2010, ConocoPhillips filed a request for waiver of Order Nos. 888, 889, 890, and Part 358 of the Commission's regulations. ConocoPhillips states this request is being made out of an abundance of caution as a result of ConocoPhillips's recent conclusion that a tie breaker (Bayway Tie Breaker) it owns (but does not operate or control) may qualify as a transmission facility under the Commission's regulations. ConocoPhillips avers that the Bayway Tie Breaker is located at the switchyard owned by ConocoPhillips at its Bayway Refinery. ConocoPhillips asserts that, if the Bayway Tie Breaker is deemed to be a transmission facility, then ConocoPhillips would be subject to the Commission's regulations applicable to transmission owners, including requirements to: (1) establish and maintain an open access transmission tariff (OATT); (2) establish an open access same-time information system (OASIS); and (3) abide by the Standards of Conduct applicable to transmission providers. ConocoPhillips contends it is eligible for the requested waiver because the Bayway Tie Breaker is a limited and discrete facility rather than an integrated transmission grid. ConocoPhillips maintains it lacks the ability to adversely affect the wholesale energy market through ownership of this asset because of its configuration and how it is used. Therefore, ConocoPhillips states that waiver of the requirements of Order Nos. 888, 889, and 890 and Part 358 is appropriate in these circumstances.

4. ConocoPhillips asserts it is also a power marketer with operations in various markets throughout the United States, primarily in the Southeast and West. ConocoPhillips maintains it is the successor to the market-based rate authorization

clarification, FERC Stats. & Regs. ¶ 31,297 (2009) revising the standards of conduct originally adopted in Order No. 2004; *see Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003) (Order No. 2004), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

granted to Conoco Power Marketing Inc.⁵ ConocoPhillips explains this authorization has been transferred on several occasions as the result of changes in ownership, internal reorganizations, name changes and mergers. ConocoPhillips states that the Bayway Tie Breaker has not previously been reported in ConocoPhillips's market-based rate filings. However, ConocoPhillips asserts that, now that the Bayway Tie Breaker has been identified as a potential transmission facility, it is submitting a companion filing to update its market-based rate docket accordingly.⁶

5. Regarding the instant request for waivers of Order Nos. 888, 889, 890, and Part 358 of the Commission's regulations, ConocoPhillips states that the Bayway Tie Breaker is a discrete part of a switchyard located at the Bayway Refinery. ConocoPhillips maintains the tie breaker was constructed in 2000 in connection with the construction of two breakers located within the Bayway Refinery switchyard that allow the transfer of backup power to the Bayway Refinery in the event its primary source of power (the 180 MW on-site cogeneration plant owned by East Coast Power Linden Holding LLC) undergoes maintenance or is out of service for any other reason. ConocoPhillips explains these two breakers also allow the transfer of surplus power from on-site generation at the Bayway Refinery to the transmission grid.

6. ConocoPhillips contends the Bayway Tie Breaker was part of the overall project that allowed the Bayway Refinery switchyard to tap into the 230-kV transmission lines that connect the Public Service Electric and Gas Company's (PSE&G) Warinanco Substation to the PSE&G Linden Substation. ConocoPhillips argues that the Bayway Tie Breaker is a break point in those 230-kV transmission lines. ConocoPhillips states the configuration of these facilities (the switchyard, the tap into the 230-kV lines, and the Bayway Tie Breaker) effectively allows the Bayway Refinery to have three independent sources of power – the 180-MW cogeneration plant located on-site, power flowing from the PSE&G Linden Substation, and power from the PSE&G Linden VFT Substation (which taps into the 230-kV transmission line on the Warinanco Substation side of the Bayway Tie Breaker). ConocoPhillips explains the Bayway Tie Breaker is normally operated in the closed position.⁷

⁵ See *Conoco Power Marketing Inc.*, Docket No. ER95-1441-000 (Aug. 30, 1995) (unpublished letter order) (granting market-based rate authorization to Conoco Power Marketing Inc.).

⁶ See ConocoPhillips Co., "Errata to 'Appendix B' Asset Tables," Docket No. ER03-428-009 (filed Jan. 7, 2010).

⁷ The closed position allows power to flow across the system between the

7. ConocoPhillips states that, pursuant to contract, PSE&G operates and maintains the Bayway Tie Breaker. ConocoPhillips asserts PSE&G also maintains and operates all of the associated relays, metering and controls. ConocoPhillips contends it does not operate the Bayway Tie Breaker facility, nor does it own, operate or maintain any transmission lines anywhere in the vicinity. ConocoPhillips explains it owns and operates the switchyard facilities at the Bayway Refinery, but these are distribution and interconnection facilities, not transmission. ConocoPhillips asserts that, although generation is located on-site at the Bayway Refinery (the 11.1-MW Bayway Refinery cogeneration plant and the 180-MW East Coast Power Linden Holding LLC cogeneration plant), the electrical and other energy output of this generation is principally dedicated to on-site use (for consumption at and by the Bayway Refinery).

8. Regarding power marketing, ConocoPhillips states it does not currently market any power onto the wholesale grid out of the Bayway Refinery. ConocoPhillips states that, to the extent any on-site generation is marketed into the wholesale market, the Bayway Tie Breaker operating in the normal closed fashion would facilitate the transactions (by allowing power to transfer across the PSE&G 230-kV lines), but use of the Bayway Tie Breaker would not be required to market the power because the PSE&G Linden and Warinanco Substations would still be available through the two breakers located within the Bayway Refinery switchyard.

9. ConocoPhillips argues that the Commission has consistently granted to public utilities waivers of the requirements of Order Nos. 888 and 890 if they can show that they own, operate, or control only limited and discrete transmission facilities that do not form an integrated transmission grid.⁸ Further, ConocoPhillips states the Commission has also granted waivers of the Order No. 889 requirements to a public utility if the applicant owns, operates, or controls only limited and discrete transmission facilities.⁹

10. Regarding its status as a transmission facility, ConocoPhillips asserts the Bayway Tie Breaker qualifies as a “limited and discrete transmission facility.” ConocoPhillips explains the Bayway Tie Breaker was constructed in connection with the construction of two breakers located within the switchyard that allows the transfer of backup power to the Bayway Refinery (for end use at the refinery); those two breakers also allow the transfer of any surplus power to PSE&G’s transmission system (for sale to PSE&G or in

Warinanco and Linden Substations.

⁸ See, e.g., *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996) (*Black Creek*); *Golden Spread Electric Cooperative, Inc.*, 106 FERC ¶ 61,151, at P 7 (2004).

⁹ See, e.g., *Hardee Power Partners Ltd.*, 125 FERC ¶ 61,036, at P 19-21 (2008).

the power markets). ConocoPhillips states that the Bayway Tie Breaker is not needed to allow the transfer of backup power to the Bayway Refinery or the transfer of surplus power from on-site generation to the transmission grid. ConocoPhillips maintains that the Bayway Tie Breaker normally operates in the closed position, thereby allowing the transfer of power across PSE&G's 230-kV transmission lines (transmission service on which is available through the PJM OATT). ConocoPhillips asserts the Bayway Tie Breaker is not the type of facility over which point-to-point transmission or network integration transmission services could be arranged by a third party on a stand-alone basis. ConocoPhillips contends there would be no practical value to require ConocoPhillips to establish and maintain an OATT for use of the Bayway Tie Breaker facility.

11. Regarding the establishment and operation of an OASIS, ConocoPhillips states the Commission should grant waiver of these requirements of Order No. 889 because it would be an inefficient use of resources for the company. ConocoPhillips notes the Bayway Tie Breaker is not the type of facility over which transmission service would normally be requested. Therefore, ConocoPhillips explains, there is no need for an OASIS site through which potential customers could request service. In addition, according to ConocoPhillips, this would be the only transmission facility owned by the company; if ConocoPhillips established an OASIS, it explains, it would apply solely to the Bayway Tie Breaker. ConocoPhillips maintains the benefits that might accrue from establishment of an OASIS site would be far outweighed by the costs involved. ConocoPhillips contends a waiver of the requirements of Order No. 889 to establish an OASIS site is appropriate in these circumstances.

12. Further, ConocoPhillips states that it acknowledges that, if granted, the waiver of Order No. 888 will be subject to the requirement that ConocoPhillips establish an OATT if it receives a request for transmission service over the Bayway Tie Breaker. In addition, with regard to the waiver of Order No. 889, ConocoPhillips acknowledges that it will be required to establish an OASIS if the Commission determines that a potential transmission customer evaluating its transmission needs cannot get necessary information to complete its evaluation.

13. Regarding the waiver of the Standards of Conduct requirements of Part 358, ConocoPhillips states its ownership of the Bayway Tie Breaker may result in "Transmission Provider" status under Section 358.3(k)(1) and, in the absence of a waiver, would be subject to the Commission's Standards of Conduct under Part 358. However, ConocoPhillips contends the Commission will grant a waiver of the Standards of Conduct for good cause shown. ConocoPhillips argues that the Commission has found that good cause exists where an entity does not perform the traditional activities of a typical transmission provider. ConocoPhillips explains that it qualifies for this exemption because it does not perform any of the functions of a typical transmission provider. ConocoPhillips states that it does not have any transmission personnel and, the local

utility, PSE&G, operates and maintains the tie breaker in the instant filing. ConocoPhillips contends that it is “merely an owner” of the discrete Bayway Tie Breaker facility.¹⁰

14. Finally, ConocoPhillips asserts granting the waiver of Part 358 of the Standards of Conduct would not circumvent the objectives of the standards in any way. ConocoPhillips explains that the Standards of Conduct were adopted by the Commission to ensure that Transmission Providers cannot extend their market power over transmission to wholesale energy markets. ConocoPhillips maintains that ownership of the Bayway Tie Breaker does not confer on ConocoPhillips any market power over transmission; the Bayway Tie Breaker, it states, is not the type of transmission facility over which third parties can obtain transmission service to reach markets (for generation or load). ConocoPhillips contends that, given the nature and configuration of the facility, there is very little use to which the Bayway Tie Breaker can be put and denying competitors access to the market is not one of them. ConocoPhillips asserts that it does not have the ability to harm wholesale energy markets by virtue of its ownership of the facility. ConocoPhillips maintains that it cannot inflict the type of harm that the Commission seeks to avoid through the Standards of Conduct and that because of this there is good cause to waive this requirement.

II. Notice

15. Notice of the Applicant’s filing was published in the *Federal Register*, 75 FR 3,458 (2010), with protests or interventions due on or before January 28, 2010. No interventions, protests, or comments were filed.

III. Discussion

16. Order Nos. 888 and 890 require public utilities to file an OATT prior to providing transmission service in interstate commerce. Commission Order No. 889 requires public utilities to establish an OASIS. In prior orders, the Commission has enunciated the standards for waiver of, or exemption from, some or all of the requirements of Order Nos. 888 and 889.¹¹ The Commission has stated that the criteria for waiver of the

¹⁰ As the transmission operator and transmission owner of the tie breaker, PSE&G and ConocoPhillips, respectively, are responsible for compliance with all applicable North American Electric Reliability Corporation standards.

¹¹ See, e.g., *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996) (*Black Creek*); *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228, at P 22 (2005) (*Entergy*).

requirements of Order No. 890 are unchanged from those used to evaluate requests for waiver under Order Nos. 888 and 889.¹²

17. The Commission may grant requests for waiver of Order Nos. 888 and 890 to public utilities that can show that they own, operate, or control only limited and discrete transmission facilities (facilities that do not form an integrated transmission grid), until such time as the public utility receives a request for transmission service. Should the public utility receive such a request, the Commission has determined that the public utility must file with the Commission a *pro forma* tariff within 60 days of the date of the request, and must comply with any additional requirements that are effective on the date of the request.¹³

18. The Commission has also determined that waiver of Order No. 889 would be appropriate for a public utility: (1) if the applicant owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) if the applicant is a small public utility that owns, operates, or controls an integrated transmission grid, unless it is a member of a tight power pool, or other circumstances are present that indicate that a waiver would not be justified.¹⁴ Moreover, the Commission has held that a waiver of Order No. 889 and the Standards of Conduct will remain in effect until the Commission takes action in response to a complaint to the Commission that an entity evaluating its transmission needs could not get the information necessary to complete its evaluation (for OASIS waivers) or an entity complains that the public utility has unfairly used its access to information about transmission to benefit the utility or its affiliate (for Standards of Conduct waivers).¹⁵

19. Based on the statements in ConocoPhillips's filing, we find that ConocoPhillips's transmission facilities are limited and discrete. According to ConocoPhillips, the Bayway Tie Breaker was built exclusively to provide multiple independent sources of power to the refinery, does not perform traditional activities of a typical transmission provider, and does not currently market any power on to the wholesale grid. As such, we find ConocoPhillips's Tie Breaker meets the Commission's definition of a limited and

¹² See *Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at P 3 (2007).

¹³ *Black Creek*, 77 FERC at 61,941.

¹⁴ *Id.*

¹⁵ *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997)); *Easton Utilities Commission*, 83 FERC ¶ 61,334, at 62,343 (1998).

discrete transmission facility. Accordingly, we will grant ConocoPhillips's waiver of the requirements in Order Nos. 888 and 890 to have an OATT on file.¹⁶ Similarly, we will grant ConocoPhillips's waiver from the OASIS requirements of Order No. 889 and the Standards of Conduct of Part 358 of the Commission's regulations.¹⁷

The Commission orders:

ConocoPhillips's request for waiver of the requirements of Order Nos. 888, 889, 890, and the Standards of Conduct of Part 358 of the Commission's regulations is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁶ Consistent with *Black Creek*, ConocoPhillips must file, within 60 days of its receiving a request for transmission service from a customer, a *pro forma* OATT and any additional requirements in compliance with Order Nos. 888 and 890.

¹⁷ A waiver of the requirement to establish and maintain an information system (i.e., an OASIS) remains effective until the Commission takes action in response to any complaint by an entity alleging that, in evaluating its transmission needs, the entity could not obtain from ConocoPhillips information necessary to complete its evaluation. A waiver of the Standards of Conduct will remain in effect unless and until the Commission takes action on a complaint by an entity that ConocoPhillips has used its access to transmission information to unfairly benefit ConocoPhillips's own sales, or an affiliate's sales. In addition, as the Commission recently explained, ConocoPhillips must notify the Commission if there is a material change in facts that affects its waiver, within 30 days of the date of such change. *Material Changes in Facts Underlying Waiver of Order No. 889 and Part 358 of the Commission's Regulations*, 127 FERC ¶ 61,141, at P 5 (2009); *see also Wolverine Power Supply Cooperative, Inc.*, 127 FERC ¶ 61,159, at n.21 (2009).