

132 FERC ¶ 61,116
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wildorado Wind, LLC
Wildorado Wind Two, LLC

ER10-1482-000
OA10-10-000

ORDER CONDITIONALLY ACCEPTING ASSIGNMENT, COTENANCY, AND
COMMON FACILITIES AGREEMENT AND GRANTING REQUEST FOR
WAIVERS

(Issued August 11, 2010)

1. On June 17, 2010, pursuant to section 205 of the Federal Power Act (FPA),¹ Wildorado Wind, LLC (Wildorado I), and Wildorado Wind Two, LLC (Wildorado II) (collectively, Applicants or Wildorado Parties) filed an Assignment, Cotenancy, and Common Facilities Agreement (Agreement)² between the Wildorado Parties and requested waiver of Order Nos. 888,³ 889,⁴ and 890,⁵ as well as section 35.28 and Parts

¹ 16 U.S.C. § 824d (2006).

² Designated as Wildorado Wind, LLC, FERC Rate Schedule No. 1.

³ *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).

⁴ *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).

⁵ *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

(continued...)

37 and 358 of the Commission's regulations.⁶ In this order, the Commission accepts the Agreement, subject to a further filing, and grants the requested waivers.

I. Background

2. Wildorado I, a Texas limited liability company, owns, and operates an approximately 161 MW wind energy project in west Texas (Wildorado I Project) that is currently interconnected with transmission facilities owned by Southwestern Public Service Company (Southwestern) and under the operational control of Southwest Power Pool, Inc. (SPP). Applicants state that Wildorado I has received market-based rate authorization from the Commission⁷ and is an exempt wholesale generator.⁸ Wildorado II, a Texas limited liability company, is developing an approximately 78.2 MW wind energy project (Wildorado II Project) (together with the Wildorado I Project, the Wildorado Projects) to be located in west Texas near the Wildorado I Project. Applicants explain that the Wildorado II Project will also be interconnected with the electric system owned by Southwestern and operated by SPP. Wildorado II currently has no operating assets and has not filed for market-based rate authorization or exempt wholesale generator status.

3. Wildorado I is indirectly owned by Edison International, a publicly traded corporation that is a holding company with many energy-related subsidiaries. Wildorado II is indirectly owned by Cielo Wind Power, LLC (Cielo), a privately owned wind energy

(2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009) *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61, 126 (2009).

⁶ 18 C.F.R. § 35.28, 18 C.F.R. Part 37, and 18 C.F.R. Part 358 (2010). *See Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *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 it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *see Standards of Conduct for Transmission Providers*, Order No. 690, FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010).

⁷ *See Wildorado Filing at 2* (citing *Wildorado Wind, LLC*, Docket No. ER07-301-000 (Jan. 31, 2007) (unpublished letter order)).

⁸ *See id.* (citing *Wildorado Wind LP*, 113 FERC ¶ 62,240 (2005)).

developer based in Texas. Applicants state that Wildorado I and Wildorado II are unaffiliated but note that a subsidiary company of Wildorado II's parent, Cielo, currently owns a 0.1 percent interest in Wildorado I.⁹

4. Applicants state the Wildorado I, Southwestern, and SPP have entered into a standard Large Generator Interconnection Agreement (LGIA), by which the Wildorado I Project is interconnected to Southwestern transmission facilities. Applicants indicate that contemporaneously with the Commission's acceptance of the Agreement, Wildorado I will assign the LGIA to a new entity, Wildorado Interconnect, LLC, (Wildorado Interconnect), which Wildorado Parties will own and which will act as an agent for Applicants with respect to receiving service as an interconnection customer under the LGIA. According to Applicants, Wildorado Interconnect will own no physical transmission assets or paper assets pursuant to which Wildorado Interconnect would be a transmission owner or transmission provider.

II. The Agreement

5. Attachment A of the Agreement sets forth the terms and conditions under which Applicants will jointly own certain interconnection facilities as tenants in common. Pursuant to the Agreement, Wildorado I will assign a radial interconnecting transmission line, related switchyard equipment, and metering facilities (Common Physical Facilities) that it currently owns to Wildorado Parties, and thereafter will be shared and owned as tenants in common by Applicants for the purpose of interconnecting the Wildorado Projects. According to Applicants, each party to the Agreement will have an undivided ownership interest that is sufficient to transmit that party's energy and capacity, and, therefore, neither party will provide transmission service to the other party.

6. Wildorado Parties state that in addition to the Common Physical Facilities, they will share in a set of project agreements, licenses, permits, and real property which together with the Common Physical Facilities will comprise the "Common Facilities." According to the Applicants, the Agreement provides that each party will be acting as independent contractors with specified ownership and contract rights to the Common Facilities, but the parties will not be acting as partners, joint venturers, or as each others' agents.

7. Applicants describe the Common Physical Facilities as an electric substation to which Applicants' separate interconnection facilities connect (Shared Switching Station), an approximately 9.25 mile, 230 kV radial interconnection transmission line, running from the Shared Switching Station to the point of interconnection specified under the LGIA, and associated metering and communications equipment. Applicants state that these facilities are currently constructed to accommodate the electric output of only the Wildorado Projects and will not serve any other parties. Applicants note however that

⁹ *Id.* at n.4.

the Agreement contemplates the possible development of a third wind energy project, the Bushorado Project.¹⁰

8. Applicants assert that the Agreement represents an arms-length negotiated arrangement between Applicants. Pursuant to the Agreement, Wildorado II will be solely responsible for deciding whether to proceed with development of the Wildorado II Project, and is solely responsible for the development, construction and cost of all necessary improvements to the Shared Switching Station. In addition, Applicants explain that Wildorado II will be responsible for the costs of interconnecting its project with the Common Physical Facilities and will be responsible for any costs, expenses, and lost revenue (including lost tax benefits) incurred by Wildorado I as a result of the construction, installation, startup, testing, interconnection, and/or operation of the Wildorado II Project. Wildorado II will also be responsible for incremental line losses, over and above those resulting from the operation of the Wildorado I Project, occurring between the Shared Switching Station and the point of interconnection under the LGIA.

9. Applicants assert that Commission approval of these transactions under section 203 of the FPA is not required. Wildorado II will pay Wildorado I consideration of substantially less than \$10 million for all of the transactions arising out of, and relating to, the Agreement. Applicants also aver that no other consideration is involved and no merger or consolidation of jurisdictional facilities is involved.

10. Applicants explain that after completion of all upgrades and improvements necessary to accommodate the Wildorado II Project they will have an equal priority of use of the Common Facilities.¹¹ According to Applicants, any curtailments will be based upon the "Sharing Ratio," which will be determined according to the ratio of the maximum nameplate capacity of each cotenant's project, upon its commercial operation, subject to adjustment for later changes, to the maximum nameplate capacity of all cotenants' projects. The Agreement also provides that Applicants will share responsibility for costs and expenses necessary or beneficial for the operation and maintenance of the Common Facilities in accordance with their Sharing Ratios. However, costs or charges arising out of the LGIA that are attributable to a particular project will be paid by the owner of that project.

¹⁰ *Id.* at 3 n.5. Applicants explain that the Agreement provides for the future participation of the Bushorado Project's owner as a cotenant under the Agreement provided that certain conditions are satisfied. These conditions include Applicants both approving any required technical changes and amendments to the Agreement and the owner of the Bushorado Project making any necessary upgrades to the Common Facilities. The Agreement provides that the owner of the Bushorado Project, as a new cotenant under the Agreement, would acquire an undivided ownership interest sufficient to accommodate its project, so that no other party would provide transmission service.

¹¹ *See* Agreement at section 2.4.

11. Applicants assert that, because the Agreement provides for allocation of common costs based on each Applicant's projects' capacity, and for the pass-through of direct costs to the responsible party, the Agreement is consistent with similar arrangements that the Commission has accepted.¹²

12. In addition, Applicants point out that Exhibit A of the Agreement includes six related agreements for the assignment, assumption, leasing, and easement by which Applicants' tenancy in common rights will be created. The first of these agreements, the Assignment and Assumption Agreement (Assigned Assets Agreement), creates the tenancy in common interest in the existing Common Physical Facilities and is attached to the Agreement. Applicants state that because the other five agreements concern Applicants' interests in real property and do not directly implicate the Commission's jurisdiction, the Applicants are not filing these agreements, consistent with Commission precedent.¹³

13. Applicants request that the Commission accept the Agreement for filing as of the date that the Agreement and the related agreements, including the Assigned Assets Agreement, become effective.¹⁴ Applicants state that after the Commission conditionally accepts the Agreement for filing, Applicants will make a filing, no later than 10 days after such action, revising the effective date footer on each page of the Agreement rate schedules to reflect the effective date.

14. Applicants request waiver of the Commission's prior notice requirements in order to permit an effective date that may occur less than sixty days after the date of the instant filing. Applicants assert that good cause exists to grant waiver of the prior notice

¹² See *id.* at 4 (citing *Grand Ridge LLC*, 128 FERC ¶ 61,134 (2009); *BP Wind Energy North America Inc., et al.*, 129 FERC ¶ 61,207 (2009) (*BP Wind Energy*)).

¹³ *Id.* (citing *PacifiCorp*, 127 FERC ¶ 61,144 at P 10-11 (2009) (filing not required for agreements that have an insignificant impact on rates and where filing and posting would "serve no practical purpose"))).

¹⁴ *Id.* at 6 and 7. Applicants explain that they have placed the Agreement and the six agreements in Exhibit A to the Agreement into escrow without an effective date. Applicants state that only after the Commission issues an order conditionally accepting the Agreement will Applicants be authorized under the escrow agreement to direct the escrow agent to release the Agreement and related agreements. When the escrow agent releases these agreements, the escrow agent will fill in the effective date in each of the agreements, thus allowing them to become effective and initiating Applicants' tenancy in common holdings. Applicants explain that because this date is not currently known, they are unable to insert an effective date into the proposed rate schedules, as required by Order No. 614. *Designation of Electric Rate Schedule Sheets*, Order No. 614, 65 Fed. Reg. 18,221 (2000), FERC Stats. and Regs. ¶ 31,096 (2000).

requirements. They state that Wildorado I requires the Commission's acceptance of the Agreement before it can take effect to avoid any regulatory uncertainty. Additionally, Applicants explain that, because they do not provide any interconnection or transmission services to any third parties, no customer or affiliate of either Applicant will be affected by the requested effective date. Thus, Applicants conclude that waiver of the prior notice requirement is consistent with the Commission's rules and precedent.¹⁵

III. Request for Waivers

15. Applicants state that the Commission has established waiver criteria for the waiver of Order Nos. 888, 889 and 890, as well as sections 35.28 and Parts 37 and 358 of the Commission's regulations.¹⁶ Applicants contend that the Commission has granted waivers where the applicant has demonstrated that it owns, operates or controls only limited and discrete transmission facilities, as opposed to an integrated transmission grid. Applicants assert that they qualify for waivers under *Black Creek*.

16. Applicants state that the Common Physical Facilities are not currently interconnected with any generating facilities other than the Wildorado I Project, and are interconnected at only a single point with the SPP transmission system. They explain that electric power flows over the Common Physical Facilities only under the following two circumstances: (1) power generated by the Wildorado I Project is being marketed at wholesale; or (2) start-up, back-up and maintenance power is being delivered to the Wildorado I Project for its own use. Applicants add that when the Wildorado II Project becomes operational, the Common Physical Facilities will continue to serve only to deliver the Wildorado Projects' power output to make wholesale sales in interstate commerce, and to deliver start-up, back-up and maintenance power to the Wildorado Projects.

17. Applicants assert that the other components of the Common Facilities will serve only a supporting role in the functioning of the Common Physical Facilities and will serve no other generation or transmission functions. Accordingly, they state that the Common Facilities do not form an integrated transmission system, and are only limited and discrete transmission facilities. Applicants add that neither Applicant owns, operates, or controls, or will own, operate or control, any other transmission facilities.

18. Applicants also assert that Commission has granted waivers of its Open Access Transmission Tariff (OATT), Open Access Same-Time Information System OASIS and Standards of Conduct regulations and requirements to owners and operators of generating

¹⁵ *Id.* (citing 18 C.F.R. § 35.11; *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992)).

¹⁶ *Id.* (citing *Black Creek Hydro, Inc, et al.*, 77 FERC ¶ 61,232 (1996) (*Black Creek*); *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228 (2005) (*Entergy*)).

facilities that own generator interconnection facilities.¹⁷ According to Applicants, they satisfy the Commission's criteria for such waivers. They assert that compliance with these regulations would entail a substantial burden without any offsetting benefits.

19. Applicants acknowledge that if they are granted the waivers and subsequently receive a request for transmission service from a third party, they will file an OATT with the Commission and satisfy all other applicable regulatory requirements.¹⁸

IV. Notice

20. Notice of the Applicants' filing was published in the *Federal Register*, 75 Fed. Reg. 37,423 (2010), with comments, protests or interventions due on or before July 8, 2010. No interventions, protests, or comments were filed.

V. Discussion

A. The Agreement

21. The Commission finds the terms and conditions of the Agreement to be just and reasonable, and not unduly discriminatory. Accordingly, we will accept the proposed Agreement, subject to a further filing, and grant the requested waivers, as discussed below.

22. With regard to the effective date, Applicants state that the Agreement is being held in escrow pending Commission issuance of an order conditionally accepting the Agreement. Applicants explain that after the Commission conditionally accepts the Agreement for filing and the Agreement and related agreements are removed from escrow and become effective, Applicants will make a filing, no later than 10 days after such action, revising the rate schedule to reflect the Agreement's effective date. Recognizing Applicants' commitment, we will require them to submit a further filing, within 10 days of the Agreement and the related agreements being removed from escrow and becoming effective, revising the Wildorado Wind, LLC, FERC Rate Schedule No. 1 to reflect the effective date of the Agreement on each of the tariff sheets, in accordance

¹⁷ *Id.* at 8 (citing *BP Wind Energy*, 129 FERC ¶ 61,207, at P 13-15 (2009) (waiver granted with respect to jointly-owned 15.5-mile 345 kV interconnecting transmission line); *Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149, at P 24-27 (2009) (waiver granted with respect to planned 88-mile 345 kV generator interconnection line); *Grand Ridge Energy, LLC*, 128 FERC ¶ 61,134, at P 14-17 (2009); *Story Wind, LLC*, 128 FERC ¶ 61,080 (2009); *Ashtabula Wind, LLC*, 127 FERC ¶ 61,215 (2009); *Crystal Lake Wind, LLC*, 127 FERC ¶ 61,213 (2009); *Langdon Wind, LLC*, 127 FERC ¶ 61,212 (2009); *Osceola Windpower, LLC*, 127 FERC ¶ 61,214 (2009).

¹⁸ *Id.* at 9.

with Order No. 614. To the extent that the effective date happens to be earlier than 60 days from the date the proposed Agreement was submitted for filing, we will grant Applicants' request for waiver of the Commission's 60-day notice requirement. We find that such waiver is warranted in this case. As a practical matter, we would not expect any service to be requested within 60 days of the filing date. Accordingly, good cause exists to grant Applicants' request for waiver of the prior notice requirement.¹⁹

B. Request for Waivers

23. With regard to the other requested waivers, Order Nos. 888 and 890 require public utilities to file an OATT prior to providing transmission service. Order No. 889 requires public utilities to establish an OASIS and abide by certain standards of conduct. 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 889.²⁰ The Commission has stated that the criteria for waiver of the requirements of Order No. 890 and Order No. 2004 are unchanged from those used to evaluate requests for waiver under Order Nos. 888 and 889.²¹ Order No. 717 did not change those criteria.²²

24. 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. If the public utility receives 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.²³

25. The Commission has also determined that waiver of Order No. 889 would be appropriate for a public utility under the following circumstances: (1) the applicant owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) the applicant is a small public utility that owns,

¹⁹ *Central Hudson Gas and Electric Co.*, 60 FERC ¶ 61,106, at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993).

²⁰ *See, e.g., Black Creek*, 77 FERC ¶ 61,232 at 61,941; *Entergy*, 112 FERC ¶ 61,228 at P 22.

²¹ *See Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at P 3 (2007).

²² *See Order No. 717*, FERC Stats. & Regs. ¶ 31,280 at P 54.

²³ *Black Creek*, 77 FERC at 61,941.

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.²⁴ Moreover, the Commission has held that a waiver of Order No. 889 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).²⁵

26. Based on the statements in Applicants' filing, we find that the Applicants' transmission facilities are limited and discrete and do not constitute an integrated transmission system. The facilities are not currently interconnected with any generating facilities other than those of the Wildorado I Project and are interconnected at only a single point within the SPP transmission system. Furthermore, the only transmission service the Wildorado Parties' facilities provide is to Wildorado I and Wildorado II. Electric power flows over the Common Physical Facilities only if power generated by the Wildorado I Project is: (1) being marketed wholesale or (2) start-up, back-up and maintenance power is being delivered to Wildorado I for its own use. When Wildorado II begins operations, the Common Physical Facilities will continue to serve only the Wildorado Parties' power output in the same two circumstances as they are currently used by Wildorado I. Additionally, neither Wildorado I nor Wildorado II will own, operate or control any transmission facilities other than the Common Facilities. The project agreements, licenses, permits, and real property will serve only a supporting role in the operation of the Common Physical Facilities and will serve no other generation or transmission functions. Accordingly, we will grant Applicants' waiver of the OATT, OASIS, and Standards of Conduct requirements set forth in Order Nos. 888, 889, and 890,²⁶ and in section 35.28, and Parts 37 and 358 of the Commission's regulations.²⁷

²⁴ *Id.*

²⁵ *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).

²⁶ Consistent with *Black Creek*, Applicants must file, within 60 days of receiving a request for transmission service a *pro forma* OATT and any additional requirements to comply with Order Nos. 888 and 890.

²⁷ The Commission will grant the requested waiver of the requirement to establish and maintain an OASIS site 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 information from Applicants that it needed to complete its evaluation. The Commission's waiver of the Standards of Conduct will remain in effect unless and until the Commission takes action on a complaint by an entity alleging that Applicants have
(continued...)

The Commission orders:

(A) The proposed Agreement is hereby accepted for filing subject to Applicants submitting a further filing, within 10 days of the Agreement and the related agreements being removed from escrow and becoming effective, revising the rate schedule to reflect the effective date of the Agreement.

(B) Applicants' request for waiver of the OATT and OASIS requirements of Order Nos. 888, 889, 890 as well as section 35.28 and Parts 37 and 358 of the Commission's regulations, is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

used their access to transmission information to unfairly benefit Applicants' own sales, or an affiliate's sales. In addition, as the Commission recently explained in *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*, 127 FERC ¶ 61,159, at n.21 (2009), Applicants 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.