

127 FERC ¶ 61,141
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Material Changes in Facts Underlying Waiver
of Order No. 889 and Part 358 of the
Commission's Regulations

Docket No. AD09-7-000

ORDER CLARIFYING REQUIREMENT TO NOTIFY COMMISSION OF
MATERIAL CHANGES IN FACTS AND ALLOWING 45-DAY FILING PERIOD
FOR NOTIFICATIONS

(Issued May 21, 2009)

1. In Order No. 889,¹ the Commission directed all public utilities that own, control or operate facilities for transmitting energy in interstate commerce to provide certain types of information regarding their transmission operations on an Open Access Same-time Information System (OASIS). The Commission also established Standards of Conduct requiring that personnel engaged in transmission system operations function independently from personnel engaged in marketing functions. In Order No. 889, the Commission stated that it would entertain requests for waiver of these requirements on a case-by-case basis, and, on a case-by-case basis has granted waivers for certain public utilities.² The Commission subsequently revised the Standards of Conduct in various proceedings, most recently in Order No. 717, but affirmed that public utilities may request a waiver of those requirements.³ In Order No. 717, the Commission found that

¹ *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).

² *See, e.g., Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232 (1996) (*Black Creek*).

³ *See Standards of Conduct for Transmission Providers*, Order No. 717, 73 Fed. Reg. 63796 (Oct. 27, 2008), FERC Stats. & Regs. ¶ 31, 280, at P 33 (2008), *reh'g pending*. The Standards of Conduct are currently codified in Part 358 of the Commission's regulations.

any entity that has previously received a full or partial waiver of prior versions of the Standards of Conduct may continue to rely on that waiver.

2. It has come to the Commission's attention that some utilities may continue to rely on these waivers even after they no longer qualify for them. The purpose of this order is to clarify that such reliance is inappropriate if there is a material change in the underlying facts on which the waiver was granted, and that the Commission must be notified when such a change occurs.

Background

3. In Order No. 889, the Commission acknowledged that it might be burdensome for certain small utilities to comply with the rules therein, and stated that utilities may seek a waiver of some or all of the requirements.⁴ In subsequent orders outside of that rulemaking proceeding, the Commission established criteria for granting requests for waiver. The Commission held that waiver of Order No. 889 would be appropriate for a public utility if it: (1) owns, operates, or controls only limited and discrete facilities; or (2) qualifies as a small public utility, unless it is a member of a tight power pool, or there are other circumstances that indicate a waiver is not justified.⁵ To qualify as a small public utility, an applicant "must be a public utility that meets the Small Business Administration (SBA) definition of a small electric utility, i.e., disposes of no more than 4 million MWh annually."⁶ In determining the amount of electricity a public utility "disposes of," the Commission has considered the annual sales of the public utility in megawatt hours.⁷

⁴ Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,594.

⁵ *Black Creek*, 77 FERC at 61,941; *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 62,126-27 (1997) (*Central Minnesota*). See also Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 23.

⁶ *Black Creek*, 77 FERC at 61,941.

⁷ The Commission, for example, identified the number of small public utilities that would be affected by open access and OASIS reforms by reference to sales data reported in FERC Form No. 1. See Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,628. In Order No. 717, the Commission clarified that public utilities that have received a full or partial waiver of the Standards of Conduct could continue to rely on those waivers to the extent the reforms adopted therein did not render such waivers moot. See Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 33.

4. The Commission articulated similar criteria for evaluating requests for waiver of open access requirements adopted in Order No. 888.⁸ In orders granting waivers of Order No. 889, the Commission has not explicitly stated what would happen if the facts upon which the Commission relied when granting the waiver changed. Orders granting waiver of Order No. 889 or Standards of Conduct requirements generally have been silent on any obligation for the public utility to notify the Commission of material changes in fact that might affect the waiver.⁹ Instead, those orders provide that such waivers remain effective until the Commission takes action in response to a complaint alleging inadequate access to transmission information or use of transmission information to unfairly benefit a utility's sales, even if material changes have occurred.¹⁰

⁸ See *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, at 31,853-54 (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). In Order No. 888, the Commission noted that the disposition of 4 million MWh a year translated, at the time, into sales in the range of \$120-180 million/year and noted that the SBA defines a small electric utility as one that disposes of 4 million MWh per year. Order No. 888, FERC Stats. & Regs. ¶31,036 at 31,897 and n.1072.

⁹ See, e.g., *Alcoa Power Generating, Inc.*, 108 FERC ¶ 61,243 (2004); *Salmon River Electric Cooperative, Inc.*, 107 FERC ¶ 61,132 (2004); *FPL Energy Oliver Wind, LLC*, 123 FERC ¶ 61,246 (2008); *but see Wabash Valley Power Ass'n*, 123 FERC ¶ 61,193, at P 11 (2008) (directing applicant to notify the Commission if material circumstances change that affect its continued qualification for waiver); *Perryville Energy Partners, L.L.C.*, 118 FERC ¶ 61,140, at P 8 (2007) (directing notification if material circumstances change); *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676, FERC Stats. & Regs. ¶ 31,216, at P 115 (2006), *reh'g denied*, Order No. 676-A, 116 FERC ¶ 61,255 (2006), *amended*, Order No. 676-B, FERC Stats. & Regs. ¶ 31,246 (2007), *revised*, Order No. 676-C, 73 Fed. Reg. 43,848 (July 29, 2008), FERC Stats. & Regs. ¶ 31,274 (2008), *order on clarification and reh'g*, Order No. 676-D, 124 FERC ¶ 61,317 (2008) (extending to small entities that previously were granted waiver of Order Nos. 888 and 889 waivers of the OASIS requirements adopted in the Rule, with the condition that if material circumstances change that affect continued qualification they must report it to the Commission).

¹⁰ In contrast, for waivers of Order No. 888, the Commission has required each utility receiving a waiver to file an Open Access Transmission Tariff (OATT) within 60

(continued)

Guidance

5. In order to ensure that public utilities continue to qualify for a waiver of the requirements of Order No. 889 or the Standards of Conduct, the Commission will require any public utility that has received a waiver of Order No. 889 or the Standards of Conduct to notify the Commission if there has been a material change in facts that may affect the public utility's waiver. A material change would include that the utility no longer meets the sales threshold applied to determine eligibility for the waiver¹¹ or if the facilities owned, operated, or controlled by the public utility are no longer "limited and discrete." Upon receipt of the notice of the change of facts, the Commission may reevaluate continued eligibility for the waiver. Utilities that are granted a waiver have 30 days from the date of the change to submit a notification. A previously-granted waiver will remain in effect until the Commission acts on such filing.

6. We recognize that the Commission has not previously required utilities with waivers to notify the Commission of material changes in fact that may affect the waiver. Accordingly, we will allow all public utilities that previously have been granted a waiver 45 days from the date of publication of this order in the *Federal Register* to notify the Commission of any change in material facts upon which the Commission relied in granting a waiver of the requirements of Order No. 889 and the Standards of Conduct.

The Commission orders:

(A) Any public utility that has received a waiver of Order No. 889 or the Standards of Conduct is hereby directed to notify the Commission if there has been a material change in facts that may affect the waiver, within 30 days of the date of the change, as discussed in the body of this order.

days of receiving a request for transmission service on its transmission system. *See, e.g., Central Minnesota*, 79 FERC at 62,126-27.

¹¹ As discussed in *Wolverine Power Supply Cooperative, Inc.*, to be issued concurrently with this order, the Commission retains the existing threshold for defining a small public utility. *Wolverine Power Supply Cooperative, Inc.*, 127 FERC ¶ 61,159 (2009).

(B) The Secretary is hereby directed to publish a copy of this order in the *Federal Register*.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.