

127 FERC ¶ 61,159
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wolverine Power Supply Cooperative, Inc.

Docket No. OA08-116-000

ORDER DENYING REQUEST FOR WAIVER
OF THE STANDARDS OF CONDUCT REQUIREMENTS

(Issued May 21, 2009)

1. Wolverine Power Supply Cooperative, Inc. (Wolverine) requests renewal of its waiver of the Standards of Conduct for Transmission Providers (Standards of Conduct).¹ It requests a continued waiver of Part 358 of the Commission's regulations, the Standards of Conduct requirements in Order No. 889² as revised by Order No. 2004³ and Order No. 690.⁴ We will deny Wolverine's request because Wolverine no longer meets the requirements for waiver and we are not convinced that the long-standing criteria for waiver should be revised.

¹ The Commission granted waiver of the Standards of Conduct in *Wolverine Power Supply Cooperative, Inc.*, 81 FERC ¶ 61,369 (1997) (Waiver Order).

² *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035, *clarified*, 77 FERC ¶ 61,335 (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), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000).

³ *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(2004), *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 Corporation v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

⁴ *Standards of Conduct for Transmission Providers*, Order No. 690, FERC Stats. & Regs. ¶ 31,237, *order on clarification*, Order No. 690-A, FERC Stats. & Regs. ¶ 31,243 (2007).

Background

2. Wolverine is a non-profit generation and transmission electric cooperative that provides wholesale service to meet all the power requirements of its six members, which all serve retail customers.⁵ It generates and purchases energy primarily to serve its members and sells only residual energy into the Midwest Independent Transmission System Operator Inc. (Midwest ISO) market. Wolverine is also a Midwest ISO transmission-owning member. Wolverine's transmission system consists of approximately 1,200 miles of 69 kV and 138 kV looped transmission lines and associated facilities, which are included in the Michigan Joint Pricing Zone under Midwest ISO's Open Access Transmission, Energy and Operating Reserves Tariff (ASM Tariff).⁶

3. The Standards of Conduct requirements apply to public utilities that own, operate or control facilities used for the transmission of electricity in interstate commerce, and require the separation of transmission personnel from wholesale marketing personnel. However, the Commission has recognized that these requirements may be a financial burden on small public utilities.⁷ For this reason, the Commission's regulations provide that a transmission provider may request waiver of all or part of the Standards of Conduct requirements for "good cause."⁸ In prior orders the Commission has enunciated the standards for waiver of, or exemption from, some or all of the requirements of the Standards of Conduct.⁹ Specifically, the Commission has granted waivers of the

⁵ Wolverine repaid its debt to the Rural Utilities Service and is a public utility within the meaning of section 201(e) of the Federal Power Act (FPA), 16 U.S.C. § 824 (e) (2006). It thus is subject to this Commission's jurisdiction.

⁶ With Commission acceptance of Midwest ISO's proposals for an Ancillary Services Market, effective January 6, 2009, the Midwest ISO's Open Access Transmission and Energy Markets Tariff became the ASM Tariff. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,321 (2008).

⁷ *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 (1996) (Order No. 888), *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).

⁸ 18 C.F.R. § 358.1(d) (2008).

⁹ *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).

Standards of Conduct requirements to: (1) a utility that owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) a small public utility¹⁰ that owns, operates, or controls an integrated transmission grid unless it is a part of a tight power pool, or unwarranted by other circumstances.¹¹

4. In the Waiver Order, the Commission granted Wolverine a waiver from the Standards of Conduct requirements because: (1) it was a small public utility with sales of only 1.5 million MWh at the time; (2) it was not part of a power pool; and (3) no other circumstances indicated that waiver was not justified. The Waiver Order did not address Wolverine's obligation to notify the Commission of material changes in fact that may affect the waiver. The Commission stated that the waiver remains in effect until the Commission takes action in response to a complaint alleging that the utility has used its access to information about transmission to unfairly benefit its own sales or the sales of an affiliate.¹²

The Filing

5. On May 16, 2008, Wolverine filed to renew its waiver of the Standards of Conduct. Wolverine states that its electric power sales have increased to 4.5 million MWh¹³ in 2007 and thus exceed the 4 million MWh threshold for a small public utility principally relied upon by the Commission in initially granting the waiver. Wolverine states that while the Waiver Order did not require that Wolverine reapply for the waiver should its sales exceed 4 million MWh, Wolverine nevertheless renews its requests for waiver of its Standards of Conduct requirements. According to Wolverine, the rationale for granting waiver to small public utilities still applies to it, and the Commission should consider the magnitude of load growth over the twelve years since the Commission adopted the Small Business Administration threshold and raise the limit for what constitutes a small public utility accordingly. Wolverine states that if the Commission

¹⁰ At that time, the Small Business Administration had defined a small public utility as having annual electric sales of no more than 4 million MWh. *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,897.

¹¹ *Peetz Logan Interconnect, LLC*, 122 FERC ¶ 61,086 (2008); *see also Alcoa Power Generating, Inc.*, 108 FERC ¶ 61,243, at P 27 (2004) (citing *Black Creek*, 77 FERC ¶ 61,232 at 61,941). A waiver from the Standards of Conduct will remain in effect unless and until the Commission takes action on a complaint that access to transmission information unfairly benefited the entity's own sales, or an affiliate's sales. *See Peetz Logan Interconnect, LLC*, 122 FERC ¶ 61,086, at n.22.

¹² *See* Waiver Order, 81 FERC ¶ 61,369 at 12.

¹³ *See* Wolverine's Request at 4.

concludes that renewed waiver is not required, the Commission may dismiss this request as moot. To the extent that Wolverine can no longer rely on the Waiver Order, it requests that the Commission grant its request for renewal of the waiver.

6. Wolverine states that it would be unduly burdensome, and unnecessary to advance the goals of open access, to require it to comply with the Standards of Conduct. According to Wolverine, when the waiver was granted in 1997, it had 92 employees; today it has 106 employees, and absent a renewed waiver, it estimates it would have to hire six new employees (approximately a 5 percent increase) to separate transmission personnel from wholesale marketing personnel. Wolverine further states that costs associated with changing the layout of the plant, and labor costs, would be approximately \$1 million in the first year and about \$674,000 per year thereafter. Wolverine argues that such protections are not necessary because it is not materially engaged in the competitive wholesale marketing of energy. It generates and purchases energy primarily to serve its members, and any excess available for sale to others is incidental to serving its members. Wolverine states that, in 2007, it sold a small amount of residual energy into the Midwest ISO spot market. It also states that it is neither a transmission provider nor the balancing authority for the Michigan Joint Pricing Zone, and therefore should not trigger the Commission's concern with preventing transmission providers from giving themselves an undue preference over their customers through the exchange of insider information between system operators and wholesale marketers. In fact, Wolverine argues that it has less control over the transmission system than at the time of the Waiver Order because its members' facilities are now under Midwest ISO's ASM Tariff.

7. Wolverine argues that the Commission should no longer rely on the Small Business Administration's 4 million MWh threshold because the threshold is outdated in light of the changes in the energy industry in the past decade. Wolverine points out that from 1997 to 2006, the electric Noncoincident Peak Load for the United States rose from 637,677 MW to 762,228 MW (Summer) and from 529,874 MW to 635,597 MW (Winter).¹⁴ These figures demonstrate an increase of about 20 percent for the Summer and Winter loads combined over 9 years, or about 2.2 percent per year on average. According to Wolverine, adjusting the Small Business Administration threshold for a load growth of 2.2 percent per year for twelve years since 1996 results in a threshold of 5.2 million MWh, a threshold that Wolverine would still meet.

Notice of the Filing and Responsive Pleadings

8. Notice of Wolverine's filing was published in the *Federal Register*, 73 Fed. Reg. 30,914-15 (2008), with interventions, comments and protests due on or before June 6, 2008. On June 6, 2008, Consumers Energy Company (Consumers Energy) filed a motion

¹⁴ See Energy Information Administration, Annual Energy Review 2006 at Table 8.12, available at <http://www.eia.doe.gov/aer/pdf/aer.pdf>.

to intervene and comments. On June 17, 2008, Wolverine filed a motion for leave to file an answer and an answer to Consumers Energy's comments.

9. Consumers Energy notes that Wolverine's 2007 electric sales exceeded the threshold for a small public utility by 12.5 percent. Consumers Energy argues that the threshold is still appropriate because it ensures that only those entities that are truly small, for which compliance with the Standards of Conduct requirements would be unduly burdensome, are granted waivers. According to Consumers Energy, Wolverine's electric sales have increased 200 percent since the waiver was granted.

10. Consumers Energy also argues that even if the Commission finds that Wolverine continues to be a small public utility for the purposes of the waiver criteria, renewal may not be warranted because of other circumstances. Consumers Energy references Wolverine's statement that its affiliate, Wolverine Power Marketing Cooperative, Inc. (Wolverine Marketing), is a significant player in the Michigan retail choice program. Nearly 23 percent of Wolverine's MWh sales in 2007 were to Wolverine Marketing.¹⁵ Consumers Energy asserts that granting renewed waiver might allow Wolverine to use its access to transmission information to unfairly benefit Wolverine Marketing's sales and this is precisely the type of competitive harm that the Standards of Conduct are intended to prevent.

Discussion

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motion to intervene serves to make the entity that filed it a party to the proceeding.

12. Rule 213(a) of the Commission's Rules of Practice and Procedure¹⁶ prohibits an answer to a protest, unless otherwise permitted by the decisional authority. We are not persuaded to accept Wolverine's answer and will, therefore, reject it.

13. At the outset, we note that, while Wolverine's request was pending, Order No. 717¹⁷ was issued. Order No. 717, among other things, revised the Standards of Conduct to: (1) eliminate the concept of energy affiliates and (2) eliminate the corporate separation approach in favor of the employee functional approach used in Order Nos.

¹⁵ See Consumers Energy's Comments at 4 n.5 (citing Wolverine's 2007 FERC Form No. 1, page 311, line 6, column d).

¹⁶ 18 C.F.R. § 385.213(a)(2) (2008).

¹⁷ *Standards of Conduct for Transmission Providers*, Order No. 717, 73 Fed. Reg. 63,796 (Oct. 27, 2008), FERC Stats. & Regs. ¶ 31,280 (2008).

497¹⁸ and 889.¹⁹ However, Order No. 717 did not revise the waiver standards at issue here.²⁰

14. We will address Wolverine's request even though no complaint has been filed that would trigger the Commission review envisioned by the Waiver Order. Wolverine raised the question of continued compliance through its renewal request, bringing to our attention substantive changes in the circumstances that had been the basis for the waiver. The Waiver Order did not direct Wolverine to notify the Commission of any material changes in facts relied upon in granting the waiver that may affect its continued eligibility for the waiver. However, if the facts upon which the Commission relied in granting a request for waiver of Order No. 889 have changed such that the utility no longer meets the sales threshold applied to determine eligibility for the waiver, the Commission must reconsider whether waiver of the Standards of Conduct remains appropriate for the utility.²¹

15. At the time the Commission issued Order Nos. 888 and 889, the Small Business Administration defined a small public utility as one that "disposes of no more than 4 million MWh annually."²² The Commission has used this definition to determine the appropriate threshold for measuring whether or not a utility is small enough to allow

¹⁸ *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, Order No. 497, FERC Stats. & Regs. ¶ 30,820 (1988); Order No. 497-A, *order on reh'g*, FERC Stats. & Regs. ¶ 30,868 (1989); Order No. 497-B, *order extending sunset date*, FERC Stats. & Regs. ¶ 30,908 (1990); Order No. 497-C, *order extending sunset date*, FERC Stats. & Regs. ¶ 30,934 (1991), *reh'g denied*, 58 FERC ¶ 61,139 (1992); *aff'd in part and remanded in part sub nom. Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992) (collectively, Order No. 497).

¹⁹ Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 2.

²⁰ In Order No. 717, the Commission said: "[I]t would be both burdensome and unfair to require entities that have already received waivers from the Standards on a case-by-case basis to file their requests again. Therefore, existing waivers relating to the Standards shall continue in full force and effect." *Id.* P 31.

²¹ We also note that, in an order being issued concurrently with this order, the Commission directs any public utility that received a waiver of the requirements of Order No. 889 and Part 358 of the Commission's regulations to notify the Commission of any material changes in facts that the Commission relied on when it granted the waiver. *See Material Changes in Facts Underlying Waiver of Order No. 889 and Part 358 of the Commission's Regulations*, 127 FERC ¶ 61,141 at P 5-6 (2009). We will construe Wolverine's request in this docket to be the required notification.

²² *Black Creek*, 77 FERC ¶ 61,232 at 61,941.

waiver of the Standards of Conduct requirements.²³ Wolverine's electric sales in 2007 were 4.5 million MWh. We find that the Small Business Administration's definition of a small public utility at the time Order Nos. 888 and 889 were issued is still the appropriate threshold; Wolverine has not persuaded us to revise the long-standing criteria for waiver. Wolverine's sales have exceeded the 4 million MWh threshold.²⁴ We will therefore deny this request for waiver of the Standard of Conduct requirements.²⁵

The Commission orders:

(A) Wolverine's request for waiver of the Standards of Conduct requirements is hereby denied, as discussed in the body of this order.

²³ See also *Renewable Energy Systems Americas Inc. and PEAK Wind Development, LLC v. Otter Tail Power Company and Minnkota Power Cooperative, Inc.*, 125 FERC ¶ 61,336, at P 33, fn 46 (2008) (hearing set to determine if Otter Tail Power Company still meets criteria for Order No. 889 waiver).

²⁴ We note that the Small Business Administration has changed its definition of small public utilities to reference the phrase "electrical output" rather than "disposes of." However we continue to find that the phrase "disposes of" no more than 4 million MWh annually is appropriate because this is consistent with language used in section 211A(c) of the Federal Power Act, 16 U.S.C. § 824j-1 (2006).

²⁵ Even though we deny Wolverine's request, we note that compliance with the Standards of Conduct may not be as onerous as Wolverine asserts. Wolverine filed its request in this proceeding before Order No. 717 was issued. Order No. 717 eliminates the corporate separation approach to the Independent Functioning Rule, which was adopted in Order No. 2004, and replaces it with the employee functional approach used in Order Nos. 497 and 889. The relevant consideration for purposes of applying the Independent Functioning Rule is the employee functional approach adopted in Order No. 717. Thus, while, under Order No. 2004, *any* employee of a marketing or energy affiliate is prohibited from interacting with transmission function employees, Order No. 717 restricted the category of employees who must function independently from transmission function employees to those who actively and personally engage in marketing functions. Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 34-40.

(B) Wolverine must comply with the Standards of Conduct within 30 days of the date of issuance of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.