

140 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

United States Department of Energy –
Bonneville Power Administration

Docket No. NJ08-2-001

ORDER DENYING REHEARING

(Issued July 19, 2012)

1. Caithness Shepherds Flat, LLC (Caithness)¹ has requested rehearing of the Commission's order that granted the petition for declaratory order filed by the Bonneville Power Administration (Bonneville).² In the July 7 Order, the Commission declared that two unexecuted long-term firm point-to-point, transmission service agreements (Agreements) between Bonneville and Caithness, and the Agreements' service commencement dates, are consistent with Bonneville's Order No. 888³ safe harbor reciprocity tariff (Tariff).⁴ For the reasons described below, we will deny rehearing.

¹ Caithness is the successor-in-interest, since November 15, 2006, to Lifeline Renewable Energy, Inc (Lifeline). References to Caithness include Lifeline, as appropriate.

² *United States Department of Energy – Bonneville Power Administration*, 124 FERC ¶ 61,018 (2008) (July 7 Order).

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, at 31,760-61 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,281-87, *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) (Order No. 888).

⁴ As a federal power marketing administration within the U.S. Department of Energy, Bonneville is not a public utility within the meaning of sections 201, 205, and

(continued...)

Background

2. The July 7 Order describes more fully the background to this case. In short, starting in 2002, Caithness submitted to Bonneville “linked” generation interconnection and transmission service requests⁵ for generation from the Shepherds Flat Wind Farm Project (Wind Farm) that Caithness was in the process of developing. Caithness later withdrew all but two service requests, one for transmission of 500 MW, to start on January 1, 2006, and the second for transmission of 250 MW, to start on January 1, 2007. Both requests specified the Point of Receipt as Bonneville’s 500 kV Slatt Substation. Bonneville’s practice at that time was to hold the transmission service requests pending its completion of the related interconnection requests’ environmental review.⁶

3. Subsequently, Bonneville observed that its linkage practice was having the unintended result of keeping transmission capacity from the market. Bonneville’s experience was that, in a number of cases, customers would submit a generator interconnection request that required construction of new facilities and thus environmental review, and simultaneously a transmission service request that utilized existing facilities and so did not require environmental review. Given the time needed for state and local environmental review, and what Bonneville has characterized as the

206 of the Federal Power Act (FPA), 16 U.S.C. §§ 824, 824d, and 824e (2006). Nevertheless, Bonneville filed an Order No. 888 reciprocity tariff with the Commission seeking “safe harbor” status. *United States Department of Energy – Bonneville Power Administration*, 80 FERC ¶ 61,119 (1997). Succinct explication of an Order No. 888 safe harbor reciprocity tariff can be found in *Southwestern Power Administration*, 114 FERC ¶ 61,292, at P 2 (2006).

⁵ Bonneville’s first Long-Term Queue Management Business Practice, adopted July 21, 2006 (2006 Queue Practice), described transmission service requests that are “linked” to generation interconnection requests thus: The two requests are submitted on the same day; the point of receipt for transmission service and the point of interconnection in the interconnection request are identical; and the requests specify a requested reserved transmission capacity that does not exceed the capacity specified in the interconnection request. *See* Bonneville, November 26, 2007, Petition for a Declaratory Order Relating to Two Unexecuted Long Term Firm Point-to-Point Transmission Service Agreements with Caithness Shepherds Flat, LLC at 8 (Bonneville Petition).

⁶ The National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (2006) (NEPA), requires Bonneville to study the environmental effects of a proposed generating project. Such study depends on state and local environmental processes that must be completed before Bonneville can complete its environmental review.

failure of customers to pursue diligently the state siting process,⁷ the capacity encumbered by the interconnection request would sit idle even though other customers in the transmission queue could have used this capacity.

4. For this reason, Bonneville revised its 2006 Queue Practice (Revised Queue Practice), effective September 1, 2007, such that where a customer had submitted a generation interconnection request and a linked transmission service request, Bonneville would proffer a transmission service agreement fifteen days after Bonneville delivered the completed interconnection feasibility study to the customer, or, if the customer had waived the feasibility study, fifteen days after Bonneville tendered the interconnection system impact study agreement.⁸

5. During the comment period on the proposed Revised Queue Practice, Caithness protested to Bonneville that the proposed change in handling linked requests was bad public policy and recommended that the developers in the queue who had relied on the former practice should receive grandfathered treatment and remain under the former practice.⁹ Bonneville, however, adopted the Revised Queue Practice without such grandfather provisions.

6. Pursuant to the Revised Queue Practice, Bonneville offered Caithness, on October 11, 2007, and November 7, 2007, the two Agreements at issue, with transmission service for 250 MW to start November 1, 2007,¹⁰ and transmission service for 474 MW to start December 1, 2007.¹¹ Both Agreements designated the Point of Receipt as the 500 kV bus in Bonneville's Slatt Substation. The Agreements provided that, upon the Wind Farm achieving commercial operation, Caithness could change the Point of Receipt to a

⁷ Bonneville Petition at 9-11. Bonneville cited Caithness as failing to pursue diligently the state permitting process. *Id.* at 5. Caithness replied, "It made little sense for [Caithness] to fast-track the siting process and incur big expenses, between 2003 and late 2005, during which time [Bonneville] had mistakenly determined . . . that there was no available Transmission Capacity (ATC) for Shepherds Flat." Caithness, December 21, 2007, Motion to Intervene and Protest, at 26 (Caithness Protest).

⁸ Bonneville Petition at 11-12.

⁹ Caithness Protest at 19-20.

¹⁰ Bonneville Petition at Attachment A, Exhibit A, Table 1A.

¹¹ Bonneville Petition at Attachment B, Exhibit A, Table 1B.

nearby new 230 kV Slatt Substation, whose construction would accommodate the Wind Farm's power.¹²

7. Caithness objected that it should not have to begin taking transmission service because Bonneville had not yet constructed the intended Point of Receipt, i.e., the new 230 kV Slatt Substation, which was awaiting completion of environmental review, and that Bonneville cannot require execution of a transmission service agreement until Bonneville can simultaneously offer a generator interconnection agreement.¹³ Caithness contended that Bonneville staff had made written and oral assurances to Caithness that Bonneville would continue to link the Wind Farm interconnection and transmission requests so that Caithness would not be asked to sign transmission agreements until Bonneville could also offer an interconnection agreement.¹⁴

8. Contradicting Bonneville's statement that the Slatt Substation is a valid Point of Receipt, Caithness asserted that the existing 500 kV Slatt Substation is really only a switching station, where a 500 kV line owned by Portland General Electric Company (Portland General) connects with four Bonneville 500-kV lines. Caithness asserted also that the Slatt Substation has no transformers, tap points, or other facilities that could serve as a point of interconnection for the Wind Farm's generation, and that the Portland General line serves as a dedicated generator-feed.¹⁵

9. Bonneville's position was that the 500 kV Slatt Substation, the Point of Receipt specified in the Agreements, existed and was being used by several Bonneville customers,¹⁶ and that no version of its Business Practices had provided that Bonneville would offer the transmission service agreement only when it offered the generator interconnection agreement.¹⁷

10. Caithness saw its choices as executing the two Agreements and paying for transmission service that, it claimed, Bonneville could not yet provide, or else forfeiting its position in Bonneville's transmission queue.¹⁸ It asked Bonneville to file the

¹² Bonneville Petition at 6, 20.

¹³ Caithness Protest at 9-10.

¹⁴ *Id.* at 18.

¹⁵ *Id.* at 8-9.

¹⁶ The transmission customers are listed in Bonneville Petition at Attachment P. In addition to Portland General, they are IPCM, EVGR, PPMI, & PRC1.

¹⁷ Bonneville Petition at 8, 13.

¹⁸ Caithness Protest at 22, 25.

unexecuted Agreements with the Commission on the issue of whether the requirement that Caithness begin taking transmission service on the specified dates is consistent with the Bonneville Tariff.¹⁹ Bonneville filed the Petition on November 26, 2007.

The July 7 Order

11. In the July 7 Order, the Commission held that Bonneville had acted consistently with its Tariff when it offered Caithness the two Agreements with the proposed service dates of November 1, 2007, and December 1, 2007.²⁰ In doing so, the Commission observed that these dates are later than the January 2006 and January 2007 service commencement dates that Caithness had requested, and noted that the facilities over which Bonneville will be providing transmission service already exist.²¹ The Commission rejected Caithness's argument that Bonneville had violated its Tariff when it changed its Business Practices concerning the transmission queue, and that it should have filed the Revised Queue Practice for Commission approval. The Commission pointed out that Bonneville is not a public utility, that its tariff is a voluntarily-filed reciprocity tariff, and that it is not required to file its tariff or changes to its tariff with the Commission.²²

12. While acknowledging a practical linkage between interconnection and transmission service, the Commission cited its previous holdings that the two services are nevertheless distinct, that each can be requested and provided separately. The Commission stated that to grant Caithness' requested relief would be to treat Caithness in an unduly preferential manner because Bonneville would not necessarily link interconnection and transmission service for its other customers.²³

¹⁹ Caithness states that it is protecting its right to the transmission capacity by exercising its service-deferral rights, under section 17.7 of the Bonneville Tariff, and will continue to do so and pay the corresponding fees while Commission action on its rehearing request is pending, at least until Bonneville completes construction of the transmission point of receipt, (i.e., the new 230 kV Slatt Substation). Rehearing Request at 1-2.

²⁰ July 7 Order, 124 FERC ¶ 61,018 at P 24.

²¹ *Id.* at P 25.

²² *Id.* at P 26 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,761; Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,281-82, 30,285).

²³ July 7 Order, 124 FERC ¶ 61,018 at P 27 (citing *Tennessee Power Co.*, 90 FERC ¶ 61,238, at 61,761-762 (2000) (*Tennessee Power*); *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 118 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. &

13. The Commission also found that, to interpret the Tariff's provisions, it did not need to resort to extrinsic evidence, such as representations that Bonneville's officers had made to Caithness²⁴ during the years before Bonneville adopted the Revised Queue Practice. The Commission also found Caithness' reliance on *Duke Energy Corporation*²⁵ inapposite. That case concerned the signing of transmission agreements before the System Impact Study and the Interconnection Facilities Study had been completed while, in this case, such studies had been completed; the uncompleted studies at issue in this case are environmental studies, which are beyond the Commission's jurisdiction. Moreover, post-*Duke Energy* Commission rulings, in *Tennessee Power* and Order No. 2003, explained that interconnection service and transmission (i.e., delivery) service are separate and distinct.²⁶

14. The Commission stated that it has no jurisdiction over state siting processes, nor Bonneville's environmental review process, and that its review is over Bonneville's application of its Tariff.²⁷ The Commission further observed that Caithness had options open to it that would maintain its requested transmission service rights while it completed project construction and interconnection. Caithness could request up to five, one-year extensions for commencement of service, or it could transfer on a temporary basis all or a portion of its transmission service rights under the Agreements.²⁸

Regs. 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

²⁴ July 7 Order, 124 FERC ¶ 61,018 at P 28. The representations, according to Caithness, were that Bonneville would not offer a transmission service agreement until it could also offer an interconnection agreement.

²⁵ *Duke Energy Corp.*, 94 FERC ¶ 61,187, at 61,657 (2001) (*Duke Energy*). Caithness had cited *Duke Energy* as holding that interconnection and transmission requests are linked, and the Commission expects transmission providers to allow customers to consider both aspects of the transactions.

²⁶ July 7 Order, 124 FERC ¶ 61,018 at P 29.

²⁷ *Id.* at P 30.

²⁸ *Id.* at P 31. Caithness has elected to exercise its service-deferral rights. *See supra* note 19.

Rehearing Request

15. On rehearing, Caithness claims that the July 7 Order erred in four respects: (1) Caithness disputes the factual conclusion that the facilities over which Bonneville can provide transmission service already exist, and argues that it has shown that Bonneville cannot provide the Agreements' transmission service until the new 320 kV Slatt Substation is constructed; (2) the Commission acted unreasonably and ignored precedent by approving Bonneville's change to its "linkage" Business Practice without giving weight to its past written assurances to Caithness; (3) the Commission erred in determining that to grant Caithness the benefit of the prior linkage practice would be to treat Caithness in an unduly preferential manner; and (4) the Commission should have followed its precedent in *Duke Energy* and found that case relevant as to the linkage of interconnection and transmission services, and that not to have done so is arbitrary and unreasonable because the distinctions between that case and the instant case are insignificant.²⁹

Discussion

16. The issue before the Commission in the July 7 Order was whether Bonneville's actions were consistent with its Tariff. In the July 7 Order, the Commission found that they were. We affirm that finding.

17. Bonneville's Tariff provides, "The Transmission Provider shall offer a standard form Point-to-Point Transmission service Agreement . . . to an Eligible Customer when it submits a Completed Application for Long-Term Firm Point-to-Point Transmission Service."³⁰ Bonneville did just that. Bonneville offered the Agreements for transmission (delivery) service to Caithness after Caithness had submitted complete applications and after Bonneville had completed feasibility studies. Bonneville was not required by its Tariff to link the Agreements for transmission (delivery) service to other agreements (interconnection agreements) or to other studies (environmental studies). Thus, its practice of not doing so did not violate its Tariff. Indeed, because Bonneville is not subject to regulation as a public utility under the FPA,³¹ even if we were to rule in Caithness's favor, the only relief we could provide would be to conclude that

²⁹ On August 27, 2008, Bonneville filed an answer to Caithness's request for rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2012), prohibits an answer to a request for rehearing. We will, therefore, reject it.

³⁰ Bonneville, Open Access Transmission Tariff, section 13.4, Service Agreements (October 3, 2008).

³¹ See 16 U.S.C. § 824(f) (2006).

Bonneville's Tariff is not a safe harbor reciprocity tariff. However, because Bonneville does not yet have a Commission-accepted Tariff that conforms to the various Commission-ordered, post-Order No. 888 changes to the Commission's *pro forma* tariff, Bonneville's Tariff has not been a safe harbor reciprocity tariff for some time already.³²

18. Caithness does not come to grips with the Commission's analysis, but instead focuses on ancillary matters. First, Caithness argues, on rehearing, that the Commission erred in "bas[ing] its order on its belief . . . that 'the facilities over which Bonneville will be providing transmission service already exist.'"³³ The Commission did no such thing. The Commission made this statement in passing. Even if the statement were to be deleted entirely from the July 7 Order, the Commission's analysis and ultimate conclusion, described above, would not change.

19. In any event, at the time of the service commencement dates sought by Caithness (January 1, 2006, and January 1, 2007), Caithness was not then able to provide the electric energy it sought to transmit.³⁴ Moreover, the service commencement dates offered by Bonneville in response (November 1, 2007, and December 1, 2007) post-dated the service commencement dates requested by Caithness.

20. Next, Caithness argues that Bonneville was unable to provide the transmission service described in the two Agreements because the requisite facilities did not exist in November and December 2007. In fact, the Commission did have before it record evidence that the 500 kV Slatt Substation could provide transmission service at that time. Bonneville included, in its Petition, a chart of transmission requests and service agreements showing several customers, in addition to Portland General, taking service at the 500 kV Slatt Substation.³⁵

21. Next, Caithness challenges the Commission's "approving" Bonneville's changes in its Business Practice. Again, the Commission did no such thing. First, that change was not filed with the Commission so the Commission could hardly have approved it.

³² We note that, on March 29, 2012, in Docket No. NJ12-7-000, Bonneville filed proposed amendments to its Tariff and asked the Commission to confirm that with these amendments its Tariff satisfies the requirements for reciprocity status. Action on Bonneville's filing is pending.

³³ Rehearing Request at 2.

³⁴ As of December 21, 2007, when Caithness filed its Protest, Caithness was "in the process of developing the Shepherds Wind Flat Farm" so that the in-service date was a "future in-service date." Caithness Protest at 2, 4.

³⁵ See *supra* P 9 & n.16.

The July 7 Order correctly noted that Bonneville is not a regulated public utility, but rather has a voluntarily-filed Order No. 888 reciprocity tariff. Thus, Bonneville is not required to file changes in its Tariff, let alone changes in its Business Practices.³⁶

22. Next, Caithness challenges the Commission's determination that granting Caithness the relief it seeks would be unduly preferential. The two services at issue here, though, interconnection service and transmission (delivery) service, are separate and distinct, and have long been held to be so. To require Bonneville to treat them as one for Caithness (even assuming the Commission had the authority to order Bonneville to do so under its Tariff), when its stated practice is to view them as two, would necessarily treat Caithness differently, and unduly preferentially, compared to other Bonneville customers.

23. Finally, Caithness focuses on *Duke Energy*. That case, as the Commission discussed in the July 7 Order, addresses a different situation, where customers were required to sign transmission service agreements before completion of both the System Impact Study and the Interconnection Facilities Study. Here, such studies concerning transmission of electric power have been completed. The studies that are delaying construction of the interconnection facilities are environmental studies under NEPA and state and local environmental regulations, and, unlike the System Impact and Interconnection Facilities Studies at issue in *Duke Energy*, are not within the Commission's purview. Moreover, as the Commission stated in rejecting Caithness's reliance on *Duke Energy*, and as we note above, interconnection and transmission (delivery) services are separate and distinct services. Commission orders subsequent to *Duke Energy*, such as *Tennessee Power* and Order No. 2003, have reiterated this point consistently.³⁷

24. We therefore continue to find that, under its Tariff, Bonneville appropriately offered the Agreements to Caithness and that it assigned appropriate service commencement dates.

³⁶ July 7 Order, 124 FERC ¶ 61,018 at P 26.

³⁷ *Id.* at P 29; accord *Virginia Elec. and Power Co.*, 110 FERC ¶ 61,039, at P 20 (2005) (generation interconnection customer entitled to interconnection service without purchasing transmission delivery service at same time.)

The Commission orders:

Caithness's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.