

124 FERC ¶ 61,018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

U.S. Department of Energy --
Bonneville Power Administration

Docket No. NJ08-2-000

DECLARATORY ORDER

(Issued July 7, 2008)

1. On November 26, 2007, Bonneville Power Administration (Bonneville) filed a petition for declaratory order requesting that the Commission find its offering two unexecuted long-term, firm point-to-point transmission service agreements (Service Agreements) to Caithness Shepherds Flat, LLC (Caithness) to be consistent with Bonneville's reciprocity tariff, and that the proposed service commencement dates are the appropriate dates under the tariff. In this order, we grant Bonneville's petition that it followed the provisions of its Order No. 888¹ reciprocity tariff and that the service commencement dates are the appropriate dates under the tariff.²

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, 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).

² After the issuance of Order No. 888, Bonneville sought and obtained a determination by the Commission that it had an acceptable reciprocity tariff. Subsequently, Bonneville submitted additional filings to ensure that its OATT would continue to qualify for safe harbor status. *See United States Department of Energy – Bonneville Power Administration*, 80 FERC ¶ 61,119 (1997) (finding reciprocity tariff to be acceptable and requiring modifications); *United States Department of Energy – Bonneville Power Administration*, 84 FERC ¶ 61,068 (1998) (finding reciprocity tariff to be acceptable and requiring further modifications); *United States Department of Energy – Bonneville Power Administration*, 86 FERC ¶ 61,278 (1999) (finding reciprocity tariff to be acceptable). However, Bonneville has not yet filed a complete revised reciprocity tariff to comply with Order No. 890.

I. Bonneville's Filing

2. Bonneville states that, on September 18, 2002, LifeLine Renewable Energy, Inc. (LifeLine), Caithness' predecessor, submitted a request to interconnect 250 MW from the Shepherds Flat Wind Farm (Shepherds Flat) to the Bonneville transmission system with a point of interconnection at Bonneville's 500 kV Slatt substation. Bonneville states that, on October 16, 2002, Bonneville and LifeLine entered into a system impact study agreement for that request to interconnect.³ Bonneville further states that it completed the system impact study on February 5, 2003, and provided it to LifeLine.

3. Bonneville states that, subsequently, on September 17, 2003, LifeLine submitted a second request to interconnect an additional 750 MW at Bonneville's 500 kV Slatt substation, along with seven requests for long-term, firm point-to-point transmission service (the latter totaling 2,450 MW). Bonneville explains that, on October 28, 2003, Bonneville and LifeLine entered into a study agreement for the additional 750 MW interconnection request and the transmission requests. Bonneville states that it completed the interconnection feasibility evaluation on June 22, 2004, and provided it to LifeLine.

4. Bonneville asserts that it found that LifeLine's requests for 2,450 MW of transmission service exceeded LifeLine's need for service, and were clogging Bonneville's transmission queue. Bonneville explains that, at its request, LifeLine withdrew all but two of the transmission service requests, one for 250 MW and one for 500 MW. Bonneville states that the 250 MW request had a point of receipt at its 500 kV Slatt substation and a January 1, 2007 service commencement date, and the 500 MW request had a point of receipt at its 500 kV Slatt substation and a January 1, 2006 service commencement date.

5. Bonneville states that, during the interconnection study process, the parties agreed that Bonneville would construct a new 230 kV Slatt substation as an alternative interconnection point for LifeLine's 250 MW and 500 MW service requests, because it would be more efficient to interconnect the generation to a new 230 kV substation rather than to the existing 500 kV substation, and would result in a \$29 million savings for LifeLine.

6. Bonneville declares that, on December 6, 2005, the parties executed an environmental study agreement, and, on June 27, 2006, LifeLine submitted a notice of intent to develop a generating resource to the Oregon Energy Facility Siting Council (Oregon Siting Council). Bonneville avers that, on February 1, 2007, Caithness (LifeLine's successor) filed a preliminary application for a site certificate (a necessary prerequisite to construction) for Shepherds Flat with the Oregon Siting Council, and, on

³ Bonneville notes that these events happened before the Commission issued Order No. 2003, *infra*, establishing a series of interconnection studies beginning with an interconnection feasibility study.

November 19, 2007 (a week before the filing of the instant petition), the Oregon Siting Council concluded that Caithness' preliminary application was complete. The Siting Council was then responsible for evaluating the application and deciding whether or not to issue the site certificate.

7. Bonneville states that, in mid-2007,⁴ Bonneville amended its Business Practices to provide that, if a customer submitted a transmission service request and a related interconnection request, Bonneville would offer the transmission service 15 days after it delivered the interconnection feasibility study, or, if the customer waived the feasibility study, 15 days after Bonneville tendered a system impact study.⁵ Having already completed two feasibility studies, Bonneville states that, on September 11, 2007, it offered a service agreement to Caithness for 250 MW with a point of receipt at the new 230 kV Slatt substation, and an October 1, 2007 service commencement date. Bonneville explains that the parties subsequently agreed to retract that service agreement.

8. On October 11, 2007, Bonneville instead offered a Service Agreement to Caithness for 250 MW with a point of receipt at the existing 500 kV Slatt substation, as previously requested by Caithness, and a November 1, 2007 service commencement date. On November 7, 2007, similarly, Bonneville offered a second Service Agreement to Caithness for 474 MW with a point of receipt at the existing 500 kV Slatt substation and a December 1, 2007 service commencement date.

9. Bonneville states that, on October 26, 2007 and November 15, 2007, respectively, Caithness requested that Bonneville file these latter two unexecuted Service Agreements with the Commission, as provided in section 15.3 of Bonneville's reciprocity tariff. Bonneville explains that Bonneville and Caithness disagree on the issue of whether Bonneville can require Caithness to execute the Service Agreements until Bonneville can simultaneously offer a generator interconnection agreement. According to Bonneville, Caithness asserts that it is not required to begin taking transmission service because Bonneville has not yet constructed certain facilities at the 500 kV Slatt substation. Bonneville adds that Caithness also exercised its right to extend the service commencement date as provided in section 17.7 of Bonneville's reciprocity tariff.

⁴ Bonneville states that on April 19, 2007, Bonneville posted on its website a proposed revision to its Long-Term Firm Queue Management Business Practice. Bonneville states that the posting indicated that Bonneville would accept comments on the proposal until May 8, 2007, and only Caithness submitted comments in opposition. Bonneville states that it adopted and posted the revised Business Practice on July 21, 2007, but delayed the effective date to September 1, 2007, to provide additional notice of the change in policy.

⁵ Bonneville states that, under its prior Business Practices, it would hold transmission service requests pending completion of its environmental review of the interconnection.

Bonneville, therefore, requests the Commission to issue a declaratory order stating that it followed the terms of its reciprocity tariff when it offered Caithness the two Service Agreements.

10. Bonneville also requests waiver of any requirement that Bonneville pay a filing fee, because Bonneville is an agency of the United States Department of Energy engaged in the official business of the Federal Government, and is exempt from filings fees.⁶

II. Notice of Filing and Interventions

11. Notice of Bonneville's filing was published in the *Federal Register*, 72 Fed. Reg. 68,870 (2007), with interventions and protests due on or before December 26, 2007.

12. The following entities filed timely motions to intervene and protests or comments: Caithness, PPM Energy, Inc. (PPM), and the Oregon Department of Energy (Oregon DOE). Bonneville filed an answer to the protests. Caithness and the Oregon DOE filed responses to Bonneville's answer.

13. Caithness states that, after promising that Bonneville would not offer service agreements for Shepherds Flat until it could also offer the necessary interconnection agreement, Bonneville has repudiated that promise and now attempts to force Caithness to pay for 724 MW of firm point-to-point transmission service before Bonneville constructs the point of receipt under the Service Agreements. Caithness adds that construction of the necessary facilities comprising the point of receipt awaits completion of ongoing review pursuant to the National Environmental Policy Act (NEPA). Caithness further adds that its development efforts were thwarted for the first three years by Bonneville's insistence that it had no available transmission capacity for Shepherds Flat's power, and that, after Bonneville found that it had transmission capacity, LifeLine and Caithness diligently pursued siting authority.

14. At the outset, Caithness states that Bonneville's claim that the 500 kV Slatt substation is an existing facility and valid point of receipt is misleading. Caithness contends that the Slatt substation has no present commercial relevance as a point of receipt to Caithness or any other entity that is not a co-owner of the Boardman coal-fired power plant, which currently injects power into the network at the Slatt substation. Contrary to Bonneville's claims, Caithness states that Bonneville must build a new 500/230 kV substation at Slatt in order to receive Caithness' power.⁷ Further, Caithness

⁶ See 18 C.F.R. §§ 381.108(a), 381.302 (2008).

⁷ Caithness contends that currently the Slatt substation is actually a switching station where a 500 kV line owned by Portland General Electric Company connects with four Bonneville 500 kV lines. Caithness notes that there are no transformers, no tap points, and no other facility or structure that could serve as a point of interconnection for Shepherds Flat, as that term is used in the tariff definition of "Point of Receipt."

states that Bonneville has already determined that such substation should be built, in its interconnection facility study, and Bonneville has determined that that new substation will be a network facility.

15. Caithness then emphasizes that its transmission and interconnection requests were linked and that the transmission requests provided for a point of receipt at a new point of interconnection within Bonneville's Slatt substation. Caithness explains that it simultaneously submitted an application requesting that Bonneville construct a new interconnection with the Slatt substation, where no point of interconnection currently exists,⁸ for the purpose of providing the requested point of receipt under the transmission service requests. For purposes of the system impact study and interconnection facility study, Caithness adds that Bonneville itself treated the transmission and interconnection requests as linked. Caithness also states that in a NEPA Agreement associated with Shepherds Flat, Bonneville agreed to the construction of a substation, and that substation is the point of receipt for the transmission service.

16. Further, Caithness states that Bonneville personnel had provided written and oral assurances that Bonneville would continue to link the Shepherds Flat transmission and interconnection requests so that LifeLine, now Caithness, would not be asked to sign transmission agreements until Bonneville could also offer an interconnection agreement. However, in 2007, Caithness explains that it was assigned a new Bonneville Transmission Account Executive who repudiated the prior assurances of linkage between the transmission and interconnection requests and told Caithness to expect near-immediate contract offers for up to 750 MW of transmission service. In April 2007, Caithness states that Bonneville proposed to drop such linkage of requests from its Business Practices.⁹ Caithness explains the Bonneville's new practice calls for the offering of transmission agreements to project developers as soon as Bonneville completes an interconnection feasibility study, but before completion of the NEPA review and Record of Decision on an interconnection request. Caithness states that Bonneville applied this new policy to Caithness effective September 1, 2007, with no grandfathering those who had relied upon the previous assurances of linkage. Caithness also contends that Bonneville never explained its justification for deviating from *Duke Energy*, where according to Caithness the Commission stated that "we expect that transmission providers will allow customers to consider both aspects of the transaction."¹⁰

⁸ See *supra* note 7.

⁹ Prior to that, Caithness states, linkage was allowed by Bonneville's Business Practices, under which Bonneville did not offer transmission service until after it completed a NEPA Record of Decision or other NEPA documentation for the linked interconnection request.

¹⁰ *Duke Energy Corp.*, 94 FERC ¶ 61,187, at 61,657 (2001) (*Duke Energy*).

17. Caithness argues that if Bonneville seeks to change customer rights under its tariff, as it has done by changing its Business Practice, it must first file a tariff revision to seek Commission approval, but has not done so. Caithness states that, as a consequence of Bonneville's change in its Business Practice, it received a proposed Service Agreement for 250 MW on October 11, 2007, which designated a point of receipt at the high-side (500 kV) of the non-existent 500/230 kV Slatt substation. Caithness notes that language in that agreement provides: "Upon the Caithness Shepherds Flat project...achieving Commercial Operation...Transmission Customer shall have the right to modify on a firm basis (redirect) the designated Point of Receipt...from Slatt 500 kV Substation to Slatt 230 kV Substation." Caithness explains, however, that neither point of receipt exists today, and also that the unbuilt 500/230 kV substation is to become part of Bonneville's transmission network, even though it is to be constructed pursuant to an interconnection agreement yet to be offered. Subsequently, Caithness adds, it received a second proposed Service Agreement for 474 MW, with the same deficiencies.

18. Caithness requests that the Commission: (1) hold Bonneville to its prior commitment that Bonneville would not offer transmission agreements until it completed the NEPA Record of Decision on the 500/230 kV substation; (2) require Bonneville to comply with its obligations under NEPA to complete its environmental review of the facilities that will comprise the point of receipt for the proposed Service Agreements before Bonneville requires Caithness to execute those agreements; and (3) require that Bonneville comply with *Duke Energy*, which requires transmission providers to allow customers to consider both aspects of the transaction, transmission and interconnection, before requiring execution of either agreement.

19. Caithness also asks that the Commission determine the appropriate service commencement dates for the Service Agreements. Caithness explains that each of the Service Agreements is linked to an Enabling Agreement, which Bonneville executed with Caithness in 2007. Caithness states that section 4 of the Enabling Agreement provides: "Service under this Service Agreement for a transaction shall commence on the later of (1) the Service Commencement Date as specified by the Transmission Customer in its request for transmission service or (2) the date on which construction of any Direct Assignment Facilities and/or Network Upgrades are complete." Caithness argues that the OATT-standard language of section 4 must control any contradictory provision inserted unilaterally by Bonneville in an exhibit, i.e., the Service Agreements, to the Enabling Agreement.

20. PPM supports Bonneville's petition in this proceeding, because it will make available additional transmission capacity; PPM explains that Bonneville's previous linking of transmission and interconnection requests had the unintended consequence of

clogging the transmission queue. PPM also notes that the process for seeking transmission service pursuant to any transmission provider's OATT is separate and distinct from the interconnection process provided for pursuant to Order No. 2003.¹¹

21. The Oregon DOE emphasizes that Bonneville's NEPA review and the Oregon siting process are two independent processes. Thus, the Oregon DOE states that, to the extent Bonneville suggests that LifeLine's failure to diligently pursue the state process has prevented Bonneville from completing its own review, that suggestion is misleading. Further, the Oregon DOE agrees with Caithness that the Oregon's Siting Council would not site a project (i.e., issue a site certificate) that lacked adequate available transmission capacity.

III. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers of Bonneville, Caithness, or the Oregon DOE and will, therefore, reject them.

B. Substantive Matters

24. Bonneville seeks a declaratory order stating that it followed the terms of its reciprocity tariff when it offered Caithness the two Service Agreements at issue here. We find that Bonneville's offering the proposed Service Agreements to Caithness, with their proposed service commencement dates of November 1, 2007 and December 1, 2007 for 250 MW and 474 MW of transmission service, respectively, is consistent with Bonneville's reciprocity tariff. Section 13.4 of Bonneville's reciprocity tariff provides that the "Transmission Provider shall offer a standard form Point-to-Point Transmission Service Agreement...to an Eligible Customer when it submits a Completed Application

¹¹ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & 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).

for Long-Term Firm Point-to-Point Transmission Service.” Bonneville has done so. Thus, we find that Bonneville has acted consistently with its reciprocity tariff by offering the proposed Service Agreements with their proposed service commencement dates.

25. Caithness contends that, under section 4 of the Enabling Agreement, its transmission service under the Service Agreements should commence on the later of the service commencement date specified by the transmission customer or the date the construction of the facilities are complete. In response, we note that the facilities over which Bonneville will be providing transmission service already exist and, in fact, Caithness’ requested service commencement dates were January 1, 2007 and January 1, 2006, for its 250 MW and 500 MW transmission service requests, respectively, and have already passed. Moreover, the proposed service commencement dates of November 1, 2007 and December 1, 2007 for 250 MW and 474 MW of transmission service, respectively, offered to Caithness by Bonneville under the instant Service Agreements are later than the service commencement dates requested by Caithness.¹²

26. Caithness also argues that Bonneville violated its reciprocity tariff when it changed its Business Practices. According to Caithness, Bonneville should have filed its Business Practice change for Commission approval. We do not agree. Initially, we note that Bonneville is not a “public utility;” its tariff is a voluntarily-filed reciprocity tariff and Bonneville is not required to file its tariff or changes to its tariff with the Commission.¹³ Further, changes in Business Practices are not changes in a transmission provider’s tariff itself, and thus do not need to be filed with the Commission.

27. We also note that Caithness was on notice from April to September 2007 of Bonneville’s proposal to implement a Business Practice change regarding linkage between transmission service and interconnection requests. While we recognize that there may be a practical linkage between interconnection and transmission (i.e., which the Commission has sometimes described as delivery) service, the two services are nevertheless distinct, and the Commission has not required that they be linked. In *Tennessee Power*,¹⁴ the Commission explained that the two services, interconnection and delivery, are distinct; they can be requested separately, and they can be provided separately. Also, in Order No. 2003, the Commission stated that it views interconnection and delivery as separate,¹⁵ which is consistent with Bonneville’s reciprocity tariff and

¹² As noted above, Bonneville offered Caithness the revised Service Agreements at issue here in late 2007. *See supra* P 8.

¹³ 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.

¹⁴ *See Tennessee Power Company*, 90 FERC ¶ 61,238, at 61,761-62 (2000) (*Tennessee Power*).

¹⁵ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 118.

Business Practices. If we were to grant Caithness' requested relief, moreover, Bonneville would be treating Caithness in an unduly preferential manner by linking interconnection and transmission (i.e., delivery) service when Bonneville's Business Practice is not to do so and when Bonneville would not necessarily do so for other customers.

28. Caithness argues that it should not be required to execute the Service Agreements due to previous communications with Bonneville executives and its reliance on the previous Business Practices. We may consider extrinsic evidence such as representations made to Caithness by Bonneville if we cannot discern the meaning of the tariff from its four corners.¹⁶ As discussed above, however, we do not find the tariff language to be ambiguous, and it does not require Bonneville to link interconnection and transmission requests. We note, further, that Bonneville took steps to notify its customers (and engage in stakeholder discussions) before implementing a change in its Business Practice.

29. Caithness cites *Duke Energy*, in which the customer suggested that the interconnection and transmission service request provisions be linked so that a customer could retain its place in both the interconnection queue and the transmission queue until it had both sets of studies to consider before committing to go forward. However, *Duke Energy* is inapposite. In *Duke Energy*, the issue was the potential for customers to have to sign agreements before both the System Impact Study and Interconnection Facilities Study were completed.¹⁷ In the instant case, Bonneville (and also Caithness) indicate that such studies have been completed. Caithness is concerned that Bonneville has not completed additional studies not at issue in *Duke Energy*, namely National Environmental Policy Act (NEPA) studies. *Duke Energy* did not address the need for the transmission provider to await such NEPA studies before providing transmission service agreements. Thus, Caithness' request for the Commission to direct Bonneville not to offer transmission service agreements prior to the completion of its NEPA review is beyond the findings in *Duke Energy*. Moreover, as noted above, *Tennessee Power*, which post-dated *Duke Energy*, found that the two services – interconnection and transmission (i.e., delivery) service – are separate and distinct. Further, the Commission reiterated this point in Order No. 2003, which was issued after both *Duke Energy* and *Tennessee Power*.

¹⁶ E.g., *MMC Energy, Inc. v. California Independent System Operator Corporation*, 123 FERC ¶ 61,251, at P 84 (2008); see also *Montgomery Great Falls Energy Partners LP v. NorthWestern Corp.*, 123 FERC ¶ 61,181, at P 47 (2008) (informal representations by transmission providers do not overtake the tariff's requirements).

¹⁷ *Duke Energy*, 94 FERC ¶ 61,187 at 61,657. We also note that in *Duke Energy* the Commission found that the transmission provider's offer to coordinate with the customer was a sufficient remedy. *Id.* Here, likewise, as discussed below, Bonneville and Caithness have avenues open to them to defer the service commencement dates.

30. Bonneville states that its NEPA review of the interconnection depends heavily on state review under a state permitting process and that LifeLine's failure to diligently pursue the state process has prevented Bonneville from completing its own review. On the other hand, Caithness and the Oregon DOE contend that Bonneville is responsible for any delay in the state siting process, because Bonneville first stated that it did not have available transmission capacity to fulfill Caithness' transmission service requests, but then Bonneville found that it did have available transmission capacity when it applied a new available transmission capacity methodology. The Commission does not have jurisdiction over the speed or timing of such state siting processes,¹⁸ or over Bonneville's NEPA study process, however, and instead need only review Bonneville's tariff and its application of its tariff in the instant proceeding, as we have done above.

31. Furthermore, given that we are granting Bonneville's request for a declaratory order, and finding that the Service Agreements were appropriately tendered and appropriately assigned service commencement dates, we note that there are options for Caithness to exercise while it completes project construction and interconnection, while still maintaining its requested transmission service rights. Specifically, section 17.7 of Bonneville's reciprocity tariff allows a transmission customer to obtain up to five one-year extensions for the commencement of service. Also, section 23.1 allows a transmission customer to sell, assign, or transfer all or a portion of its rights under its Service Agreements. These options would allow Caithness to either delay commencement of service or to temporarily sell, assign, or transfer its transmission service rights while awaiting the completion of Shepherds Flat and its interconnection to Bonneville's system.

C. Filing Fee Waiver

32. Bonneville petitions for an exemption from the filing fee based on its non-jurisdictional status. As we stated in Order No. 888-A, "[the Commission's] regulations specifically exempt states, municipalities, and anyone who is engaged in the official business of the Federal Government from filing fees."¹⁹ Because Bonneville is an agency of the United States Department of Energy engaged in the official business of the Federal government, we will grant Bonneville's request for waiver of the filing fee.

The Commission orders:

(A) Bonneville's petition for declaratory order is hereby granted, as discussed in the body of this order.

¹⁸ While the Commission does have "backstop" federal siting authority, that authority is not implicated here. *See* 16 U.S.C. § 824p (2006).

¹⁹ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,288-89.

(B) Bonneville's request for exemption from the filing fee is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.