

138 FERC ¶ 61,135
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cross-Sound Cable Company, LLC

Docket No. TS10-1-001

ORDER DENYING CONTINUATION OF
STANDARDS OF CONDUCT WAIVER

(Issued February 24, 2012)

1. In this order, after consideration of additional information provided by Cross-Sound Cable Company, LLC (CS Cable), the Commission denies CS Cable's motion for a continuation of its waiver of the Commission's Standards of Conduct requirements.

I. Background

2. In 2004, the Commission granted CS Cable a waiver of the Commission's Standards of Conduct requirements.¹ On December 18, 2009, CS Cable notified the Commission of a change in the facts and circumstances that the Commission relied upon in the 2004 waiver and requested a continued waiver from the Standards of Conduct requirements under Order No. 717.²

3. In its request for a continued waiver CS Cable reported that, in November 2009, the Commission, pursuant to section 203(a)(1)(A) and (a)(2) of the Federal Power Act (FPA),³ authorized the disposition of jurisdictional assets filed by CS Cable, Babcock

¹ *Alcoa Power Generating Inc., et al.*, 108 FERC ¶ 61,243, at P 27-28 (2004).

² *Standards of Conduct for Transmission Providers*, Order No. 717, 73 FR 63796 (Oct. 27, 2008), FERC Stats. & Regs. ¶ 31,280 (2008) (Order No. 717); *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297 (2009), *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 133 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017 (2011).

³ 16 U.S.C. § 824b.

& Brown Infrastructure Limited (Babcock & Brown), Burgundy Acquisition I Ltd., Burgundy Infrastructure Acquisition II Ltd. (Burgundy Infrastructure), Brookfield Infrastructure L.P., Brookfield Infrastructure Partners L.P., Brookfield Renewable Power Inc. (Brookfield Renewable), and Brookfield Asset Management Inc. regarding Burgundy Infrastructure's acquisition of up to 48 percent of Babcock & Brown.⁴ On November 30, 2009, the parties notified the Commission that the transaction closed.

4. In its December 2009 request, CS Cable notified the Commission that, as a result of assets acquired in the disposition transaction, it is possible that Brookfield Renewable could be considered an "affiliate" as several downstream subsidiaries perform "marketing functions" as those terms are defined in the Commission's regulations. However, as reflected in the section 203 application, CS Cable noted that "all [CS Cable] and its subsidiaries' employees will operate separately from any Brookfield Company or Brookfield Company subsidiary 'marketing function employees' in compliance with the Commission's Standards of Conduct."⁵ CS Cable supported its request for waiver by stating that it was an independent transmission line and not an integrated transmission grid; that it provides open access transmission service under ISO-NE's open access transmission tariff; and it did not share any employees with an affiliate.

5. The Commission issued an order⁶ denying CS Cable's 2009 waiver request finding that, to qualify for a continuing waiver of the Standards of Conduct requirements, CS Cable needed to demonstrate that it has relinquished access to information on the operation of the transmission facilities.⁷

6. In its June 20 Filing, CS Cable provided additional information in support of its waiver request.

⁴ *Cross-Sound Cable Company, LLC*, 129 FERC ¶ 62,123 (2009).

⁵ See CS Cable submittal dated June 20, 2011 (June 20 Filing) at 3 (citing its section 203 request).

⁶ *Black Hills Power, Inc.*, 135 FERC ¶ 61,058, at P 21-25, 42-45 (2011) (*Black Hills*). In *Black Hills*, the Commission explained what additional information CS Cable would need to provide to show that it qualified for a Standards of Conduct waiver.

⁷ *Id.* P 45.

Notice of Filing

7. Notice of CS Cable's June 20 Filing was published in the *Federal Register*, 76 Fed. Reg. 40,721 (2011), with protests and interventions due on or before July 11, 2011. None was filed.

II. Discussion

CS Cable's June 20 Filing

8. In the June 20 Filing, CS Cable argues that there are unique facts that show good cause for the Commission to continue its waiver of the Commission's Standards of Conduct requirements and argues that it meets the waiver criteria described in *Black Hills* for a public utility transmission owner/operator that participates in a Commission-approved ISO or RTO. In this regard, CS Cable makes three assertions. First, it states that the firm capacity on the Cross Sound Cable is fully subscribed by Long Island Power Authority (LIPA) pursuant to a long-term contract and that LIPA decides, in its sole discretion, how to utilize its transmission capacity rights. Any unused capacity is released by LIPA and posted on the ISO-NE OASIS and available on an hourly non-firm basis pursuant to Schedule 18, the Schedule 18 Implementation Rule, and the Attachments to Schedule 18 under the ISO-NE OATT (Schedule 18).⁸

9. Second, it states that the Commission-approved contractual arrangements governing service over the Cross Sound Cable do not provide CS Cable the discretion to allocate primary transmission capacity to any entity, affiliate or otherwise, other than LIPA. LIPA, as the sole capacity holder, makes all determinations as to whether it will or will not use all of its capacity. CS Cable states that it lacks any ability to exercise any discretion with respect to making this capacity available to an affiliate or other entity.⁹

10. Third, it states that, to the extent LIPA is not using all of its capacity rights, any request for transmission service over the Cross Sound Cable of this limited capacity must be made via Schedule 18 of the ISO-NE OATT and that service agreements are signed using the *pro forma* agreement contained in Schedule 18.

11. CS Cable also states that the only service available to customers is Non-Firm Point-to-Point transmission service between the Tomson Converter Station in Shoreham, New York and the Halvarsson Converter Station in New Haven, Connecticut.

⁸ June 20 Filing at 4.

⁹ *Id.* at 4-5.

Additionally, CS Cable states that a customer using the Cross Sound Cable is not given access to any other part of the ISO-NE system by virtue of engaging in a non-firm transmission transaction over the line.¹⁰

12. CS Cable argues that these circumstances show that it has turned over operational control of its transmission system to ISO-NE and ISO-NE is responsible for determining the actual flows over the Cross Sound Cable pursuant to the terms and conditions of Schedule 18 and the ISO-NE OATT. Thus, it argues it meets the first criterion for waiver.¹¹

13. With respect to the second criterion, CS Cable argues it meets this criterion because it has no access to information concerning the operation of the transmission facilities it has turned over to the ISO/RTO. To support this claim, CS Cable assumes that by “operation of the transmission facilities it has turned over the ISO/RTO” the Commission does not intend to refer to the activities undertaken by CS Cable or its contractors respecting the physical operation of the line, but instead “operation” refers to the activities that the ISO/RTO has assumed pursuant to the terms and conditions of the ISO OATT. In reliance on that supposition, CS Cable asserts that it meets the standards.

14. CS Cable states that LIPA has contracted for all of the firm transmission capacity of the transmission line pursuant to a long-term contract. CS Cable states it has no information or control of LIPA’s use of its capacity until LIPA posts electronic tags for the Day Ahead Market. Approval or adjustment to the electronic tags is performed by ISO-NE in conjunction with NYISO with no involvement by CS Cable. CS Cable further states that the operator of the Cross Sound Cable in the CS Cable control room has no direct knowledge of the actual scheduled interchange until receiving direction from ISO-NE to perform certain actions to physically allow power to flow over the transmission line in accordance with the ISO schedule. CS Cable also explains that the instruction from ISO-NE occurs in real-time, long *after* LIPA has requested whatever amount of capacity it wishes to use. CS Cable states that its control room employees have password access to ISO-NE’s OASIS site, but only to the Cross Sound Cable node of the OASIS site and solely for confirming capacity information entered by ISO-NE and taking any actions as directed by ISO-NE based on the activities of LIPA.¹² CS Cable states that this establishes that its control room employees have no access to other transmission system information for the remainder of the ISO-NE and NYISO transmission systems,

¹⁰ *Id.* at 5.

¹¹ *See Black Hills*, 135 FERC ¶ 61,058 at P 45.

¹² June 20 Filing at 6.

nor do they have access to system information of other New England or New York transmission service providers.¹³

15. CS Cable adds that, any capacity made available by LIPA is a direct result of LIPA's electronic tag requests to the ISO-NE, and the available non-firm capacity is posted on the OASIS. Thus, CS Cable argues that its activities are extremely narrow and are limited by its long-term contract with LIPA and Schedule 18, which contains explicit procedures for obtaining any non-firm transmission resulting from LIPA's release of capacity.

16. CS Cable also argues that the calculation of Available Transmission Capability (ATC) and Total Transmission Capability (TTC) on Cross Sound Cable is largely determined by ISO-NE.¹⁴ In this regard it states that ISO-NE determines the TTC for the Cross Sound Cable, based on equipment ratings and availability information provided by CS Cable and system conditions.¹⁵ While CS Cable calculates and posts Cross Sound Cable's ATC, pursuant to Attachment C of Schedule 18, it claims that ISO-NE determines the ultimate amount of ATC based on information provided by Cross Sound Cable and system conditions.¹⁶ Thus, CS Cable argues that there is simply no opportunity nor incentive for it to favor any customer affiliate or otherwise. In short, CS Cable argues that it is more akin to an operator for the benefit of its customer, LIPA, than to a transmission provider.¹⁷

17. As to the third criterion, CS Cable argues that it obtains transmission system information about transmission availability solely by viewing OASIS postings.¹⁸ CS Cable further argues that, while it may provide information on the physical condition of the Cross Sound Cable to ISO-NE, ISO-NE determines whether there is capacity available and CS Cable mechanically implements the Schedule 18 and contract-based mechanisms to ensure that the use of the line is consistent with the transmission schedules and requests on a particular day.¹⁹ Other than enforcing the eligibility and

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

credit requirements specified under Attachment L of Schedule 18, CS Cable states that it exercises no discretion over entities that can use the line on a non-firm basis.²⁰ It states that customers seeking to transmit over the Cross Sound Cable must have a service agreement with CS Cable as the Merchant Transmission Facility Provider.²¹

18. CS Cable further states that, if a customer meets the requirements specified in Schedule 18, such customer can then execute a service agreement with CS Cable as the Merchant Transmission Facility Provider.²² If there is a requestor of non-firm transmission service, ISO-NE confirms the availability of the service and directs CS Cable to physically implement the transaction and at that time.²³ CS Cable states that its role is limited to ensuring that: (1) the party transmitting has a valid service agreement; (2) adequate funds; and (3) continues to qualify for transmission service under Schedule 18.²⁴ This responsibility is accomplished through the ISO-NE WebTrans Scheduling software such that only customers with a valid service agreement can request transmission capacity that becomes available.²⁵

Commission Determination

19. Under 18 C.F.R. § 358.1(c), a transmission-owning public utility that participates in a Commission-approved ISO or RTO who “does not operate or control its transmission system and has no access to transmission function information” may request a waiver of the Commission’s Standard of Conduct requirements. In *Black Hills*, the Commission explained that, when a public utility transmission owner/operator participates in a Commission-approved Independent System Operator (ISO) or Regional Transmission Organization (RTO), the size of the utility is not relevant to whether the waiver request will be granted or denied. Citing the criteria in section 358.1(c) of the Commission’s regulations, the Commission stated that eligibility for a waiver depends on whether an applicant: (1) has turned over operation or control of its transmission system to the ISO/RTO; (2) has no access to information concerning the operation of the transmission facilities it has turned over to the ISO/RTO; and (3) obtains information about such

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 7-8.

²⁴ *Id.* at 8.

²⁵ *Id.*

matters only by viewing the ISO/RTO's pertinent Open Access Same-Time Information System (OASIS) postings.²⁶

20. CS Cable argues that it should be deemed to have turned over operation and control of its transmission system to ISO-NE because all of its firm capacity has been sold to LIPA under a long-term contract and, when unused capacity becomes available, it uses ISO-NE's rules to dispose of this capacity. CS Cable further argues that it has no access to information concerning the operation of the transmission facilities it has turned over to the ISO/RTO.

21. Section 358.3(h) of the Commission's regulations defines transmission functions as the planning, directing, organizing, or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests.²⁷ Notwithstanding the Commission's directives in *Black Hills*, information in the June 20 Filing reveals that CS Cable still does perform some transmission functions, e.g., calculating ATC, executing transmission agreements, and enforcing eligibility and credit functions.

22. Moreover, with respect to transmission function information in Order Nos. 717 and 717-A, the Commission provided examples of transmission function information specifically including available transmission capability²⁸ and planned transmission outages.²⁹ Information in the June 20 Filing indicates that CS Cable still has access to several types of transmission function information, including ATC and maintenance (presumably planned transmission outages) information. In addition, CS Cable concedes that it has access to information about the activities undertaken by CS Cable or its contractors respecting the physical operation of the line.

23. Thus, the Commission finds that CS Cable has failed to meet the three criteria described in section 358.1(c) of the Commission's regulations and in *Black Hills* for waiver of the Commission's Standards of Conduct requirements for a public utility transmission owner/operator that participates in a Commission-approved ISO or RTO.

²⁶ In *Black Hills*, the Commission also clarified the waiver standard for small public utilities that have not relinquished control over the operation of their transmission system to an ISO/RTO would remain unchanged. *Black Hills*, 135 FERC ¶ 61,058 at P 3.

²⁷ See also Order No. 717 at P 40.

²⁸ *Id.* P 275.

²⁹ Order No. 717-A at P 135.

Accordingly, the Commission will deny CS Cable's request for continued waiver of the Commission's Standards of Conduct requirements. Accordingly, we will direct CS Cable to comply with the Standards of Conduct under Part 358 within 60 days of the date of this order.

The Commission orders:

CS Cable's motion for continuance of its previously-granted waiver of the Commission's Standards of Conduct requirements is hereby revoked, as discussed in the body of this order, effective 60 days from the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.