

141 FERC ¶ 61,111
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

November 13, 2012

In Reply Refer To:
Wyoming Colorado Intertie, LLC
Docket No. ER12-1753-000

Adam Wenner
Orrick, Herrington & Sutcliffe LLP
Columbia Center
1152 15th Street, NW
Washington, DC 20005

Dear Mr. Wenner:

1. On May 9, 2012, you filed on behalf of Wyoming Colorado Intertie, LLC (WCI) a non-conforming transmission service agreement (TSA) between WCI and Wyoming Wind & Power, LLC (Wyoming Wind).¹ WCI states that the non-conforming provisions of the proposed TSA were mutually agreed to by the parties in order to further each project's development. For the reasons set forth below, we conditionally accept the proposed non-conforming TSA for filing, effective July 9, 2012, as requested, and direct WCI to submit a compliance filing.
2. Notice of WCI's Filing was published in the Federal Register, 77 Fed. Reg. 30,001 (2012), with protests and interventions due on or before May 30, 2012. Wyoming Wind and the Wyoming Infrastructure Authority filed timely motions to intervene and comments in support of the filing.
3. On July 5, 2012, Commission staff issued a deficiency letter. WCI filed a response to the deficiency letter on July 20, 2012. Notice of WCI's response was published in the *Federal Register*, 77 Fed. Reg. 45,346 (2012) with comments due on or before August 10, 2012. None was filed.

¹ WCI intends to develop a new 180-mile, 850 MW, 345 kV merchant transmission line that extends from the Laramie River Station substation, in Wheatland, Wyoming to Public Service Company of Colorado's Pawnee substation, in Brush, Colorado (WCI Project). Wyoming Wind intends to build a 900 MW wind generating facility in Wheatland, Wyoming (Wyoming Wind Project).

4. On September 21, 2012, WCI submitted a letter providing additional support for its revised definition of affiliate and its proposed standard of review. In that letter, WCI also requested that the Commission establish a shortened comment period, and accept the proposed TSA for filing by October 31, 2012. Notice of WCI's submission was published in the *Federal Register*, 77 Fed. Reg. 60,417 (2012) with comments due on or before October 1, 2012. None was filed.

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

6. The Commission previously issued an order, on May 8, 2009, accepting WCI's Open Access Transmission Tariff (OATT) and open season report and approving negotiated rate authority for the WCI Project, wherein the Commission found that WCI satisfied the four-factor *Chinook* standard.² Subsequently, however, both of the winning bidders in the WCI Project exercised their right to terminate.

7. In July 2011, Wyoming Wind submitted to WCI an application for interconnection service and a request for long-term firm point-to-point transmission service for 100 percent of the WCI Project capacity up to 900 MW. WCI states it responded by posting notice of the application on its website, along with a redacted copy, and a notice of open auction, inviting competing bids for a period of one month, in accordance with its tariff provisions. Several companies made inquiries in response to the notice of open auction, WCI explains, but none submitted a bid.

8. WCI asserts that its acceptance of Wyoming Wind's request represents the culmination of a lengthy open process and does not present any concerns associated with the allocation of transmission rights to an anchor customer prior to an open season. WCI also represents that, other than the loss of its original transmission customers, there remain no changes in the facts that resulted in the Commission's approval of its negotiated rate authority.

9. In the instant filing, WCI proposes the TSA to establish rates, terms, and conditions under which WCI will provide transmission service to Wyoming Wind, and includes project milestones and commitments by both parties to ensure the coordinated development of each respective project. The initial term for transmission service is 25 years from the commercial operation date of the Wyoming Wind project, with rollover rights of at least five but no more than fifteen years. WCI states it will continue to have full ownership and operational control of the WCI Project. Additionally, should the WCI

² See *Wyoming Colorado Intertie, LLC*, 127 FERC ¶ 61,125, at PP 38, 39 (2009) (May 2009 Order) (citing *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009)).

Project exceed its planned development, any unscheduled capacity will be posted on WCI's website or OASIS site for resale to other customers.

10. Section 7.4 of the proposed TSA specifies the conditions upon which Wyoming Wind, as the transmission customer, may acquire the WCI Project at WCI's development costs. This provision may be applied if WCI fails to meet a key milestone, and as a result of such failure the commercial operation date cannot be achieved within one year of the proposed TSA's target commercial operation date (or within up to two years if the cause of the failure is a Force Majeure event). In addition, Section 8 of the proposed TSA includes a Utility Purchase Option. This option allows WCI, at the request of Wyoming Wind, to sell cumulative ownership of the WCI Project, representing up to 50 percent of the WCI Project's capacity to the utility that either: (1) enters into a power purchase agreement with Wyoming Wind or (2) agrees to purchase the Wyoming Wind Project. According to WCI, the transmission service associated with the portion of the WCI Project that WCI retains shall be used for the Wyoming Wind Project. The transmission service associated with the portion of the WCI Project purchased by a utility, to the extent not required for delivery of power from the Wyoming Wind Project, would be available through that utility's OASIS. Section 8 of the proposed TSA suggests that this purchase option may be conditioned on Commission approval and confirmation that the co-ownership structure will not jeopardize WCI's negotiated rate authority.

11. With respect to the revised definition of affiliate, WCI states that the revision does not change the definition as applied to the WCI OATT or any other service agreements thereunder, nor does it affect WCI's assurances that WCI has no utility affiliate with captive customers who would be required to pay the costs of the project, based on the *pro forma* OATT's definition of affiliate. WCI states that use of the proposed TSA definition of affiliate is limited to specific provisions in the executed TSA between WCI and Wyoming Wind. WCI states that the definition adds, for purposes of the proposed TSA only, additional clarity as to the definition of what constitutes "control" as referenced in the OATT definition.³

12. WCI indicates that this added clarity is important because of the use of the term affiliate in Section 7.4 of the proposed TSA, which has no OATT counterpart. WCI states that Section 7.4 allows the Transmission Customer (Wyoming Wind) to acquire the development rights in the WCI Project if WCI fails to meet a key schedule milestone and as a result the commercial operation date cannot be achieved within one year. WCI asserts that, in such case, the Transmission Customer, among other requirements, must accept assignment of existing WCI Project contracts entered into by the Transmission Provider (WCI) or its affiliates, but is not required to assume a contract the Transmission Provider has entered into with its affiliate. WCI states that "[g]iven these unique

³ WCI Sept. 21, 2012 Supplement at 2.

provisions, both parties needed additional detail, to reduce the risk of future dispute over whether an entity was or was not an [a]ffiliate.”⁴

13. With respect to the standard of review, WCI explains that the proposed TSA differs from its OATT and the *pro forma* TSA in two ways. First, whereas Section 9 of the OATT and the *pro forma* TSA give both parties the right to seek unilateral changes in rates, terms, and conditions, WCI and Wyoming Wind have agreed that, absent their mutual written consent, the proposed TSA “shall not be subject to change by application of either party pursuant to Section 205 or 206 of the FPA.”⁵ Second, the parties have agreed to apply the “public interest” standard⁶ to all provisions of the proposed TSA, instead of the specific provisions identified in the *pro forma* TSA.⁷

14. In its September 21, 2012 letter providing additional support for the proposed TSA, WCI contends that in order to preserve the terms agreed to in the TSA, Wyoming Wind insisted upon subjecting all rate changes arising under the TSA to the more stringent “public interest” standard of review. According to WCI, Wyoming Wind stresses that its project lenders will see the Project as, in effect, an extension of the Wyoming Wind Project and that the terms, including rate limitations and milestones as agreed in the TSA, will be critical for financing, as will be the ability to assure lenders that the terms of the TSA cannot be changed by the Transmission Provider. WCI adds that the TSA commitments by the Transmission Customer will be crucial to the Transmission Provider’s project lenders, as will be the ability to assure the lenders that these terms cannot be changed by the Transmission Customer.

15. WCI further states that the terms to which the standard of review applies do not apply to third parties, including any parties that may in the future seek transmission service on the WCI Project. Thus, WCI concludes that neither WCI nor Wyoming Wind believes that it is “necessary to bind modifications requested by third parties or initiated by the Commission acting *sua sponte* to the ‘public interest’ standard.”⁸ WCI also notes that it and Wyoming Wind will, if directed by the Commission, revise the standard of

⁴ WCI July 20, 2012 Response at 6.

⁵ WCI May 9, 2012 Transmittal at 7 (citing TSA Section 13.3.1).

⁶ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

⁷ WCI May 9, 2012 Transmittal at 7 (citing TSA Section 13.3.2).

⁸ WCI Sept. 21, 2012 Supplement at 5.

review applicable to modifications requested by third parties or initiated by the Commission.⁹

16. WCI's proposed TSA provides that:

Absent the agreement of all parties to the proposed change, the standard of review for changes to this Agreement whether proposed by a Party, a non-Party, or the Federal Energy Regulatory Commission acting sua sponte shall be the "public interest" standard of review set forth in *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the "*Mobile-Sierra* doctrine"), or such other standard of review permissible to preserve the intent of the parties pursuant to this Section 13.3 to uphold the sanctity of contracts without modification.¹⁰

Thus, the proposed TSA provides that the Commission and third parties will be bound by the public interest standard.

17. As explained below, the Commission will require, as a condition for acceptance of the proposed TSA, modification of the provisions of the non-conforming TSA that seek to bind the Commission and third parties to the *Mobile-Sierra* "public interest" standard of review.

18. We find that the proposed TSA does not establish "contract rates,"¹¹ but rather establishes service under WCI's OATT. In *Wyoming Colorado Intertie*, the Commission accepted for filing WCI's OATT, which included a *pro forma* TSA.¹² The proposed TSA at issue here thus pertains to WCI's OATT and service provided thereunder. For this reason, we find that the *Mobile-Sierra* presumption, as defined by the U.S. Supreme Court,¹³ does not apply to the proposed TSA.

⁹ *Id.* at 5.

¹⁰ TSA Section 13.3.2.

¹¹ *Cf. El Paso Elec. Co. and Tucson Elec. Power Co.*, 136 FERC ¶ 61,150, at P 5 (2011); *El Paso Elec. Co.*, 136 FERC ¶ 61,149, at P 6 (2011).

¹² *Wyoming Colorado Intertie, LLC*, 127 FERC ¶ 61,125.

¹³ *See Morgan Stanley Capital Grp. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527 at 546 (2008); *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 130 S.Ct. 693 at 700 (2010). *See also MidAmerican Energy Co.*, 138 FERC ¶ 61,028 (2012).

19. As we have stated in several recent orders, in the context of reviewing settlements that do not involve “contract rates,” the Commission has discretion as to whether to approve a request to impose the more rigorous application of the statutory “just and reasonable” standard of review that is often characterized as the *Mobile-Sierra* “public interest” standard of review.¹⁴ The Commission has also stated in those orders that we will not approve imposition of that more rigorous application of the statutory “just and reasonable” standard of review on future changes to settlements sought by the Commission or non-settling third parties, absent compelling circumstances such as we found to exist in *Devon Power*. We find that the circumstances surrounding the proposed TSA do not satisfy that test, and thus we find it unjust and unreasonable to impose the more rigorous application of the statutory “just and reasonable” standard of review in the instant proceeding with respect to future changes to the proposed TSA sought by the Commission acting *sua sponte* or at the request of a third party. Accordingly, WCI is hereby directed to submit, within 30 days from the date of this order, a compliance filing revising the standard of review applicable to modifications requested by third parties or initiated by the Commission.

20. With respect to the revised definition of affiliate, we find the proposed TSA definition is limited to the specific provisions of the TSA and is not used for any other purpose. WCI and Wyoming Wind indicate that the revised definition was an important part of their negotiations because it would limit the contracts that must be assumed in the event that the WCI terminates the project and Wyoming Wind or any other third party chooses to purchase the project under section 8 of the TSA. We accept the revised definition under the TSA and its limited purpose to help facilitate the development of WCI’s merchant transmission project and Wyoming Wind’s generation project.

21. In its September 21, 2012 supplement, WCI states that the parties have agreed to extend the Early Period No-Fault Termination Deadline and the commencement date of the Transmission customer’s right to termination for convenience under section 7.5 of the TSA to March 29, 2013.¹⁵ WCI states that extending these two dates will allow WCI and Wyoming Wind to preserve the rights negotiated in the proposed TSA, as they were originally intended. We accept the extension of these dates, and direct WCI to revise these dates, if necessary, in the compliance filing directed herein.

¹⁴ See, e.g., *Devon Power LLC*, 134 FERC ¶ 61,208, *order on reh’g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*); see also *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *Southern LNG LLC*, 135 FERC ¶ 61,153, at P 24 (2011); *Petal Gas Storage LLC*, 135 FERC ¶ 61,152, at P 17 (2011); *High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at P 24 (2011).

¹⁵ WCI Sept. 21, 2012 Supplement at 6.

22. We also note that a change in WCI's ownership of the WCI Project would require the Commission to reevaluate the factors upon which the Commission relied in granting WCI's request for negotiated rate authority. At this time, the Commission cannot confirm whether the exercise of the purchase options for co-ownership under Sections 7 and 8 of the proposed TSA, by Wyoming Wind or a third party utility, respectively, would negatively impact WCI's negotiated rate authority. Should the parties decide to exercise a purchase option under either section of the proposed TSA, WCI must demonstrate to the Commission that its negotiated rate authority continues to be just and reasonable under the change in circumstances.

23. Accordingly, we direct WCI to submit a compliance filing, within 30 days of the date of this order, with the revisions described above.

By direction of the Commission. Commissioner Norris is concurring with a separate statement attached.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Wyoming Colorado Intertie, LLC

Docket No. ER12-1753-000

(Issued November 13, 2012)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves a non-conforming Transmission Service Agreement (TSA) between Wyoming Colorado Intertie, LLC and Wyoming Wind & Power, LLC, subject to the TSA being revised to not impose the “public interest” standard of review on future changes proposed by the Commission or third parties. I agree that the TSA does not establish “contract rates”, and that as a result, the public interest presumption does not apply.¹⁶ For the reasons I expressed in my partial dissent in *Devon Power LLC*, however, I disagree that the Commission can or should exercise its discretion to extend the public interest standard of review to non-contract rates, terms, and conditions.¹⁷ Therefore, I disagree with the analysis in this order of whether the Commission should permit the application of the public interest standard to future changes to the TSA sought by the Commission or a third party.¹⁸

For these reasons, I respectfully concur.

John R. Norris, Commissioner

¹⁶ *Wyoming Colorado Intertie, LLC*, 141 FERC ¶ 61,111, at P 18 (2012).

¹⁷ *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *Norris, dissenting in part*.

¹⁸ *Wyoming Colorado Intertie, LLC*, 141 FERC ¶ 61,111, at P 18-19.