

143 FERC ¶ 61,261
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Canadian Hills Wind, LLC

Docket No. ER13-1332-000

ORDER CONDITIONALLY ACCEPTING SHARED FACILITIES AGREEMENT
AND GRANTING REQUEST FOR WAIVERS

(Issued June 24, 2013)

1. On April 25, 2013, as supplemented May 29, 2013, Canadian Hills Wind, LLC (Canadian Hills) filed a Co-Tenancy and Shared Facilities Agreement (Shared Facilities Agreement) between itself; Kingfisher Transmission, LLC, CH Wind East Transmission, LLC, and APFAI, LLC (collectively, the Apex Affiliates);¹ and Atlantic Power Services, LLC (Atlantic Power), as Manager, pursuant to section 205 of the Federal Power Act (FPA).² In its filing, Canadian Hills also requests waivers of certain requirements under Order Nos. 888,³ 889,⁴ 890,⁵ 2004,⁶ and 717 and section 35.28,

¹ Apex Affiliates are subsidiaries of Apex Wind Energy Holdings, LLC (Apex).

² 16 U.S.C. § 824d (2006).

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 (1996), *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) (Order No. 888).

⁴ *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (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) (Order No. 889).

Parts 37 and 358 of the Commission's regulations.⁷ In this order, the Commission conditionally accepts the Shared Facilities Agreement, effective June 24, 2013, as requested, and grants the requested waivers.

I. Background

2. Canadian Hills explains that it owns and operates a 298.45 MW wind-powered electric generating facility located in Canadian County, Oklahoma, which is interconnected with the Oklahoma Gas and Electric transmission system by a 25-mile, 345 kV generator tie-line, with approximately 1,000 MW of capacity, and associated equipment and facilities to meet the requirements set forth at the interconnection point with Southwest Power Pool (Shared Facilities).⁸ Canadian Hills states that Atlantic Power will provide operation and maintenance service for the Shared Facilities pursuant to an operation and maintenance agreement. Canadian Hills explains that the Apex Affiliates, directly or through their affiliates, are developing wind-powered generating facilities in the vicinity of Canadian Hills' facility with a combined generating capacity

⁵ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009) *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) (Order No. 890).

⁶ *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, *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 Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *see Standards of Conduct for Transmission Providers*, Order No. 690, FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, FERC Stats. & Regs. ¶ 31,243 (2007).

⁷ 18 C.F.R. § 35.28, 18 C.F.R. Part 37, and 18 C.F.R. Part 358 (2012). *See also Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017 (2011) (Order No. 717).

⁸ Canadian Hills Transmittal Letter at 2.

of up to 700 MW, and have an interest in utilizing the excess capacity on the Shared Facilities to interconnect the Apex Affiliates' planned wind facilities to the Bulk-Power System.⁹ As described in the supplemental filing made by Canadian Hills, Apex requested transmission service from Canadian Hills on October 4, 2012, but subsequently withdrew its transmission request upon the Apex Affiliates' execution of the Shared Facilities Agreement on April 8, 2013.

3. Canadian Hills states that on April 8, 2013 it entered into an Option and Asset Purchase Agreement (Purchase Agreement), which granted each of the Apex Affiliates an option to acquire an undivided ownership interest in the Shared Facilities, provided the option is exercised within five years from the date of the Purchase Agreement and provided that at least one of the three Apex Affiliates has exercised its option within two years and all three Apex Affiliates exercise their option within five years. Canadian Hills adds that once the Apex Affiliates exercise their respective options and take their respective ownership interest in the Shared Facilities, they will jointly own the Shared Facilities as tenants in common with Canadian Hills under the Shared Facilities Agreement, and will have the non-exclusive right to use their respective shares of the Shared Facilities for the purpose of delivering power from their respective projects to the point of interconnection with Oklahoma Gas and Electric's transmission system.¹⁰ Canadian Hills states that if all options are exercised, it will retain a 30 percent undivided interest in the Shared Facilities and be entitled at all times to no less than 300 MW of the electric transmission capacity of the Shared Facilities.

II. Shared Facilities Agreement

4. Canadian Hills explains that the Shared Facilities Agreement sets forth the rights and obligations under which the Shared Facilities are owned, utilized, operated, and maintained by Canadian Hills, the Apex Affiliates and Atlantic Power. Specifically, Canadian Hills states that section 5.1 of the Shared Facilities Agreement provides that the actual costs of operating and maintaining the Shared Facilities will be shared on a *pro rata* basis based on ownership percentage. Similarly, Canadian Hills states that section 6.1 provides that expenses and liabilities relating to the use, maintenance, repair, and inspection of and access to the Shared Facilities will be shared on a *pro rata* ownership basis.¹¹ According to Canadian Hills, the cost allocation provisions of the Shared Facilities Agreement provide only for the pass-through of actual costs based on

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.* at 3 n.12.

each owner's *pro rata* ownership interest, which Canadian Hills contends is consistent with cost allocation provisions typically included in joint ownership or shared facilities agreements previously accepted by the Commission.¹²

III. Requests for Waiver

5. In its filing, Canadian Hills requests that the Commission grant waiver of certain requirements of Order Nos. 888, 889, 890, 2004 and 717, as well as section 35.28, and Parts 37 and 358 of the Commission's regulations. Specifically, Canadian Hills requests waiver of the requirement of Order Nos. 888 and 890 to file an Open Access Transmission Tariff (OATT), and the requirement of Order No. 889 to establish an Open Access Same-Time Information System (OASIS). Canadian Hills also requests a waiver of the Standards of Conduct under Part 358 of the Commission's regulations.

6. Canadian Hills asserts that good cause exists for the Commission to grant its request for waivers with respect to the Shared Facilities. According to Canadian Hills, the Shared Facilities are limited and discrete, do not comprise an integrated transmission system, and are not designed to serve any transmission customers other than the parties to the Shared Facilities Agreement. Therefore, Canadian Hills asserts that it would be burdensome to file an OATT or to establish an OASIS. Canadian Hills states that, consistent with Commission precedent, it agrees to file an OATT with the Commission if it receives a request for transmission service.¹³

IV. Notice of Filings and Responsive Pleadings

7. Notice of Canadian Hills' filing was published in the *Federal Register*, 78 Fed. Reg. 26,023 (2013), with interventions and protests due on or before May 16, 2013. A timely motion to intervene was filed by the Apex Affiliates on April 26, 2013. No protest was filed.

¹² *Id.* at 4 (citing *AmerGen Vermont LLC*, 90 FERC ¶ 61,307 (2000); *Hardee Power Partners Ltd.*, 125 FERC ¶ 61,036 (2008) (noting that the Commission has also accepted shared facilities agreements involving *pro rata* allocation of operations and maintenance costs of joint-used rather than jointly-owned facilities)).

¹³ *Id.*

V. Discussion

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the Apex Affiliates' timely, unopposed motion to intervene serves to make the Apex Affiliates parties to this proceeding.

A. Shared Facilities Agreement

9. The Shared Facilities Agreement appears to be just and reasonable, and has not been shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. However, the filing does not comply with Order No. 714.¹⁴ Specifically, in order to comply, Canadian Hills should revise the title page of the Shared Facilities Agreement to include: (1) Tariff Submitter; (2) FERC Tariff Program name; (3) Tariff Title; (4) Tariff Record Proposed Effective Date; (5) Tariff Record Title; (6) Option Code; and (7) Other information as the Commission may require by notice or order.¹⁵ In addition, Canadian Hills should amend the Record Content Description to Rate Schedule No. 2, the Record Title should be changed to Shared Facilities Agreement, and the eTariff version of the Shared Facilities Agreement to 0.1.0. Finally, when making such filing, the tariff filing code should be 70, the code assigned to compliance filings under the Market Based Rates program.

10. Accordingly, we conditionally accept Canadian Hills' filing, effective June 24, 2013, subject to Canadian Hills submitting a compliance filing within 30 days of the date of this order to revise the Shared Facilities Agreement to comply with Order No. 714.

B. Request for Waivers

11. Order Nos. 888 and 890 and section 35.28 of the Commission's regulations require public utilities that own, operate, or control facilities used for the transmission of electric energy in interstate commerce to file an OATT. Order No. 889 and Part 37 of the Commission's regulations require public utilities to establish and maintain an OASIS. Order Nos. 889, 2004, and 717 and Part 358 of the Commission's regulations

¹⁴ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008) (cross-referenced at 124 FERC ¶ 61,270 (2008)).

¹⁵ See *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings* (April 18, 2011) (*Implementation Guide*) pages 7 and 8, available at <http://www.ferc.gov/docs-filing/etariff/implementation-guide.pdf>.

require public utilities to abide by certain standards of conduct.¹⁶ In prior orders, the Commission set forth the standards for waiver of, or exemption from, some or all of the requirements of Order Nos. 888 and 889.¹⁷ The criteria for waiver of these requirements are unchanged by Order Nos. 890, 2004, and 717.¹⁸

12. The Commission may grant requests for waiver of the obligation to file an OATT to public utilities that can show that they own, operate, or control only limited and discrete transmission facilities and facilities that do not form an integrated transmission grid, until such time as the public utility receives a request for transmission service. If the public utility receives such a request, the Commission has determined that the public utility must file with the Commission a *pro forma* OATT within 60 days of the date of the request, and must comply with any additional requirements that are effective on the date of the request.¹⁹

13. The Commission also determined that waiver of the requirement to establish an OASIS and abide by the Standards of Conduct is appropriate for a public utility if the applicant: (1) owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) is a small public utility that owns, operates, or controls an integrated transmission grid, unless other circumstances are present that indicate that waiver would not be justified.²⁰ The Commission has held

¹⁶ Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,590; Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 16; Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 313.

¹⁷ See, e.g., *Black Creek Hydro*, 77 FERC ¶ 61,232, at 61,941 (1996) (*Black Creek*); *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228, at P 22 (2005) (*Entergy*).

¹⁸ See *Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at P 3 (2007); Order No. 717, FERC Stats. & Regs. ¶ 31,280 at PP 31-33.

¹⁹ *Black Creek*, 77 FERC ¶ 61,232 at 61,941. We note that, as described in the May 29, 2013 supplemental filing, contrary to the requirements of Order Nos. 888, 890 and section 35.28 of the Commission's regulations, Canadian Hills failed to file an OATT or request for an extension to file an OATT within 60 days of receiving a request for transmission service from Apex, despite the request subsequently being withdrawn. Canadian Hills is reminded that it must submit required filings in a timely manner.

²⁰ *Id.* Although the Commission originally precluded waiver of the requirements for OASIS and the Standards of Conduct for a small public utility that is a member of a tight power pool, in *Black Hills Power, Inc.*, 135 FERC ¶ 61,058, at PP 2-3 (2011), the Commission explained that membership in a tight power pool is no longer a factor in the determination for waiver of Standards of Conduct. Additionally, size is not relevant to

(continued...)

that a waiver of Order No. 889 will remain in effect until the Commission takes action in response to a complaint to the Commission that an entity evaluating its transmission needs could not get the information necessary to complete its evaluation (for OASIS waivers), or an entity complains that the public utility has unfairly used its access to information about transmission to benefit the utility or its affiliates (for Standards of Conduct waivers).²¹

14. Based upon Canadian Hills' representations in its filing, we find that the Shared Facilities qualify as limited and discrete. Accordingly, we will grant Canadian Hills' request for waiver of the requirements of Order Nos. 888 and 890 and section 35.28 of the Commission's regulations to have an OATT on file. However, if Canadian Hills receives a request for transmission service, it must file with the Commission a *pro forma* OATT within 60 days of the date of the request, and must comply with any additional requirements that are effective on the date of the request.²²

15. We also grant Canadian Hills' request for waiver of the requirements of Order No. 889 and Part 37 of the Commission's regulations with respect to establishing an OASIS, and Order Nos. 889, 2004, and 717 and Part 358 of the Commission's regulations with respect to the Standards of Conduct. We note that the waiver of the requirement to establish an OASIS will remain in effect unless and until the Commission takes action in response to a complaint to the Commission that an entity evaluating its transmission needs could not get the information necessary to complete its evaluation.²³ Likewise, Canadian Hills' request for waiver of the Standards of Conduct will remain in

whether waivers are granted to public utilities because they participate in a Commission-approved Independent System Operator or Regional Transmission Organization. *See* 18 C.F.R. § 358.1(c) (2012).

²¹ *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997) (*Central Minnesota*); and *Easton Utils. Comm'n*, 83 FERC ¶ 61,334, at 62,343 (1998) (*Easton*)).

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

²³ *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota*, 79 FERC ¶ 61,260 at 62,127; and *Easton*, 83 FERC ¶ 61,334 at 62,343).

effect unless and until the Commission takes action on a complaint by an entity that Canadian Hills has unfairly used its access to information to benefit itself or its affiliate.²⁴

The Commission orders:

(A) Canadian Hills is hereby directed to make a compliance filing within 30 days of the date of this order, as discussed in the body of the order.

(B) The Shared Facilities Agreement is hereby accepted for filing, as modified in accordance with Ordering Paragraph (A), effective June 24, 2013, as discussed in the body of this order.

(C) Canadian Hills' request for waiver of the OATT and OASIS requirements of Order Nos. 888, 889, 890, 2004, 717 as well as section 35.28 and Part 37 and Part 358 of the Commission's regulations, is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁴ *Id.* Canadian Hills must notify the Commission if there is a material change in facts that affects the waiver, within 30 days of the date of such change. *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 (2009).