

149 FERC ¶ 61,273
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Erie Wind, LLC
Niagara Wind Power, LLC

Docket Nos. ER15-222-000
ER15-224-000

ORDER ACCEPTING TENANT IN COMMON AGREEMENT AND SHARED
FACILITIES AGREEMENT AND GRANTING WAIVERS

(Issued December 24, 2014)

1. In this order, we accept the Tenant in Common Agreement and Shared Facilities Agreement between Erie Wind, LLC (Erie) and Niagara Wind Power, LLC (Niagara), effective December 29, 2014, as requested.¹ Further, as discussed below, we grant the Filing Parties' request for waivers of the requirements to file an Open Access Transmission Tariff (OATT), establish and maintain an Open Access Same-Time Information System (OASIS), and comply with the Commission's Standards of Conduct.

I. Background

2. Erie owns and operates an approximately 15 MW wind-powered generation facility located in Erie County, New York (Erie Facility), and Niagara owns and operates an approximately 20 MW wind-powered generation facility, also located in Erie County, New York (Niagara Facility) (collectively, Projects). The Projects are interconnected to transmission facilities owned by Niagara Mohawk Power Corporation (Niagara Mohawk) and operated by the New York Independent System Operator, Inc. (NYISO). The Filing Parties each own a 50 percent undivided interest in a substation that steps up the output of the Projects to 115 kV for delivery to the NYISO transmission system, as well as certain

¹ Erie filed the Tenant in Common Agreement, designated as Erie's FERC Electric Rate Schedule No. 1, and the Shared Facilities Agreement, designated as Erie's FERC Electric Rate Schedule No. 2, in Docket No. ER15-222-000. Niagara filed the Tenant in Common Agreement, designated as Niagara's FERC Electric Rate Schedule No. 1, and the Shared Facilities Agreement, designated as Niagara's FERC Electric Rate Schedule No. 2, in Docket No. ER15-224-000.

fixtures, related improvements, and personal property owned, leased, or controlled by Erie or Niagara located in the substation (collectively, Substation).

3. On October 29, 2014, the Filing Parties submitted, pursuant to section 205 of the Federal Power Act,² the Tenant in Common Agreement and Shared Facilities Agreement. The Tenant in Common Agreement governs the joint ownership of the Filing Parties' undivided interests in the Substation. Pursuant to the Tenant in Common Agreement, Erie and Niagara each have the right to use the Substation to deliver the output of their respective facilities to the NYISO markets. The Tenant in Common Agreement provides Erie a 42.85 percent interest in Substation capacity and Niagara a 57.14 percent interest, reflecting the ratio of the capacity of the Projects. Substation curtailments will be made in accordance with the Filing Parties' *pro rata* interests.

4. The Shared Facilities Agreement provides for the Filing Parties to share the costs of the Substation, to share the use and costs associated with certain poles that may be owned by only one party, but which may be used to carry lines owned by both parties, and to share the use and costs associated with other non-jurisdictional facilities (such as an operations and maintenance building) and certain real property (collectively, the Shared Facilities). A third-party affiliate provides the operation and maintenance services for the Shared Facilities under the Shared Facilities Agreement and a separate operations and maintenance agreement; the Filing Parties share expenses incurred under the operations and maintenance agreement based on the same usage ratios discussed above. However, when such costs and expenses are solely related to repairs, improvements, or damages related to one of the Projects or one of the Filing Party's actions or omissions, that Party will be solely responsible for such costs and expenses.

5. The Filing Parties maintain that the Tenant in Common Agreement and Shared Facilities Agreement are just and reasonable because they provide for the Filing Parties to share the costs of the Substation and the poles based on their relative usage of the Substation, which is derived from the relative generation capacities of their respective Projects. The Filing Parties contend that the terms of the Tenant in Common Agreement and Shared Facilities Agreement are similar to those typically included in joint ownership agreements accepted by the Commission.

6. The Filing Parties seek an effective date of December 29, 2014, for the Tenant in Common Agreement and Shared Facilities Agreement, noting that they have jointly owned and operated the Substation since October 1, 2010, and have jointly used the Shared Facilities since December 16, 2011, but are submitting the Agreements now after

² 16 U.S.C. § 824d (2012).

completing a compliance review. They state that they have reported the matter to the Commission's Office of Enforcement.³

7. The Filing Parties also request waivers⁴ of the requirements to file an OATT, establish and maintain an OASIS, and comply with the Commission's Standards of Conduct. Specifically, they request waivers of Order Nos. 888,⁵ 889,⁶ and 890,⁷ and their implementing regulations at section 35.28⁸ and Parts 37⁹ and 358¹⁰ of the Commission's regulations. In support of their requests, the Filing Parties state that the

³ The Filing Parties also state that no charges have been assessed and, therefore, no late-filing penalties would be applicable to the extent this is deemed to be a late filing.

⁴ It appears that, contrary to the requirements of section 35.28(d)(2) of the Commission's regulations, 18 C.F.R. § 35.28(d)(2) (2014), in addition to failing to file the Tenant in Common Agreement and Shared Facilities Agreement in a timely manner, the Filing Parties failed to file a request for waiver of Order Nos. 888 and 889 in a timely manner. We remind Erie and Niagara that they must submit required filings on a timely basis or face possible sanctions by the Commission.

⁵ *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).

⁶ *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).

⁷ *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).

⁸ 18 C.F.R. § 35.28 (2014).

⁹ 18 C.F.R. pt. 37 (2014).

¹⁰ 18 C.F.R. pt. 358 (2014).

Substation and poles constitute limited, discrete facilities utilized for the purpose of delivering the output of energy produced by the Projects to the NYISO transmission system, for which the Commission routinely grants waiver of its open access requirements. In addition, according to the Filing Parties, the facilities at issue do not form an integrated transmission system.

II. Notice of Filing

8. Notice of both filings was published in the *Federal Register*, 79 Fed. Reg. 65,648 (2014), with interventions and comments due on or before November 19, 2014. None was filed.

III. Discussion

9. We find the terms and conditions of the Tenant in Common Agreement and Shared Facilities Agreement to be just and reasonable and not unduly discriminatory or preferential. Accordingly, we will accept the proposed Tenant in Common Agreement and Shared Facilities Agreement, effective December 29, 2014, as requested.¹¹

10. As mentioned above, the Filing Parties request waivers of the Commission's open access requirements, namely to file an OATT, to establish and maintain an OASIS, and to comply with the Standards of Conduct for the Substation and poles owned by Erie and Niagara. 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 prior to providing transmission service. Order No. 889 and Parts 37 and 358 of the Commission's regulations require public utilities to establish an OASIS. Order Nos. 889, 2004,¹² and 717¹³ and Part 358 of

¹¹ *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992).

¹² *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).

¹³ *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.

(continued...)

the Commission's regulations require public utilities to abide by certain Standards of Conduct.¹⁴ In prior orders, the Commission has enunciated the standards for waiver of, or exemption from, some or all of the requirements of Order Nos. 888, 889, and 890.¹⁵ The Commission has stated that the criteria for waiver of the requirements of Order No. 890 have not changed from those used to evaluate requests for waiver under Order Nos. 888 and 889.¹⁶ Order No. 717 did not change those criteria.¹⁷

11. The Commission may grant requests for waiver of the obligation to file an OATT under Order Nos. 888 and 890 to public utilities that can show that they own, operate, or control only limited and discrete transmission facilities (facilities that do not form an integrated transmission grid), until such time as the public utility receives a request for transmission service. Should the public utility receive 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.¹⁸

12. The Commission has also determined that waiver of the requirements to establish an OASIS pursuant to Order No. 889 would be appropriate for a public utility if the applicant: (1) owns, operates, or controls only limited and discrete transmission facilities (other than part of an integrated transmission grid); or (2) is a small public utility that owns, operates, or controls an integrated transmission grid, unless other circumstances

¶ 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).

¹⁴ 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.

¹⁵ See, e.g., *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996) (*Black Creek*); *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228, at P 22 (2005) (*Entergy*).

¹⁶ See *Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035 at P 3 (2007); *Alcoa Power Generating Inc.*, 108 FERC ¶ 61,243, at P 27 (2004).

¹⁷ See Order No. 717, FERC Stats. & Regs. ¶ 31,280 at PP 31–33.

¹⁸ *Black Creek*, 77 FERC ¶ 61,232 at 61,941.

are present that indicate that waiver would not be justified.¹⁹ The Commission has held that 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 affiliate (for Standards of Conduct waivers).²⁰

13. Based on the statements by the Filing Parties that their facilities will be used only to transmit their generation to the NYISO transmission, we find that the Substation and poles owned by Erie and Niagara constitute limited and discrete facilities that are not part of an integrated transmission grid. Accordingly, we will grant the Filing Parties' request for waiver of the requirement in Order Nos. 888 and 890 to have an OATT on file with respect to those facilities. However, if the Filing Parties receive a request for transmission service, they must file a *pro forma* OATT with the Commission within 60 days of the date of the request.²¹

14. The Commission will also grant the Filing Parties' request for waiver of the requirements of Order No. 889 and Part 37 of the Commission's regulations to establish and maintain an OASIS, and Order No. 889 and Part 358 with respect to the Standards of Conduct. We note that waiver of the requirement to establish an OASIS will remain in effect until the Commission takes action in response to a complaint that an entity evaluating its transmission needs could not get the information necessary to complete its evaluation.²² Likewise, waiver of the Standards of Conduct will remain in effect unless

¹⁹ *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) (*Black Hills*), the Commission explained that membership in a tight power pool is no longer a factor in the determination for waiver of Standards of Conduct. Moreover, *Black Hills* did not affect waivers based on a public utility disposing of no more than 4 million MWh annually.

²⁰ *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997) (*Central Minnesota*); *Easton Utilities Commission*, 83 FERC ¶ 61,334, at 62,343 (1998) (*Easton*)).

²¹ *Black Creek*, 77 FERC ¶ 61,232 at 61,941.

²² *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota*, 79 FERC at 62,127; *Easton*, 83 FERC at 62,343).

and until the Commission takes action on a complaint that the Filing Parties have used their access to information to unfairly benefit themselves or their affiliate(s).²³

The Commission orders:

(A) The Filing Parties' proposed Tenant in Common Agreement and Shared Facilities Agreement are hereby accepted, effective December 29, 2014, as requested, as discussed in the body of this order.

(B) The Filing Parties' request for waivers of the Commission's requirements to file an OATT, to establish and maintain an OASIS, and to comply with the Standards of Conduct are hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²³ *Id.* Applicants must notify the Commission if there is a material change in facts that affect its waiver within 30 date 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).