

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Elkem Metals Company - Alloy, L.P.

Docket Nos. ER06-424-000
ER06-424-001
OA06-3-000
TS06-5-000

ORDER ACCEPTING AGREEMENT FOR FILING AND GRANTING REQUESTS
FOR WAIVERS

(Issued February 21, 2006)

1. This order accepts for filing a proposed Shared Facilities Agreement (Facilities Agreement) between Elkem Metals Company – Alloy, L.P. (Elkem) and West Virginia Alloys, Inc. (WVA), effective December 21, 2005, as requested. We also grant Elkem's requests for waivers of Order Nos. 888,¹ 889,² and Standards of Conduct.³

¹ *Promoting Wholesale Competition Through Open Access Non-discriminatory Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *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, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

² *Open-Access Same-time Information System and Standards of Conduct*, Order No. 889, 61 Fed. Reg. 21,737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles, January 1991- June 1996 ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, 62 Fed. Reg. 12,484 (March 14, 1997), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2000 ¶ 31,049 (1997), *order on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

³ *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Regulations Preambles ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, 107 FERC ¶ 61,032, *order on reh'g*, Order No. 2004-B, 108 FERC ¶ 61,118 (2004), *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs., Regulations Preambles ¶

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Background

2. Elkem⁴ states that it owns and operates: (1) a smelter alloy plant in Fayette County, West Virginia (Alloy Plant), (2) a 40 MW steam turbine unit (Steam Unit), (3) the Hawks Nest/Glen Ferris Hydroelectric Project (Project), and (4) limited transmission interconnection facilities that connect the Project to the Alloy Plant and to the Appalachian Power Company (Appalachian) transmission system. Elkem states that its limited transmission interconnection facilities subject to this Facilities Agreement are an 11.6 mile, 138 kV transmission line and a 0.6 mile, 46 kV transmission line that connect a switchyard adjacent to the Alloy Plant to the Appalachian transmission system, together with a related 13.8 kV bus and transformers (collectively, Transmission Facilities). Elkem states that the Transmission Facilities are used to deliver energy Elkem purchases from third-parties from the Appalachian transmission system for Elkem's wholesale sales to third-parties.

Filing

3. On December 20, 2005, Elkem filed, under section 205 of the Federal Power Act, a Shared Facilities Agreement (Facilities Agreement) between Elkem and WVA. Elkem explains that under an asset sale agreement, dated November 11, 2005, Elkem will sell the Alloy Plant and the Steam Unit (collectively, Manufacturing Facility) to WVA, with the transfer occurring on December 21, 2005.⁵ Elkem also states that on December 21,

31,172; *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), appeal pending sub nom. *National Gas Fuel Supply Corp. v. FERC*, No. 04-1183, *et al.* (D.C. Cir. June 15, 2004).

⁴ Elkem advises that it is a Delaware limited partnership, with Elkem Metals, Inc. (EMI) as the sole general partner and Elkem Investment Holdings, Inc. (EIH) is the sole limited partner in Elkem. Elkem adds that EMI and EIH are indirectly owned by Elkem AS, a Norwegian company engaged in the business of: (1) producing and supplying metal and materials to the steel, foundry, chemicals, electronics and aluminum industries, and (2) the production of hydroelectric power in Norway and Canada. Elkem adds that Elkem AS is a wholly-owned subsidiary of Orkla ASA, a Norwegian public company.

⁵ Elkem notes that after the transfer occurs, Elkem will sell energy from its Project to an affiliated power marketer (the Marketer) pursuant to a wholesale power agreement. Elkem states that it will transmit the Project power it sells at wholesale to the Marketer over the other Elkem interconnection facilities and the Marketer will take title to the power at the delivery point, which will be at Elkem buses at the switchyard. Elkem states that the Marketer will resell the power to WVA, for use in its Manufacturing Facility, at Elkem buses at the switchyard. Elkem notes that it will not provide transmission services to any party over the other Elkem interconnection facilities. Elkem also adds that it

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2005, it has agreed to make capacity available on its Transmission Facilities to deliver energy to WVA that WVA may purchase at retail from third-parties (*i.e.*, WVA Energy) for use in the Manufacturing Facility and that is made available to WVA at Elkem's interconnection with Appalachian. Elkem states that any WVA Energy that Elkem transmits over the Transmission Facilities will be owned by WVA at all times and Elkem will not have title to such energy at any time.

4. Elkem explains that under the Facilities Agreement, WVA will pay a pro rata share of Transmission Operating and Maintenance (O&M) Costs and Switching Station Operator Costs. Elkem states that it will segregate the Transmission O&M costs in a separate account and include in that account direct labor, labor overheads, pensions and benefits, equipment and supplies, and the cost of outside contractors associated with the Transmission Facilities. Elkem adds that Switching Station Operator Costs will include direct labor costs and labor overheads. Elkem states that for each month, the charge for services provided under the Facilities Agreement will be the product of: (1) the sum of 100 percent of the Transmission O&M costs and 25 percent of the Switching Operator Costs and (2) the ratio of (a) the number of kWhs received from Appalachian and delivered to WVA to (b) the sum of (i) the number of kWhs received from Appalachian and delivered to WVA and (ii) the kWh, if any, delivered from the Project to the Appalachian system. In addition, Elkem states that WVA will pay any Commission annual charges assessed to Elkem.

5. Elkem asks that the Commission accept for filing the proposed Facilities Agreement without suspension, hearing, or modification. Elkem also requests that the Commission waive the 60-day prior notice requirement so that the Facilities Agreement will be made effective date on December 21, 2005, the date when the transfer of the Manufacturing Facility to WVA occurred.

6. Elkem also asks that the Commission confirm that it continues to qualify for waiver of Order Nos. 888 and 889,⁶ and also requests waiver of the Standards of Conduct under Part 358 of the Commission's regulations (18 C.F.R. § 358 (2004)). In support of its request for waiver, Elkem contends that the Facilities Agreement is not a new use of the Transmission Facilities but rather maintains the historical practice whereby the

recently submitted (in Docket No. EG06-24-000) a request for Determination as an Exempt Wholesale Generator (EWG) under section 32 of the Public Utility Holding Company Act of 1935 to allow it EWG status. We note that the Commission granted Elkem's request for EWG status on February 1, 2006. *See Elkem Metals Company-Alloy L.P.*, 114 FERC ¶ 62,091 (2006).

⁶ *See Elkem Metals Company and Elkem Metals Company-Alloy, Inc.*, 91 FERC ¶ 61,130 (2000) (Commission letter order granting waivers of Order Nos. 888 and 889).

Transmission Facilities support both the delivery by Elkem of its power from the Project to the Appalachian transmission system and the delivery of energy purchased at retail for use in the Manufacturing Facility. Thus, Elkem claims that while the acquisition by WVA of the Manufacturing Facility required that the parties enter into the Facilities Agreement and file it with the Commission, the usage of the facilities has not changed. Therefore, Elkem argues that it continues to meet the Commission's requirements for waiver of Order Nos. 888 and 889. In addition, Elkem maintains that it satisfies the small utility criterion and does not own or control an integrated transmission grid because the Transmission Facilities can only be used to support the delivery by Elkem of excess power to the Appalachian transmission system and the delivery of power purchased by WVA from third parties.

Notice

7. Notice of Elkem's filing was published in the *Federal Register*, 71 Fed. Reg. 3078 (2006), with protests or motions to intervene due on or before January 12, 2006. No interventions, protests, or comments were filed.

Discussion

Section 205 Filing – Facilities Agreement

8. We find that the proposed rates for Transmission O&M and Switching Station Operator costs in the Facilities Agreement that are based on actual direct labor costs and related out-of-pocket contract costs are just and reasonable, and have not been shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the proposed Facilities Agreement for filing, without hearing or suspension. We will also grant Elkem's request that we waive our 60-day prior notice requirement to make the Facilities Agreement effective on the date service commences, as Elkem requested. Therefore, we will accept the Facilities Agreement to become effective on December 21, 2005.⁷

⁷ See *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,984, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (waiver of prior notice will be granted if service agreements are filed within 30 days after service commences); *accord Southern Company Services, Inc.*, 102 FERC ¶ 61,319 at P12 (2003); *Southwest Power Pool, Inc.*, 113 FERC ¶ 61,101 at P 21 (2005).

Waiver of Order Nos. 888 and 889

9. 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 and 889.⁸ The Commission grants requests for waiver of Order No. 888 from 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 tariff 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.⁹

10. The Commission has also determined that waiver of Order No. 889 would be appropriate for a public utility: (1) if the applicant owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) if the applicant is a small public utility that owns, operates, or controls an integrated transmission grid, unless it is a member of a tight power pool, or other circumstances are present that indicate that a waiver would not be justified.¹⁰ Moreover, the Commission has held 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 used its access to information about transmission to unfairly benefit the utility or its affiliate (for Standard of Conduct waivers).¹¹

11. In support of its request for waiver of the requirements of Order Nos. 888 and 889 Elkem asserts that its limited transmission interconnection facilities subject to this Facilities Agreement are an 11.6 mile, 138 kV transmission line and a 0.6 mile, 46 kV transmission line that connect a switchyard adjacent to the Alloy Plant to the Appalachian transmission system, together with a related 13.8 kV bus and transformers. In addition, Elkem maintains that it satisfies the small utility criterion and does not own or control an integrated transmission grid because its Transmission Facilities can only be used to support the delivery by Elkem of excess power to the Appalachian transmission system

⁸ See, e.g., *Entergy Mississippi, Inc. (Entergy)*, 112 FERC ¶ 61,228 at P 22 (2005).

⁹ *Black Creek Hydro, Inc. (Black Creek)*, 77 FERC ¶ 61,232 at 61,941 (1996).

¹⁰ *Id.*

¹¹ *Entergy* at P 23, citing *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260 at 62,127 (1997); *Easton Utilities Commission*, 83 FERC ¶ 61,334 at 62,343 (1998).

and the delivery of power purchased by WVA from third parties. Elkem also contends that the Facilities Agreement maintains the Transmission Facilities' historical practice of supporting the delivery by Elkem of its power from the Project to the Appalachian transmission system and the delivery of energy purchased at retail for use in the Manufacturing Facility. Elkem claims that although WVA's acquisition of the Manufacturing Facility required that the parties enter into the Facilities Agreement, the usage of the facilities has not changed. Thus, Elkem maintains that it meets the Commission's requirements for waiver of Order Nos. 888 and 889.

12. Based on the statements in Elkem's request, we will grant Elkem, consistent with *Black Creek*, a waiver of the requirements of Order Nos. 888 and 889.

Waiver of Standards of Conduct

13. Elkem also requests waiver of the Standards of Conduct requirement under Part 358 of the Commission's regulations. Elkem argues that it meets the Commission's waiver standards under *Black Creek* because Elkem asserts that it controls a limited and discrete transmission system that are not part of the grid. In this regard, Elkem states that the Transmission Facilities are used to deliver energy Elkem purchases from third parties from the Appalachian transmission system for Elkem's wholesale sales to third parties.

14. The Commission will grant Elkem a waiver of the Standards of Conduct. Waivers of Order No. 2004 are granted upon request to: (1) a utility that owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) a small public utility that owns, operates, or controls an integrated transmission grid unless it is a part of a tight power pool, or unwarranted by other circumstances.¹² We find that Elkem controls only small, discrete, stand-alone transmission facilities. We also find that the transmission facilities operated by Elkem are not part of the grid and are not operated by any ISO. Consequently, under these facts, we find good cause exists to grant Elkem's request for an exemption from the requirements of Order No. 2004 and Part 358 of the Commission's regulations.

The Commission orders:

(A) The proposed Facilities Agreement filed by Elkem in Docket Nos. ER06-424-000 and ER06-424-001, designated as Electric Rate Schedule FERC No. 1, is hereby accepted without hearing or suspension, to become effective on December 21, 2005, as requested.

¹² *Central New York Oil and Gas Co., LLC, et al.*, 109 FERC ¶ 61,231 at P 26-27 (2004).

(B) Elkem's requests for waiver of the requirements of Order Nos. 888, 889, and the Standards of Conduct are hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.