

123 FERC ¶ 61,246
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

FPL Energy Oliver Wind, LLC

Docket No. TS08-2-000

ORDER GRANTING REQUESTS FOR WAIVERS

(Issued June 5, 2008)

1. On January 30, 2008, FPL Energy Oliver Wind LLC (Oliver Wind) filed a petition for waivers of the standard of conduct requirements of Part 358 of the Commission's regulations,¹ Order No. 888,² Order 889,³ and Order No. 890.⁴ As discussed below, this order grants these waivers.

¹ 18 C.F.R. Part 358 (2007); *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, 72 Fed. Reg. 2,427 (Jan. 19, 2007), FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, 72 Fed. Reg. 14,235 (Mar. 27, 2007), FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, 72 Fed. Reg. 3,958 (Jan. 29, 2007) FERC Stats. & Regs. ¶ 32,611 (2007); Notice of Proposed Rulemaking, 73 Fed. Reg. 16,228 (Mar. 27, 2008) FERC Stats. & Regs. ¶ 32,630 (2008).

² *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. ¶ 31,306 (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).

I. Background

2. Oliver Wind owns and operates a 50.6 MW wind-powered electric generating facility (Oliver Wind Facility) in Oliver County, North Dakota. FPL Energy Oliver Wind II, LLC (Oliver Wind II), an affiliate of Oliver Wind, owns and operates a 48 MW wind-powered electric generation facility (Oliver Wind II Facility), also located in Oliver County, North Dakota. Oliver Wind states that it has been granted exempt wholesale generator (EWG) status,⁵ and that Oliver Wind II's notice of self-certification of EWG status is on file with the Commission.⁶ Oliver Wind states that both Oliver Wind and Oliver Wind II have been granted the authority to sell energy, capacity, and ancillary services at market-based rates.⁷

3. The Oliver Wind Facility is interconnected by an approximately 542-foot long, 230 kV transmission line and associated infrastructure, which interconnects to a 230 kV terminal position at the Center Substation owned by Square Butte Electric Cooperative (Square Butte). Oliver Wind sells all of the output from the Oliver Wind Facility to Minnesota Power, a division of Allete, Inc. (Minnesota Power), pursuant to a long-term power purchase agreement.

4. The Oliver Wind II Facility is interconnected by a 12.5 mile, 34.5 kV underground transmission line owned by Oliver Wind II, which connects to the approximately 542-foot long, 230 kV transmission line owned by Oliver Wind. Oliver Wind's transmission

³ *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 889-B, 81 FERC ¶ 61,253 (1997).

⁴ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g and clarification*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007).

⁵ *FPL Energy Oliver Wind, LLC*, Notice of Effectiveness of Exempt Wholesale Generator Status, Docket No. EG06-74-000 (Nov. 1, 2006).

⁶ *FPL Energy Oliver Wind II, LLC*, Notice of Self Certification of Exempt Wholesale Generator Status, Docket No. EG08-4-000 (Oct. 15, 2007).

⁷ *FPL Energy Oliver Wind, LLC*, Docket No. ER08-206-000 (unpublished letter order dated Jan. 8, 2008); *FPL Energy Oliver Wind II, LLC*, Docket No. ER08-197-000 (unpublished letter order dated Dec. 19, 2007).

facilities then transmit the power produced by the Oliver Wind II Facility to the substation owned by Square Butte. Oliver Wind II sells all of the output from the Oliver Wind II Facility to Minnesota Power pursuant to a long-term power purchase agreement.

5. Oliver Wind states that pursuant to a Shared Facilities Agreement,⁸ Oliver Wind II has the right to access and utilize Oliver Wind's transmission and other facilities in connection with Oliver Wind II's ownership and operation of its wind project. The Shared Facilities Agreement also provides Oliver Wind II with access to certain Oliver Wind buildings. Oliver Wind explains that the agreement also specifies that Oliver Wind is responsible for the ownership, operation, inspection, maintenance, repair, alteration, relocation, improvement and replacement of the shared facilities.

II. Details of Filing

6. On January 30, 2008, Oliver Wind filed its petition for the above-mentioned waivers. Oliver Wind states that because it shares a transmission facility with its affiliate, Oliver Wind II, it may be deemed a "Transmission Provider" under section 358.3(a)(1)⁹ of the Commission's regulations. Therefore, pursuant to section 358.1(d),¹⁰ Oliver Wind requests a waiver of the Standard of Conduct requirements in Part 358 of the Commission's regulations. Oliver Wind argues that good cause exists to grant it a complete waiver of Part 358, because it has neither the ability nor the incentive to favor its affiliate (Oliver Wind II) and no ability to harm wholesale energy markets.

7. In support of this waiver request, Oliver Wind states that its transmission facility is a limited and discrete radial facility, which does not form part of any integrated electricity grid. Oliver Wind explains that the Oliver Wind transmission facility was built for the purpose of delivering the output of Oliver Wind and Oliver Wind II to the interconnection point with Square Butte. Oliver Wind further states that the Oliver Wind transmission facility does not serve customers other than Oliver Wind II. Oliver Wind asserts that although Oliver Wind II is an "energy affiliate" as defined by the Commission's regulations,¹¹ it has no economic incentive for information sharing or

⁸ Oliver Wind and Oliver Wind II entered into a shared facilities agreement dated November 13, 2007 and designated as FPL Energy Oliver Wind, LLC Rate Schedule FERC No. 1. *See FPL Energy Oliver Wind, LLC*, Docket No. ER08-206-000 (unpublished letter order dated Jan. 8, 2008).

⁹ 18 C.F.R. § 358.3(a)(1) (2007).

¹⁰ 18 C.F.R. § 358.1(d) (2007).

¹¹ 18 C.F.R. § 358.3(d) (2007).

granting preferences because the transmission service will be provided only to Oliver Wind II and such service is subject to the terms of the Shared Facilities Agreement on file with the Commission. Thus, Oliver Wind states that good cause exists to grant it a waiver of Part 358 of the Commission's regulations.

8. Oliver Wind also requests a waiver of the requirement to file an Open Access Transmission Tariff (OATT) prior to providing transmission service under Order Nos. 888 and 890, and the requirement to establish an Open-Access Same Time Information System (OASIS) under Order No. 889. In support of its waiver request, Oliver Wind states that Oliver Wind will provide Oliver Wind and Oliver Wind II with transmission service pursuant to the Shared Facilities Agreement. Oliver Wind further states that the only jurisdictional facility it will own is the Oliver Wind Line, which is necessary to connect the Oliver Wind and Oliver Wind II Facilities with the Square Butte substation. Consequently, Oliver Wind asserts that it would be a waste of resources for it to file an OATT or establish an OASIS. Furthermore, Oliver Wind states that it is the Commission's practice to grant these waivers to small utilities producing 4 million MWh or less annually, noting that the maximum output from the Oliver Wind and Oliver Wind II facilities is approximately 865,000 MWh.¹²

III. Public Notice, Intervention and Comments

9. Notice of Oliver Wind's filing was published in the *Federal Register*, 73 Fed. Reg. 8,039 (2008), with protests or motions to intervene due on or before February 20, 2008. No interventions, protests, or comments were filed.

IV. Discussion

A. Waiver of Standards of Conduct

10. For the reasons discussed below, we will grant Oliver Wind's request for waiver of the Standards of Conduct requirements. The Standards of Conduct, adopted in Order No. 2004 and codified in Part 358 of the Commission's regulations,¹³ govern the relationships between transmission providers and their marketing and energy affiliates. The Commission will grant waivers of the Standards of Conduct requirements upon request to certain entities: (1) a utility that owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) a small

¹² Oliver Wind calculates this maximum amount of energy by adding the 48 MW from Oliver Wind II plus 50.6 MW from Oliver Wind and multiplying that amount by 8,760 hours in a year.

¹³ 18 C.F.R. Part 358 (2007).

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.¹⁴ Based on the statements in Oliver Wind's filing, we find that Oliver Wind controls a limited and discrete transmission facility, not part of an integrated transmission grid, which Oliver Wind and Oliver Wind II use as a means to move power from their generating facilities to Square Butte's substation, for sale to Minnesota Power. Consequently, under the above-described facts, we find good cause exists to grant Oliver Wind's request for a waiver of the Part 358 Standards of Conduct requirements.¹⁵

B. Waiver of Order Nos. 888, 889, 890

11. Order Nos. 888 and 890 require public utilities to file an OATT prior to providing transmission service. Order No. 889 requires public utilities to establish an OASIS. 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 889.¹⁶ The Commission has stated that the criteria for waiver of the requirements of Order 890 are unchanged from those used to evaluate requests for waiver under Order Nos. 888 and 889.¹⁷

¹⁴ *Peetz Logan Interconnect, LLC*, 122 FERC ¶ 61,086 (2008); *see also Alcoa Power Generating, Inc.*, 108 FERC ¶ 61,243, at P 27 (2004) (citing *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996) (*Black Creek*)). A waiver from the Standards of Conduct will remain in effect unless and until the Commission takes action on a complaint by an entity that Oliver Wind has used its access to transmission information to unfairly benefit Oliver Wind's own sales, or an affiliate's sales. *See Peetz Logan Interconnect, LLC*, 122 FERC ¶ 61,086 at n.22.

¹⁵ Additionally, on March 21, 2008, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing a series of reforms to the Standards of Conduct. While the NOPR proposes to rescind the application of the Standards of Conduct to energy affiliates of transmission providers, the Standards of Conduct would continue to apply to marketing affiliates. Based on Oliver Wind's pleading, it appears that its affiliate, Oliver Wind II, is also a marketing affiliate. Accordingly, even if the reforms proposed in the NOPR are adopted in the final rule, the NOPR does not appear to affect either Oliver Wind's need for the waiver requested herein or the Commission's decision. We note that Oliver Wind, like other transmission providers, will have to comply with any new or revised requirements that may be adopted under a final rule.

¹⁶ *See, e.g., Black Creek*, 77 FERC ¶ 61,232 at 61,941; *Entergy Mississippi, Inc. (Entergy)*, 112 FERC ¶ 61,228, at P 22 (2005).

¹⁷ *See Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at P 3 (2007).

12. The Commission may grant requests for waiver of 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* tariff within 60 days of the date of the request and must comply with any additional requirements that are in effect on the date of the request.¹⁸

13. 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.¹⁹ 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 unfairly used its access to information about transmission to benefit the utility or its affiliate (for Standard of Conduct waivers).²⁰

14. In support of its request for waiver of the requirements of Order Nos. 888, 889, and 890, Oliver Wind states that the line is a limited and discrete radial line that does not form a part of any integrated transmission grid, and that it serves only to move power from Oliver Wind and Oliver Wind II, so that it can be sold to Minnesota Power. Furthermore, Oliver Wind states that it meets the Commission's definition of a small public utility because it transmits less than 4 million MWh annually, as discussed above.

15. Oliver Wind requests waiver of the requirement of Order Nos. 888 and 890 to file an OATT prior to providing transmission service, and the requirement of Order No. 889 to establish an OASIS. As stated above, the criteria for waiver of Order No. 890 are unchanged from those used to evaluate requests for waiver under Order Nos. 888 and 889. Based on the statements in Oliver Wind's filing, we find that Oliver Wind's Line is

¹⁸ *Black Creek*, at 61,941.

¹⁹ *Id.*

²⁰ *Entergy*, 112 FERC ¶ 61,228 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)).

a limited and discrete facility. The only transmission service Oliver Wind's facility provides is to itself and Oliver Wind II, and it is unlikely that any other generator would request transmission service from Oliver Wind. In addition, Oliver Wind meets the Commission's definition of a small public utility.²¹ In light of these circumstances, we will grant Oliver Wind's waiver from the OASIS requirements of Order 889,²² and waiver of the requirements in Orders 888 and 890 to have an OATT on file prior to providing transmission service.²³

The Commission orders:

Oliver Wind's requests for waiver of the OATT requirements of Order Nos. 888 and 890, the OASIS requirement of Order No. 889, and 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.

²¹ See *Alcoa Power Generating, Inc.*, 116 FERC ¶ 61,257, at P 7 and n.5 (2006).

²² A waiver of the requirement to establish and maintain an information system (i.e., an OASIS) remains effective until the Commission takes action in response to any complaint by an entity alleging that in evaluating its transmission needs, the entity could not obtain from Oliver Wind information necessary to complete its evaluation.

²³ Consistent with *Black Creek*, Oliver Wind must file, within 60 days of its facility's receiving a request for transmission service from a customer other than Oliver Wind II, a *pro forma* OATT in compliance with Order Nos. 888 and 890, and any additional requirements.