

141 FERC ¶ 61,067
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

KODE Novus I, LLC

Docket No. ER12-2533-000

ORDER ACCEPTING SHARED FACILITIES AGREEMENT AND GRANTING
REQUEST FOR WAIVERS

(Issued October 26, 2012)

1. On August 28, 2012, pursuant to section 205 of the Federal Power Act (FPA),¹ KODE Novus I, LLC (Novus I) filed a Shared Facilities Agreement between Novus I and KODE Novus II, LLC (Novus II). In its filing, Novus I also requested waivers of sections 35.12 and 35.28,² Parts 37 and 358³ of the Commission's regulations and Order

¹ 16 U.S.C. § 824d (2006).

² 18 C.F.R. § 35.28 (2012).

³ 18 C.F.R. Part 358 (2012). *See also 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); *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); *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).

Nos. 888,⁴ 889,⁵ and 890.⁶ In this order we accept the Shared Facilities Agreement between Novus I and Novus II, effective April 27, 2012, and grant Novus I's requested waivers.

I. Background

2. On August 28, 2012, Novus I filed the Shared Facilities Agreement. In its filing, Novus I states that Novus I and Novus II are currently constructing, and will own and operate wind-powered electric generating facilities located in Guymon, Oklahoma.

3. Novus I states that it is a qualifying facility (QF) and is owned 50 percent by KOSEP USA, Inc. (KOSEP) and 50 percent by DeWind Co. Novus I further states that KOSEP is a wholly-owned subsidiary of Korea South East Power Co., a Korean corporation and DeWind is a wholly-owned subsidiary of Daewoo Shipbuilding and Marine Engineering, Co., Ltd.

4. Novus I states that Novus II is a QF owned by KOSEP, DeWind, and Speco Wind Power, Inc. (Speco).⁷ According to Novus I, Speco is a wholly-owned subsidiary of Speco Wind Power S.A. DE. C.V., a Mexican corporation and Speco Ltd., a Korean corporation. Novus I states that KOSEP owns a 49 percent membership interest in

⁴ *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).

⁵ *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).

⁶ *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 reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) (Order No. 890).

⁷ Transmittal at 2-3.

Novus II, and DeWind owns 48 percent membership interest in Novus II and Speco owns the remaining 3 percent.⁸

5. According to Novus I, the Novus I Facility will have a generating capacity of 80 MW and the Novus II facility will have a generating capacity of 40 MW. At the time of the filing, Novus I states that the Novus I Facility is expected to enter into service in September 2012 and the Novus II Facility is expected to commence commercial operations by the end of 2012. Novus I states that the Novus I Facility is interconnected to the transmission system owned by Southwestern Public Service Company, Inc. (SPS) and under the operational control of Southwest Power Pool, Inc.⁹

6. Novus I states that it owns the interconnection facilities that are the subject of the Shared Facilities Agreement and that will be used by both Novus I and Novus II. Novus I also states that under the Shared Facilities Agreement, Novus I will allow Novus II to utilize Novus I's right to interconnect to the SPS transmission system at the point of interconnection.¹⁰

II. Applicant's Filing

A. Shared Facilities Agreement

7. According to Novus I, under the Shared Facilities Agreement, Novus I will be responsible for the operation, inspection, maintenance, repair, alternation, relocation, improvement and replacement of certain shared interconnection facilities (Shared Facilities), including the costs of compliance with the Commission's requirements. Novus I additionally states that it will make the Shared Facilities available to Novus II on a non-exclusive basis to transmit energy generated by Novus II to the point of interconnection, and Novus II will pay Novus I its pro rata share of the operations and maintenance (O&M) expenses for the Shared Facilities.¹¹ Novus I states that the Shared Facilities will consist of a single, radial interconnection line and associated interconnection facilities. Novus I asserts that this radial interconnection line will interconnect the Novus I and Novus II facilities with the SPS transmission system at a single point. Novus I states that the Shared Facilities will be constructed solely for the purpose of interconnecting Novus I and Novus II to the SPS transmission system and will

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

not serve any other customers. Novus I states that it will not own, operate, or control any transmission facilities other than the Shared Facilities.¹²

8. Novus I states that Novus I and Novus II executed the Shared Facilities Agreement on April 27, 2012. Novus I seeks the same effective date for the Shared Facilities Agreement. Novus I asserts that, as of the date of the filing, Novus I has not provided any service to, or collected any amounts from, Novus II under the Shared Facilities Agreement.¹³

9. Novus I maintains that all requisite agreements for the Shared Facilities Agreement have been obtained and that the Shared Facilities Agreement was freely negotiated and executed by Novus I and Novus II. According to Novus I, no other parties need to execute the Shared Facilities Agreement.¹⁴ Novus I also states that it has no other rate schedules and that, therefore, a comparison of the Shared Facilities Agreement to other jurisdictional agreements is unnecessary.¹⁵

B. Requests for Waiver

10. Novus I submits that the only charge related to the Shared Facilities Agreement is for the shared O&M expenses between Novus I and Novus II. According to Novus I, the basis for this charge is the actual cost incurred by the entities for O&M expenses. Novus I anticipates that such costs will likely be minimal, but asserts that it cannot make an estimate with any accuracy at this time. Consequently, Novus I requests waiver of the requirement under section 35.12(b)(1) to provide an estimate of future transactions and revenues under the Shared Facilities Agreement. Novus I also states that the only charge related to the Shared Facilities Agreement is for the shared O&M expenses and requests waiver of the statement of its cost computations pursuant to section 35.12(b)(2)(ii) of the Commissions' regulations.¹⁶

11. Novus I also requests waiver of the Commission's requirements to: (1) file an open access transmission tariff (OATT) pursuant to section 35.28 of the Commission's regulations and Order Nos. 888 and 890; (2) establish an open access same-time information system (OASIS) pursuant to Part 37 of the Commission's regulations and

¹² *Id.* at 6.

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.* at 5.

¹⁶ *Id.*

Order No. 889; and (3) comply with the Commission's Standards of Conduct under Part 358 of the Commission's regulations.

12. Novus I asserts that good cause exists to grant its requested waiver of the requirements to file an OATT, establish and maintain an OASIS, and abide by the Standards of Conduct, because the Shared Facilities do not comprise an integrated transmission system, and comprise only limited and discrete transmission facilities.¹⁷ Novus I also asserts that imposing the subject regulation on Novus I would create a substantial burden for Novus I without any offsetting benefits.

III. Notice of Filing

13. Notice of the filing was published in the *Federal Register*, 77 Fed. Reg. 54,907 (2012), with interventions and protests due on or before September 18, 2012. None was filed.

IV. Discussion

A. The Shared Facilities Agreement

14. The Commission finds the terms and conditions of the Shared Facilities Agreement to be just and reasonable, and not unduly discriminatory or preferential. Accordingly, we will accept the Shared Facilities Agreement, effective April 27, 2012, as requested.

B. Request for Waivers

15. Novus I requests waiver of the Commission's requirements to file an OATT, establish OASIS and comply with the Commission's Standards of Conduct. 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 Part 37 of the Commission's regulations require public utilities to establish and maintain an OASIS and abide by certain standards of conduct.¹⁸ In prior orders, the Commission has enunciated the standards for waiver of, or exemption from, some or all

¹⁷ *Id.* at 6.

¹⁸ Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,590; Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 16; Order No. 690, FERC Stats. & Regs. ¶ 31,237; Order No. 717, FERC Stats. & Regs. ¶ 31,280.

of the requirements of Order Nos. 888 and 889.¹⁹ The Commission has also stated that the criteria for waiver of the requirements of Order No. 890 and Order No. 2004 are unchanged from those used to evaluate requests for waiver under Order Nos. 888 and 889.²⁰ Order No. 717 did not change those criteria.²¹

16. The Commission may grant requests for waiver of the obligation under Order Nos. 888 and 890 to file an OATT 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. 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.²²

17. Based on the statements in Novus I's filing, we find that the transmission facilities at issue are limited and discrete. The Shared Facilities will be utilized solely to facilitate the transmission of power from the affiliates' Novus I Facility and Novus II Facility to the grid. Accordingly, we will grant Novus I's 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.

18. If, however, Novus I receives a request for transmission service from a non-affiliate, 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, in compliance with Order Nos. 888 and 890.

19. The Commission has also determined that waiver of Order No. 889 would be appropriate for a public utility under the following circumstances: (1) the applicant owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) 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

¹⁹ See, e.g., *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232 at 61,941 (1996); *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228, at P 22 (2005) (*Entergy*).

²⁰ See *Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at P 3 (2007).

²¹ See Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 54.

²² *Black Creek*, 77 FERC at 61,941.

justified.²³ In addition, the Commission grants waivers to small public utilities based on the threshold of whether they dispose of no more than 4 million MWh annually.²⁴ 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 Standards of Conduct waivers).²⁵

20. The Commission will also grant Novus I's waiver of the requirements of Order No. 889 and Part 37 of the Commission's regulations with respect to 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 Novus I's waiver of the requirement to establish an OASIS 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.²⁶ Likewise, Novus I's waiver of the Standards of Conduct will remain in effect unless and until the Commission takes action on a complaint by an entity that Novus I has unfairly used its access to information to unfairly benefit itself or its affiliate.²⁷

21. The Commission also grants Novus I's request for waiver of section 35.12(b)(1) and 35.12(b)(2)(ii). The only charge related to the Shared Facilities Agreement is for the

²³ *Id.* 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 whether waivers are granted to public utilities that participate in a Commission-approved Independent System Operator or Regional Transmission Organization.

²⁴ *See Wolverine Power Supply Coop., Inc.*, 127 FERC ¶ 61,159, at P 15 (2009).

²⁵ *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).

²⁶ *Id.*

²⁷ *Id.* Novus I must notify the Commission if there is a material change in facts that affect their 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).

shared actual costs incurred for O&M expenses between Novus I and Novus II, which, according to Novus I, cannot be estimated with any accuracy at this time.

The Commission orders:

(A) The Shared Facilities Agreement is hereby accepted for filing, effective April 27, 2012, as requested.

(B) Novus I's request for waiver of the OATT and OASIS requirements of Order Nos. 888, 889, 890 as well as sections 35.12 and 35.28 and Parts 37 and 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.