

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Big Rivers Electric Corporation

Docket No. EL04-76-000

ORDER CLARIFYING STATUS OF SAFE HARBOR TARIFF

(Issued April 19, 2004)

1. In this order, the Commission clarifies that the “safe harbor” Open Access Transmission Tariff (OATT) of Big Rivers Electric Corporation (Big Rivers) has not been deemed to include the pro forma Large Generator Interconnection Agreement (LGIA) and Large Generator Interconnection Procedures (LGIA) adopted by the Commission in Order 2003 and Order 2003-A. This order benefits customers by further clarifying the status of “safe harbor” tariffs under Order Nos. 2003 and 2003-A.

Background

2. In Order No. 888, the Commission required non-public utilities that own, operate or control transmission facilities, as a condition of receiving open access transmission service from a public utility under its OATT, to provide reciprocal transmission service on comparable terms.¹ As one method of satisfying this reciprocity requirement, the Commission allowed non-public utilities to file an OATT with the Commission under the voluntary “safe harbor” provision.² Under this provision, the Commission issues a

¹ 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) at 31,760-61 (Order No. 888), order on reh’g, Order No. 888-A, 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 (1997), 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).

² Id. at 31,761.

declaratory order finding the OATT appropriate for “safe harbor” status if its provisions “substantially conform or are superior to” the pro forma OATT.³

3. More recently, in Order No. 2003 the Commission required public utilities that own, control or operate transmission facilities to include in their OATT standardized Large Generator Interconnection Procedures (LGIP) and a Large Generator Interconnection Agreement (LGIA).⁴ In that order, the Commission also stated that “[a] non-public utility that has a ‘safe harbor’ Tariff may add to its Tariff an interconnection agreement and interconnection procedures that substantially conform or are superior to the . . . LGIP and LGIA if it wishes to continue to qualify for safe harbor treatment.”⁵

4. Later, in its Notice Clarifying Compliance Procedures,⁶ the Commission stated that the OATTs of all “non-independent Transmission Providers”⁷ were “deemed to be revised to include” the LGIP and LGIA as of January 20, 2004. Big Rivers is a non-public utility that has a “safe harbor” OATT that was found by the Commission in 1998 to satisfy the reciprocity requirement of Order No. 888.⁸ On January 20, 2004, Big Rivers submitted a letter to the Commission citing the above language from the January 8 Notice but explaining that it has “not concluded that the Commission intended to deem the *pro forma* LGIP and LGIA to be included in the ‘safe harbor’ tariffs of *non-jurisdictional* utilities such as Big Rivers.”⁹ Big Rivers states that it wishes to maintain its “safe harbor” status, and requests “to the extent necessary to maintain its ‘safe harbor’

³ Id.

⁴ Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 104 FERC ¶ 61,103 (2003) (Order No. 2003), order on reh’g, Order No. 2003-A, 106 FERC ¶ 61,220 (2004).

⁵ Order No. 2003 at P 842; see also Order No. 2003-A at P 773.

⁶ See Notice Clarifying Compliance Procedures, Docket Nos. RM02-1-000 (Jan. 8, 2004) (January 8 Notice).

⁷ A non-independent Transmission Provider is defined as a utility that either is not an RTO or ISO, or is a member of an RTO or ISO but maintains ownership and operational control over certain of its Commission-jurisdictional facilities. See id. At note 2.

⁸ See Letter Order Accepting Big Rivers’ OATT, Docket No. NJ98-5-000 (Sept. 18, 1998).

⁹ Big Rivers’ Letter at 2 (emphasis added).

status and solely for that purpose, that the Commission deem Big Rivers' OATT to include the *pro forma* LGIP and LGIA as of January 20, 2004, to the extent the LGIP and LGIA are not inconsistent with the requirements of Kentucky law and the policies of the Kentucky Public Service Commission (KPSC)."¹⁰ Big Rivers also states "that some aspects of the *pro forma* LGIP and LGIA may be incompatible with the requirements of Kentucky law and the policies of the KPSC."¹¹

Discussion

5. In response to Big Rivers' request, the Commission clarifies that, in the January 8 Notice, only the OATTs of non-independent Transmission Providers were deemed to include the pro forma LGIP and LGIA. "Transmission Provider," as defined in the pro forma LGIP and LGIA, means only a *public utility*.¹² Therefore, the Commission did not deem the LGIP and LGIA to be included in "safe harbor" Tariffs, and because Big Rivers is not a public utility, its OATT has not been deemed to include the pro forma LGIP and LGIA.

6. As we stated in Order No. 2003, a non-public utility may seek to add interconnection procedures and an interconnection agreement to its "safe harbor" OATT that substantially conform with or are superior to the pro forma LGIP and LGIA if the utility wishes to continue to qualify for "safe harbor" treatment. If Big Rivers decides to make such a filing, it should identify which provisions of the pro forma LGIP and LGIA may conflict with state law, include in the filing specific language that it believes is necessary to remedy potential conflicts with state law, and explain how its proposal meets the "substantially conform or are superior to" standard under which we review "safe harbor" tariffs. The Commission will consider such language at that time.

¹⁰ Id.

¹¹ Id.

¹² See Order 2003, pro forma LGIP (Appendix C) at Section 1, and pro forma LGIA (Appendix 6 to LGIP) at Section 1 (defining "Transmission Provider" to mean only a public utility (or its designated agent)).

The Commission orders:

The Commission hereby clarifies the status of Big Rivers' "safe harbor" OATT, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.