

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Termoelectrica U.S., LLC

Docket No. ER03-175-003

ORDER GRANTING REHEARING

(Issued October 22, 2003)

1. In an order issued on January 10, 2003,<sup>1</sup> the Commission conditionally accepted for filing, without suspension or hearing, the proposed market-based rate schedule and code of conduct filed by Termoelectrica U.S., LLC (Termoelectrica), to become effective on November 13, 2002. In addition, the Commission denied Termoelectrica's request for waiver of Order No. 888<sup>2</sup> and the Open Access Same-Time Information System (OASIS) requirement of Order No. 889,<sup>3</sup> as well as its request to make sales to its public utility affiliate, San Diego Gas & Electric Company (SDG&E), pursuant to its market-based rate tariff. In this order, we grant Termoelectrica's request for rehearing regarding the waiver requests. This order benefits customers by clarifying our policies with respect to the circumstances under which we will grant waiver of the requirements of Order Nos. 888 and 889.

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<sup>1</sup>Termoelectrica U.S., LLC, 102 FERC ¶ 61,024 (2003) (January 10 Order).

<sup>2</sup>Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and 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 (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).

<sup>3</sup>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 (1997), reh'g denied, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

## I. Background

2. Termoelectrica is a limited liability company organized and existing under the laws of Delaware and is a wholly-owned, direct subsidiary of Termoelectrica de Mexicali, S. De R.L. de C.V. (Termoelectrica Mex). Both are indirect, wholly-owned subsidiaries of Sempra Energy Global Enterprises, a subsidiary of Sempra Energy which owns SDG&E and Southern California Gas Company. Termoelectrica states that Termoelectrica Mex will construct, own and operate a 650-MW merchant generating facility to be located in the State of Baja California, Mexico (Mexicali Generation Facility). The Mexicali Generation Facility will be electrically connected with the California ISO's transmission system by a new 9-mile, 230-kV generator tie-line (Interconnection Line) at SDG&E's Imperial Valley Substation.<sup>4</sup> Termoelectrica Mex will own the 3-mile portion of the Interconnection Line located within Mexico, and Termoelectrica will own the 6-mile portion of the Interconnection Line located within the United States.<sup>5</sup>

3. On November 12, 2002, as amended on November 19, 2002, Termoelectrica filed an application under Section 205 of the Federal Power Act (FPA)<sup>6</sup> seeking, among other things, waiver of Order No. 888 and the requirement of Order No. 889 to establish an OASIS for its transmission line (i.e., the U.S. portion of the Interconnection Line).

4. As relevant here, in the January 10 Order, the Commission denied Termoelectrica's request for waiver of Order No. 888 and the OASIS requirement of Order No. 889.

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<sup>4</sup>In its request for rehearing, Termoelectrica clarifies that neither the Mexicali Generation Facility nor the Interconnection Line is interconnected to the transmission and distribution grid owned and operated by Mexico's Comisión Federal de Electricidad.

<sup>5</sup>In its request for rehearing, Termoelectrica states that practical and commercial realities (i.e., tax implications) of this unusual cross-border project necessitated the bifurcation of ownership of the facilities between Termoelectrica, which owns that portion of the Interconnection Line located in the United States, and Termoelectrica Mex, which owns the Mexicali Generation Facility and the 3-mile portion of the Interconnection Line located in Mexico. It notes, however, that there is no electrical break in the Interconnection Line at the U.S.-Mexico border or at any other point between the Mexicali Generation Facility and the Imperial Valley Substation.

<sup>6</sup>16 U.S.C. § 824d (2000).

5. On February 10, 2003, Termoelectrica filed a request for rehearing of the January 10 Order, and SDG&E filed a motion to intervene out-of-time and a request for rehearing. On that same date and on March 17, 2003, Termoelectrica filed motions for stay seeking an extension of time to comply with the requirements of Commission Order Nos. 888 and 889, as directed by the January 10 Order. By notice dated March 21, 2003, Termoelectrica was granted an extension of time to comply with the Order Nos. 888 and 889 requirements until fifteen days after the Commission issues an order on rehearing in this proceeding. On April 9, 2003, the California ISO filed a motion to intervene out-of-time and comments.

## **II. Discussion**

### **A. Procedural Matters**

6. We will deny SDG&E's and the California ISO's motions for intervention out-of-time. Under Rule 214(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d)(1) (2003), the movant must show good cause for filing late interventions. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial. Thus, movants bear a high burden to demonstrate good cause for granting such late intervention. The Commission finds that SDG&E and the California ISO have not met that burden. The issues in this proceeding were apparent prior to issuance of the January 10 Order. Consequently, SDG&E and the California ISO are not parties to this proceeding, and we will not consider SDG&E's request for rehearing or the California ISO's comments.

### **B. Waiver of the Requirements of Order Nos. 888 and 889**

7. In the January 10 Order, we concluded that, because Termoelectrica is affiliated with SDG&E, and Termoelectrica's Interconnection Line connects directly to SDG&E's transmission facilities, and SDG&E has an OATT on file with the Commission, Termoelectrica's Interconnection Line is a part of and covered by SDG&E's OATT. In addition, since SDG&E had conveyed operational control over its transmission facilities to the California ISO, we concluded that Termoelectrica's Interconnection Line would be part of and covered by the California ISO's OATT and OASIS. We found, therefore, that Termoelectrica had not justified its request for waiver of Order No. 888 and the OASIS requirement of Order No. 889.

8. On rehearing, Termoelectrica argues that the Commission's decision not to grant waiver of Order No. 888 and the OASIS requirement of Order No. 889 for the Interconnection Line is erroneous because: (1) it is inconsistent with prior Commission cases in which the Commission has granted waiver of the requirements of Order Nos. 888 and 889;<sup>7</sup> (2) it is inconsistent with the Commission's definition of network transmission facilities in prior cases, as to which facilities constitute part of an integrated transmission grid;<sup>8</sup> and (3) the Commission's concerns regarding the affiliate relationship between Termoelectrica and SDG&E are without merit. In addition, it argues that the Interconnection Line is a limited and discrete facility that does not form a part of an integrated transmission grid because it is merely a generator tie-line that extends from the Mexicali Generation Facility across the U.S.-Mexico border to the California ISO transmission system. Termoelectrica also argues that denying waiver of Order Nos. 888 and 889 will impose on it an unwarranted administrative and organizational burden because it claims it currently does not have any personnel and will have to staff up to meet the requirements.

9. Termoelectrica also states that, if the Commission denies its request for rehearing, it would potentially need to execute a Transmission Control Agreement with the California ISO to place the Interconnection Line under the California ISO's operational control and to provide for the posting of capacity available on the Interconnection Line on the California ISO's OASIS.

10. Upon reflection, we will grant rehearing and grant Termoelectrica's request for waiver of Order No. 888 and the OASIS requirement of Order No. 889, based on the facts of this case. The Interconnection Line is a 9-mile line that runs from the Mexicali Generation Facility to SDG&E's Imperial Valley Substation. There is no electrical break anywhere in the line between these two points. Neither the Mexicali Generation Facility

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<sup>7</sup>Citing *Baja California Power, Inc.*, 100 FERC ¶ 61,148 at 61,554 (2002); *FirstEnergy Corp., et al.*, 94 FERC ¶ 61,182 at 61,631 (2001); *Potomac Elec. Power Co.*, 93 FERC ¶ 61,240 at 61,783 (2000); *Commonwealth Edison Co.*, 93 FERC ¶ 61,040 at 61,085-86 (2000); *Black Creek Hydro, Inc., et al.*, 77 FERC ¶ 61,232 at 61,941 (1996) (*Black Creek*); *PECO Energy Co., et al.*, 90 FERC ¶ 61,269 at 61,906-07 (2000); *Public Serv. Co. of New Mexico*, 93 FERC ¶ 61,213 at 61,705-06 (2000).

<sup>8</sup>Citing *Order No. 888*, FERC Stats. & Regs. ¶ 31,036 at 31,743; *Florida Mun. Power Agency v. Florida Power & Light Co.*, 67 FERC ¶ 61,167 (1994), *order on reh'g*, 74 FERC ¶ 61,006 (1996), *order on reh'g*, 96 FERC ¶ 61,130 (2001), *aff'd sub nom. Florida Mun. Power Agency v. FERC*, 315 F.3d 362 (D.C. Cir. 2003).

nor the Interconnection Line is interconnected to Mexico's transmission or distribution grid. The Interconnection Line likewise is not interconnected to any U.S. transmission or distribution facilities (other than SDG&E's Imperial Valley Substation, at the U.S. end of the Interconnection Line), and the Interconnection Line, as well, is not interconnected to any load or other generation facilities. In short, the Interconnection Line serves simply and solely to interconnect the Mexicali Generation Facility to SDG&E's Imperial Valley Substation, i.e., to the California ISO's transmission system. Without deciding whether the Interconnection Line should be considered part of the grid facilities of Termoelectrica's affiliate SDG&E (an issue we need not decide here), we find that in these circumstances waiver is appropriate, until such time as, as to Order No. 888, Termoelectrica receives a request for transmission service and, as to Order No. 889's OASIS requirement, the Commission takes action in response to a complaint to the Commission that an entity evaluating its transmission needs could not get information necessary to complete its evaluation.<sup>9</sup>

11. If, in the future, Termoelectrica receives a request for transmission service over the Interconnection Line, then an OATT must be filed with the Commission within 60 days of the date of the request. Moreover, waiver of the OASIS requirement is granted unless and until the Commission takes action on a complaint that an entity evaluating its transmission needs could not get information necessary to complete its evaluation.

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<sup>9</sup>E.g., Central Minnesota Municipal Power Agency, 79 FERC ¶ 61,260 at 62,126-27 (1997); Easton Utilities Commission, et al., 83 FERC ¶ 61,334 at 62,342-43 (1998).

The Commission orders:

(A) The untimely motions to intervene of SDG&E and the California ISO are hereby denied.

(B) Termoelectrica's request for rehearing is hereby granted and the requested waivers are hereby granted, as discussed in the body of this order and subject to the conditions identified in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.