

133 FERC ¶ 61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Grasslands Renewable Energy LLC

Docket No. EL10-51-000

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued December 16, 2010)

1. On March 29, 2010, Grasslands Renewable Energy LLC (Petitioner or Grasslands) filed, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,¹ a petition for declaratory order requesting that the Commission address whether Petitioner's proposal to construct a network transmission system that assigns priority transmission rights to customers that agree to pay the entire cost of the system, by contracting for service at cost-based rates in advance of construction, satisfies the Commission's open access transmission requirements. In this order, we find that Petitioner's proposal would improperly grant an undue preference to certain transmission customers, and as such is inconsistent with section 205 of the Federal Power Act (FPA) and the Commission's open access principles. Accordingly, the Commission denies the requested approvals without prejudice to Petitioner revising its proposal to comport with the Commission's open access principles, as discussed below.

I. Background

2. Petitioner states that it is a limited liability company owned by a privately held entity, Grasslands Renewable Energy Montana, LLC (GREM).² Petitioner also states that Elecnor, S.A. (Elecnor), a publicly traded Spanish infrastructure development company, has acquired an option to purchase a 50 percent membership interest in Grasslands. Petitioner indicates the owners/sponsors of this project have no financial

¹ 18 C.F.R. § 385.207 (2010).

² Petitioner, March 29, 2010 Petition for Declaratory Order at 3 (March 29 Petition) (explaining that some of the owners of GREM are the principals originally behind the Montana-Alberta Tie Line project and, therefore, have significant experience in the development of major infrastructure and electric transmission projects).

interest in any existing wind power projects in the region that will be covered by this proposal or in any transmission facilities in the project's footprint. Enerfín Sociedad de Energía, a subsidiary of Elecnor, has an ownership interest in an 80 MW wind project under development in the Northern Plains³ region, but has not expressed any formal interest in participating in the Wind Spirit Project and the Petitioner states it is not aware of any plans for Enerfín to do so.

3. In its filing, Petitioner proposes to develop the Wind Spirit Project, which it characterizes as a transmission expansion and wind power aggregation project in the Northern Plains. Petitioner explains that the proposed Wind Spirit Project is a gathering system of network transmission and radial lines designed to: (1) aggregate wind resources at dispersed locations in the Northern Plains region; (2) "firm up" or shape the variable wind power through the utilization of storage assets; and (3) deliver this firm wind energy product to load centers in the Southwest and West.⁴ Petitioner states that the Wind Spirit Project comprises three affiliated entities—WSP Poolco, WSP Transco, and WSP Firmco—each of which will be under the control of Petitioner during the early stages of the Wind Spirit Project's development.⁵

4. Petitioner explains that it will form WSP Poolco to serve as a wind power aggregation, management and marketing/brokering company.⁶ Petitioner states that WSP Poolco will enter into power purchase agreements (PPAs) or comparable agreements with wind generators. Petitioner also states WSP Poolco will aggregate the output of wind generators who voluntarily participate in WSP Poolco, market or broker this aggregated power as a firm renewable product, and acquire transmission service on transmission facilities that will be constructed by WSP Transco, which Petitioner refers to as the WSP

³ Petitioner states that the term "Northern Plains" refers to a geographic area comprising portions of Montana, North Dakota and Wyoming, as well as the southern portions of Alberta and Saskatchewan, Canada.

⁴ March 29 Petition at 10.

⁵ Petitioner indicates that, at some point during the development phase, it intends to transfer all or a majority portion of its ownership in WSP Poolco to the wind generators participating in the Wind Spirit Project or to one or more non-affiliated entities.

⁶ Petitioner states that to the extent WSP Poolco takes title to the wind power for resale, it will file for market-based rate authority with the Commission in connection with these resales; however, WSP Poolco would not file for such authority if it were to act only as a broker without taking title to the power.

Collector System.⁷ Petitioner explains that the WSP Collector System will be designed to enable wind generators that enter into agreements with WSP Poolco to deliver their output to a common location on the bulk power system for delivery to markets.⁸ Petitioner states that “[i]n order to ensure that the economics of the [Wind Spirit Project] are optimized for all participating parties, the Petitioner plans to own a controlling portion of WSP Poolco during the development phase of the [Wind Spirit Project].”⁹

5. Petitioner asserts that wind generators participating in WSP Poolco will earn revenues through a “netback” model. Under the “netback” model, participating wind generators will be paid based on downstream firm energy sales less firming service (via WSP Firmco), transmission service (via WSP Transco) and administrative costs and fees associated with services provided by WSP Poolco.¹⁰ Petitioner believes that by aggregating disparate wind resources and offering a firm wind power product, it will increase the value and profitability of participating wind generators. Petitioner therefore asserts that “the economics of the [Wind Spirit Project] require that the Petitioner be able to design and build a WSP Collector System that will match the location of the wind resources that participate in the [Wind Spirit Project].”¹¹ Petitioner explains that the final design of the WSP Collector System will depend on the location and size of the generation sources that participate in WSP Poolco, as well as other transmission customers that may commit to participant fund the full cost of the WSP Collector System in advance of construction.¹²

6. Petitioner next describes WSP Transco—a new, single-purpose transmission company that, either on its own or through one or more subsidiaries, will develop,

⁷ Petitioner describes the WSP Collector System as a combination of network facilities that will be integrated into the existing transmission system, as well as certain limited radial lines to areas where there is proposed renewable energy development. March 29 Petition at 10. Petitioner notes that participating wind generators would be responsible for the costs of their own interconnections with the Collector System. *Id.* at 14 n.12.

⁸ Petitioner notes that in addition to using WSP Transco’s transmission facilities, WSP Poolco may purchase additional transmission services from other transmission providers in the region.

⁹ March 29 Petition at 5.

¹⁰ *Id.* at 13-14.

¹¹ *Id.* at 14.

¹² *Id.* at 11.

construct and own the WSP Collector System. Petitioner states that WSP Transco will sell transmission service at cost-based rates to its affiliate, WSP Poolco, as well as to other transmission customers interested in acquiring long-term transmission rights on comparable terms to WSP Poolco.¹³ Further, Petitioner asserts that WSP Transco will file an open access transmission tariff (OATT) with the Commission prior to the construction of the WSP Collector System, under which Petitioner contends that WSP Poolco will enter into a transmission service agreement for firm point-to-point transmission services to permit the aggregated wind generation output to be delivered to the markets in which WSP Poolco will sell power.¹⁴ Additionally, Petitioner states that WSP Transco will enter into transmission service agreements with any other party that chooses to participant-fund a portion of the WSP Collector System on comparable terms with WSP Poolco.

7. Petitioner indicates that if WSP Transco cannot satisfy a request for firm transmission service over the WSP Collector System using Available Transmission Capacity that exists after meeting its firm service obligations to WSP Poolco and other existing firm customers, WSP Transco will perform the appropriate Facilities Study under the OATT relating to expansion of the WSP Collector System and will offer to sell transmission services from new capacity, subject to recovery of the costs of expansion as determined in the Facilities Study.¹⁵

8. Petitioner contends that WSP Firmco will develop or acquire energy storage and firming capability and enter into a contract to sell these services to WSP Poolco in order to create a firm renewable energy product for sale in wholesale markets. In order to provide this service, Petitioner states that WSP Firmco will finance, construct and own a pumped hydro storage project, battery storage devices or other comparable energy storage facilities that will be used to shape and firm the variable wind generation controlled by WSP Poolco.¹⁶

II. Grasslands' Petition

9. Petitioner states that it will engage in a two-phase process in order to identify those entities that are willing to participant-fund the WSP Collector System. In Phase One, Petitioner explains that it will identify those wind developers in the Northern Plains that are interested in participating in the Wind Spirit Project by making their output

¹³ *Id.* at 6.

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.* at 8.

available to WSP Poolco for aggregation and firming services.¹⁷ Petitioner indicates that while it has approached more than 60 wind developers, 10 developers have executed preliminary, non-binding Letters of Intent (LOI) to participate in WSP Poolco, and three additional developers are considering executing LOIs. Petitioner states that none of these developers is an affiliate of Petitioner nor has any developer, at this point, been denied a right to participate.¹⁸ If this petition is granted, Petitioner asserts that it intends to offer potential WSP Poolco participants an opportunity to make a more formal (but still conditional) commitment by executing an interim precedent agreement during the Phase One process. Petitioner explains that the interim agreements will include upfront financial commitments, but will be subject to various conditions, which may include matters such as the completion of the WSP Collector System, obtaining appropriate trunk line access, acquiring a source of storage or firming energy, and obtaining commitments from purchasers via WSP Poolco. After the base WSP Poolco participants have been established, Petitioner commits to continue its outreach efforts to solicit wind developers interested in participating in the Wind Spirit Project during its Phase One process.¹⁹

10. Petitioner contends that the full benefits of the Wind Spirit Project will be achieved only if it is able to acquire rights to wind power at diverse locations throughout the Northern Plains, and at locations that are reasonably accessible to the WSP Collector System. Thus, Petitioner states that it is possible, though unlikely, that one or more interested wind generators will not be asked to participate in the Wind Spirit Project through membership in WSP Poolco.²⁰ Further, Petitioner states that it intends to identify and prioritize: (1) projects that are being developed by experienced and creditworthy wind developers; (2) projects further along in the development process; (3) projects likely to be able to interconnect with the WSP Collector System at a reasonable cost; and (4) projects that are geographically dispersed.²¹ Petitioner asserts that its goal is to “objectively select projects for participation” in WSP Poolco so that the Wind Spirit Project can reliably and economically succeed.²²

11. In Phase Two, Petitioner states that it will provide public notice to potentially interested non-WSP Poolco generators and offer transmission rights on the WSP

¹⁷ *Id.* at 18.

¹⁸ *Id.* at 19.

¹⁹ *Id.*

²⁰ *Id.* at 20.

²¹ *Id.*

²² *Id.* at 21.

Collector System to those willing to participant-fund a share of the project at cost-based rates, with terms comparable to those provided to WSP Poolco.²³ Petitioner explains that interested parties can contact Petitioner for additional information, including the proposed location and configuration for the WSP Collector System that is being designed for the Wind Spirit Project participants. Petitioner explains that Phase Two is not intended to be a formal open season, but is instead designed to identify non-Wind Spirit Project participants interested in funding a portion of the WSP Collector System, so that their demands can be included in the final system planning. Petitioner states that in Phase Two it will be offering firm, long-term service over the WSP Collector System, subject to customers agreeing to participant-fund a *pro rata* portion of the WSP Collector System.

12. Petitioner indicates that the economics of the Wind Spirit Project will not work, i.e., optimizing the profitability of wind generation for Wind Spirit Project wind generators, if the Petitioner is required to build a WSP Collector System that is oversized relative to the initial demand. Petitioner states that it is possible “that because the Petitioner has offered transmission service to customers that are not participants in the [Wind Spirit Project], the cost to build the WSP Collector System will become excessive in relation to the demands of the parties that are willing [to] participant fund the system, i.e., the unit cost of transmission service over the WSP Collector System will be materially higher for the [Wind Spirit Project] participants.”²⁴ If this occurs, Petitioner proposes to reserve the right to decline to provide transmission services to non-Wind Spirit Project participants, subject to certain conditions. Petitioner states that it would be counterproductive for the Commission to require the Petitioner to provide transmission service to non-Wind Spirit Project participants where this would undermine the economics of the Wind Spirit Project under the netback model.²⁵ If it declines a customer’s request for service, Petitioner commits to providing evidence to that customer showing that including that customer in the initial design of the WSP Collector System would increase the cost by an amount that makes the project uneconomical for Wind Spirit Project participants. In these circumstances, Petitioner asserts that it will offer a smaller quantity of service if it is able to do so. In the alternative, Petitioner states that any non-Wind Spirit Project participant would have the option of paying the full incremental cost of adding its project to the WSP Collector System.²⁶ Petitioner contends that this is the same expansion commitment that transmission providers make under their OATTs.

²³ *Id.*

²⁴ *Id.* at 23.

²⁵ *Id.* at 25.

²⁶ *Id.* at 24.

13. Finally, Petitioner asks the Commission to take into consideration that “[it] is not an existing transmission owner in the area where the WSP Collector System will be constructed, does not have any franchised service territory, and therefore should not have an advantage over other non-utility developers that may propose to build new transmission facilities in this area.”²⁷ Thus, Petitioner argues that it should not have a broad obligation to build transmission facilities for third parties to whom it has no obligation to serve, especially when such an obligation would undermine project objectives. Moreover, Petitioner states that it will not proceed with project development if the Wind Spirit Project becomes economically non-viable for Wind Spirit Project participants. Accordingly, petitioner states that only after the WSP Collector System is constructed will WSP Transco assume the obligation to expand that other transmission providers have pursuant to the OATT.²⁸

III. Notices and Interventions

14. Notice of Petitioner’s filing was published in the *Federal Register*, 75 Fed. Reg. 18,202 (2010), with interventions and protests due on or before April 28, 2010. Public Service Electric and Gas Company, PSEG Power LLC, PSEG Energy Resources & Trade LLC (collectively, the PSEG Companies), Otter Tail Power Company and Montana-Dakota Utilities, Co. filed timely motions to intervene. Electric Transmission America, LLC filed a motion to intervene out-of-time.

IV. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

16. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant the late-filed motion to intervene of Electric Transmission America, LLC given its interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

B. Substantive Matters

17. Petitioner seeks a determination that its proposal to construct the WSP Collector System as a set of participant-funded transmission facilities, with priority transmission service rights assigned to WSP Poolco and other entities that agree to pay for the entire

²⁷ *Id.* at 25.

²⁸ *Id.* at 7.

cost of the WSP Collector System by contracting for such service at cost-based rates in advance of construction, satisfies the Commission's open access transmission requirements.²⁹ We deny Petitioner's request. While, the proposed WSP Collector System would have the salutary effects of creating additional regional transmission capacity, the proposal involves a transmission provider (WSP Transco) granting preferential treatment to WSP Poolco that is not available to other customers (non-Wind Spirit Project participants). Such a preference is not consistent with section 205 of the FPA or the Commission's open access policies. Therefore we deny the Petition, without prejudice to Petitioner revising its proposal to comport with the Commission's open access policies, as discussed below.

18. To support its request, Petitioner relies on *NU/NSTAR*, in which the Commission approved a proposal to allocate firm transmission capacity rights over a cost-based, participant-funded 1,200 MW HVDC transmission line to the non-affiliated transmission customer funding the line.³⁰ Petitioner describes two findings in *NU/NSTAR* that it relies on to support its request: (1) the Commission permitted the transmission provider in *NU/NSTAR* to allocate transmission rights on a new line to an entity funding the construction of that line without holding an open season;³¹ and (2) the Commission found that, so long as the transmission provider retained its obligation to expand pursuant to its OATT, it would fulfill its requirement to provide transmission service on a non-discriminatory basis.³²

19. We find that there are significant factual differences between *NU/NSTAR* and the instant proposal, and that these differences undermine Petitioner's reliance on that case. Importantly, in *NU/NSTAR*, the transmission provider was undertaking an incremental expansion of an existing transmission system at the request of a customer. Because the transmission provider would be obligated to construct a customer-requested system expansion at the higher of incremental or embedded cost, the Commission found that other developers had the same opportunity to acquire a system expansion as the participant funder, and an open season was not necessary to prevent undue

²⁹ *Id.* at 14-15.

³⁰ *Northeast Utilities Services Co. and NSTAR Electric Co.*, 127 FERC ¶ 61,179, at P 17 (2009) (*NU/NSTAR* Declaratory Order), *reh'g denied*, 129 FERC ¶ 61,279 (2009) (*NU/NSTAR* Rehearing Order) (collectively, *NU/NSTAR*).

³¹ March 29 Petition at 15-16 (citing *NU/NSTAR* Rehearing Order, 129 FERC ¶ 61,279 at P 20, 27-28).

³² *Id.* at 16 (citing *NU/NSTAR* Declaratory Order, 127 FERC ¶ 61,179 at P 27; *NU/NSTAR* Rehearing Order, 129 FERC ¶ 61,279 at P 17).

discrimination.³³ In contrast, WSP Transco is proposing to develop a new system, rather than expand an existing one pursuant to an OATT, and it expressly seeks the right to grant a transmission service priority to one customer that is not available to others. Therefore, it is in a different position than *NU/NSTAR*, and its reliance on that case is misplaced.

20. The issue raised in the Petition is whether the Commission's open access principles would permit Petitioner to allocate capacity on its new transmission system in a way that creates two classes of customers taking transmission service at cost-based rates: (1) WSP Poolco, which will purchase transmission capacity sufficient to meet the needs of the wind generators participating in the Wind Spirit Project (i.e., those taking the suite of services offered by WSP Poolco, WSP Transco, and WSP Firmco); and (2) other customers that do not wish to participate in the Wind Spirit Project and that, instead, wish to take only transmission service from WSP Transco. We find that Petitioner's proposal would allow WSP Transco to grant an undue preference to WSP Poolco. This preference arises from the fact that only those generators that agree to take the bundle of services offered by Petitioner would be guaranteed to receive preferential, embedded cost rate treatment as compared to those generators who wish to take only transmission service from WSP Transco.

21. Specifically, the customer to whom Petitioner seeks to grant preferential service (WSP Poolco) consists of wind generators who agree to take not only transmission service from WSP Transco, but also agree to take the aggregating and marketing service from WSP Poolco and the balancing service from WSP Firmco.³⁴ We find this proposal to be inconsistent with the open access principles embodied in the OATT. Granting preferential transmission service to a subset of customers that purchase other services from the transmission provider's affiliates would impose the type of unduly discriminatory conditions on the sale of transmission service that the OATT was intended to eliminate.

22. However, the Commission appreciates the Petitioner's interest in developing transmission. Therefore, the rejection of the Petition is without prejudice to the Petitioner revising its proposal to comport with the Commission's open access policies. One alternative the Petitioner may wish to consider is the use of an open season to identify potential customers that may be interested in participating in the design of the WSP Collector System, in addition to WSP Poolco and its member generators. In similar situations, where the Commission has been concerned as to whether transmission

³³ See *NU/NSTAR* Declaratory Order, 127 FERC ¶ 61,179 at P 29.

³⁴ *But see* March 29 Petition at 8 (noting that WSP Poolco may ultimately purchase some or all of its firming service from non-affiliated third-party generators or service providers).

capacity on a new facility has been fairly allocated, the Commission has relied on an open season to ensure that capacity on the facility is allocated in a fair, open and transparent manner that does not unduly discriminate or favor any one particular customer (or class of customers).³⁵ Such open processes enable all potential customers the opportunity to acquire capacity on a new transmission facility in a way that does not favor any customer or class of customers.

23. The Petitioner also could consider the use of clustering procedures to determine the set of facilities to efficiently meet the needs of customer requests. This could include the identification of a subset of customers for which embedded cost rates are offered and those that would be charged incremental rates, provided the criteria used for distinguishing between classes of customer is nondiscriminatory and transparent.³⁶

The Commission Orders:

Petitioner's request for declaratory order is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁵ See e.g., *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,839 (2000); *Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 53 (2006); *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P 40-41 (2009); *Tres Amigas LLC*, 130 FERC ¶ 61,207, at P 88-89 (2010).

³⁶ See, e.g., *Bonneville Power Admin.*, 123 FERC ¶ 61,264, at P 47(2008) (approving a Network Open Season clustering procedures).