

142 FERC ¶ 61,043  
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.

NextEra Energy Resources, LLC  
Peetz Logan Interconnect, LLC  
PWEC, LLC

Docket No. EL11-46-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued January 17, 2013)

1. On June 20, 2011, NextEra Energy Resources, LLC (NextEra) and two of its indirect subsidiaries, Peetz Logan Interconnect, LLC (Peetz Logan) and PWEC, LLC (PWEC), (collectively, Petitioners) filed a petition for declaratory order requesting Commission approval to allow PWEC priority use rights to capacity over Peetz Logan's generator interconnection facility (the Peetz Logan Facilities) for a third phase of the Petitioners' planned wind project development (PWEC Project). As discussed below, we will grant the Petitioners' request because they have shown that the forthcoming PWEC Project is covered by a pre-existing expansion plan, with milestones for the planning, design and construction of generation and material progress toward meeting those milestones.<sup>1</sup> The Commission also concludes that it will no longer require transfer of ownership of generator interconnection facilities to their affiliates as a condition for granting priority rights to generation-developing affiliates of a transmission owner.

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<sup>1</sup> The priority rights issue was also raised in *Peetz Logan Interconnect, LLC*, 136 FERC ¶ 61,075 (2011) (August Order). In that proceeding, however, the Commission left resolution of the priority rights issue to the instant proceeding. *Id.* P 51. In that same order, the Commission conditionally accepted in part and rejected in part an open access transmission tariff (OATT) filed by Peetz Logan in response to a March 16, 2010 request by an unaffiliated third-party, Arion Energy, LLC (Arion), for interconnection and transmission services over the Peetz Logan Facilities. Peetz Logan then submitted a compliance filing to the August Order, and the Commission order on that filing is being issued concurrently with the instant order.

## I. Background

2. Located in Logan County, Colorado, the Peetz Logan Facilities consist of an approximately 78 mile, 230 kV transmission line and its related equipment and facilities. As stated above, they were constructed to interconnect NextEra's wind generation projects to the Public Service Company of Colorado (PSC Colorado) transmission system. Petitioners emphasize that the line is a single circuit radial line.<sup>2</sup>

3. Petitioners state that, by the end of 2006, they had made plans to build up to 800 MWs of wind power generation in Logan County, Colorado, and these plans materialized into three separate interconnection requests to PSC Colorado.<sup>3</sup> These interconnection requests were included in PSC Colorado's interconnection queue and comprise the three phases of the Petitioners' planned development. The first two phases include three wind generating facilities, Peetz Table, Logan Wind, and NCW, with a combined capacity output of 575 MW.<sup>4</sup> Two of these generating facilities became operational in 2007 and the third became operational in 2009.

4. Petitioners state that they commenced development of PWEC Project in 2005 with certain land right acquisitions. Petitioners state that they submitted an interconnection request, acquired land leases, acquired permits, and developed preliminary drawings of the proposed wind turbines over the course of the next few years.<sup>5</sup> Petitioners explain that they have been actively marketing the PWEC Project since 2008, when they entered discussions with PSC Colorado's parent, Xcel Energy, about the possibility of constructing and selling PWEC to Xcel Energy. When these discussions failed, Petitioners state that on March 5, 2010 they participated in PSC Colorado's 2009 Request for Proposals (RFP) for Wind Resources by submitting a non-binding proposal for a

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<sup>2</sup> Petition at 2, 10.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> Petitioners explain that they decreased the capacity of the NCW generating facility to approximately 175 MW to satisfy the Low Voltage Ride Through (LVRT) requirements for "the most severe combination of a three phase fault and line outage on the PSC Colorado system." *Id.* at 8.

<sup>5</sup> *Id.* at 9.

150 MW wind facility, the PWEC Project, with a proposed in-service date of December 2011.<sup>6</sup>

**A. The Petition**

5. Petitioners ask the Commission to confirm that PWEC will be entitled to priority rights to a portion of the Peetz Logan Facilities in order to reserve capacity for its interconnection to the planned PWEC Project to PSC Colorado's grid.<sup>7</sup>

6. In support, Petitioners contend that Commission precedent supports priority rights for PWEC.<sup>8</sup> Petitioners explain that the Commission has established and confirmed in several cases that the owner of generation may be afforded firm priority rights to the capacity on the generator interconnection facilities associated with that generation, if there are specific, pre-existing generation plans with milestones for the planning, design and construction of generation and material progress toward meeting those milestones.<sup>9</sup> In this regard, Petitioners contend that the PWEC Project meets the requirements of *Aero* and *Milford*, and that the Petitioners are diligently pursuing the development of the PWEC Project to be interconnected with the Peetz Logan Facilities.<sup>10</sup> Petitioners assert that, as in *Aero* and *Milford*, they have specific plans with definite dates and milestones

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<sup>6</sup> Prior to this proposal, the Petitioners responded to PSC Colorado's 2008 RFP and proposed a 200 MW wind facility, with a commercial operation date of October 1, 2008, to be owned and operated by PWEC. On February 5, 2008, PSC Colorado issued a System Impact Study Report that stated, in part, that the Petitioner's 200 MW expansion "does not meet the FERC Order No. 661-A guidelines for [LVRT] and therefore it is not feasible to expand the customer's large generation facility to a total of 800 MW." Petitioners withdrew this request from the PSC Colorado interconnection queue on November 11, 2009. *Id.* at 9.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> *Id.* at 16-21.

<sup>9</sup> *Aero Energy LLC*, 116 FERC ¶ 61,149 at P 28 (2006) (*Aero*); *Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149 at P 22 (2009) (*Milford*); *Alta Wind I, LLC et al.*, 134 FERC ¶ 61,109 (2011) (*Alta Wind I*). Petitioners state that their situation is akin to those in *Aero* and *Milford* and is distinguishable from instances where the Commission rejected such requests. See *SunZia Transmission, LLC*, 131 FERC ¶ 61,162 (2010) (*SunZia*); *Terra-Gen Dixie Valley, LLC*, 132 FERC ¶ 61,215 (2010) (*Terra-Gen*).

<sup>10</sup> Petition at 22.

for development and construction, and they have made material progress toward meeting those milestones.<sup>11</sup> Petitioners state that they have demonstrated that the activity and investment surrounding the PWEC Project are real, involved and progressing to completion.<sup>12</sup> Petitioners assert that Confidential Exhibit A demonstrates the following major milestones for the PWEC Project are being met: (1) land acquisition; (2) completion of environmental studies; (3) completion of local permitting; (4) interconnection; (5) marketing of the project; (6) financing; and (7) construction.<sup>13</sup>

7. Petitioners state that confirmation of PWEC's priority rights will reduce the ongoing regulatory uncertainty that wind developers face when they seek to maximize the cost-effectiveness of their phased projects through the construction of a common generator interconnection facility for multiple phases of their development plans.<sup>14</sup>

8. Additionally, Petitioners contend that granting priority rights to PWEC for the use of the Peetz Logan Facilities does not create undue preference or discrimination.<sup>15</sup> Petitioners explain that the Commission's focus on undue preference or discrimination for transmission owners turns on the needs of those owners for native load growth.<sup>16</sup> Specifically, Petitioners state that focus on native load growth translates into plans that are well under way before the developer receives any third-party requests for service across its generator interconnection facilities. Moreover, Petitioners point out that third-party requests for service on the Peetz Logan Facilities hereafter will be governed by Peetz Logan's OATT, which is pending before the Commission.<sup>17</sup> As a result, according to Petitioners, all future available capacity can be accessed by unaffiliated third parties.<sup>18</sup> Additionally, Petitioners point out that, if required under applicable law and with

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Petition at 3.

<sup>15</sup> *Id.* at 23.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 24.

<sup>18</sup> *Id.* at n.2 & 3.

appropriate assurance of recovery on its investment, they must upgrade the Peetz Logan Facilities to expand their available capacity.<sup>19</sup>

9. Finally, Petitioners also contend that granting PWEC priority rights to the use of the Peetz Logan Facilities is consistent with the Commission's open access policies.<sup>20</sup> They assert that NextEra's investment activity and material progress toward completion of the PWEC Project "establish PWEC's Priority Rights."<sup>21</sup> According to Petitioners, in *SunZia* and *Alta Wind I*, the Commission identified the future transfer of ownership interest in generator interconnection facilities to affiliates needing capacity on the facility as a factor in granting priority rights to the generation-developing affiliates of a transmission owner.<sup>22</sup> Petitioners explain that, for financing reasons, it is not feasible to transfer an undivided ownership interest in the Peetz Logan Facilities to PWEC. Nevertheless, Petitioners note that the use of the Peetz Logan Facilities will be governed by the terms and conditions of the Peetz Logan OATT, and, as a result, granting priority rights to use the Peetz Logan Facilities by PWEC is consistent with the Commission's open access policies.<sup>23</sup>

**B. Notice of Filing**

10. Notice of the Petitioners' petition was published in the *Federal Register*, 76 Fed. Reg. 37,804 (2011), with interventions or protests due on or before July 21, 2011.

11. A timely motion to intervene and comments was filed by Arion.<sup>24</sup> Arion also filed a non-disclosure certificate and a motion to lodge. On August 5, 2011, the Petitioners filed an answer to Arion's protest and to its motion to lodge.

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<sup>19</sup> *Id.* at 24.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 26.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 27.

<sup>24</sup> Arion subsequently filed a correction to its pleading, regarding unintentional blanks in the document. Arion also separately filed a non-disclosure certificate and a motion to lodge.

### C. Arion's Comments and Motion to Lodge

12. Arion is a wind developer that submitted an interconnection request to Peetz Logan and its parent companies on March 16, 2010. Arion argues that, under the Commission's precedent in *Aero*,<sup>25</sup> where capacity is shown to exist on the line – in this case arguably enough for both PWEC and Arion's projects – the third-party project should be allowed to move forward with interconnection.<sup>26</sup> Arion also argues that *Aero* requires that Peetz Logan should offer Arion a *pro rata* curtailment arrangement, and that Peetz Logan should offer Arion a Large Generator Interconnection Agreement (LGIA) with PSC Colorado with the same terms and conditions that apply to the NextEra affiliates.<sup>27</sup>

13. Arion also argues that, in allowing *pro rata* curtailment, the Commission in *Aero* held that Order No. 888<sup>28</sup> requires “comparability of service” and that this precedent is directly applicable in this situation, where Arion seeks service comparable to that enjoyed by the three affiliates of NextEra currently interconnected and taking transmission service via the Peetz Logan Facilities.<sup>29</sup> Arion also argues that the circumstances here are distinguishable from those in *Milford*, because in *Milford* no third party had requested service.<sup>30</sup> According to Arion, if it is allowed to interconnect as a cost-sharing customer, it will reduce costs for all concerned. Arion explains that the public interest is served by allowing non-affiliates to have a larger market share.<sup>31</sup>

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<sup>25</sup> See *Aero*, 116 FERC ¶ 61,149 at P 22.

<sup>26</sup> Arion July 21, 2011 Motion to Intervene and Comments at 9.

<sup>27</sup> *Id.*

<sup>28</sup> *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).

<sup>29</sup> Arion July 21, 2011 Motion to Intervene and Comments at 9.

<sup>30</sup> *Id.* at 9.

<sup>31</sup> *Id.* at 8.

14. Arion also argues that, under Order No. 890,<sup>32</sup> open access principles dictate that Arion may also deliver power to the PSC Colorado system under the uniform LGIA for the Peetz Logan Facilities.<sup>33</sup> Arion contends that Peetz Logan is required to offer to Arion the same interconnection terms that Peetz Logan offers to its affiliates, so that Arion has the same access to the greater PSC Colorado system as is provided to affiliates using the Peetz Logan Facilities.<sup>34</sup> Arion argues that failure to do so would mean that the affiliates are exercising selective market power to the detriment of third parties who may seek to interconnect to the PSC Colorado system through the Peetz Logan Facilities.<sup>35</sup>

15. Finally, Arion states that its place in the Peetz Logan Facilities queue cannot be confirmed absent an Open Access Same-Time Information System posting or Commission order; Arion should not be deemed subordinate in terms of applicable service under the Peetz Logan OATT, which has not yet been approved by the Commission.<sup>36</sup>

16. In its motion to lodge, Arion argues that the Commission should take notice in this proceeding, and in the proceeding in Docket No. ER11-2970, of information by Tri-State Generation and Transmission Association (Tri-State) in the draft transmission plan compiled on the WestConnect transmission planning website in anticipation of the transmission planning submittal to be filed with the Colorado Public Utilities Commission in February 2012.<sup>37</sup> Arion argues that this information is directly relevant because it shows that Peetz Logan is contemplating a potential partnership with Tri-State for two 230 kV projects that could have an impact on Peetz Logan's calculation of total transfer capability and available transfer capability.<sup>38</sup> Arion contends that these materials

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<sup>32</sup> *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, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

<sup>33</sup> Arion July 21, 2011 Motion to Intervene and Comments at 9.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 8, 11. *See supra* note 1.

<sup>37</sup> Arion August 5, 2011 Motion to lodge at 1.

<sup>38</sup> *Id.* at 2-3.

are pertinent to Peetz Logan's contentions regarding available capacity on the Peetz Logan Facilities.<sup>39</sup>

**D. Petitioners' Answer**

17. Petitioners dispute Arion's characterization of the Commission's precedent in *Milford*, arguing that it is premature to determine at this time whether there is sufficient physical capacity on the line for all 275 MW in the Peetz Logan Facilities queue, without any network upgrades, regardless of the priority rights sought in the petition.<sup>40</sup> In this regard, Petitioners note that Arion's argument is undercut by its concession that the interconnection study process has not been completed.<sup>41</sup>

18. Petitioners argue there is no need to grant Arion's motion to lodge the submissions in Docket No. ER11-2970-000 wherein Arion provided a consultant's views on the availability of sufficient capacity to handle both the PWEC affiliates and Arion.<sup>42</sup> Petitioners argue that the issue of whether there is adequate capacity cannot be answered in this proceeding.<sup>43</sup> Similarly, Petitioners argue that Arion's arguments, including those related to participation and diversification of market share, are not pertinent to the key issue raised by the petition, which is whether to confirm PWEC's priority use of the Peetz Logan Facilities.<sup>44</sup> Finally, Petitioners assert that Arion's policy suggestions regarding priority access to new transmission could "stifle the very innovative transmission investment that the Commission is eager to encourage," which is more appropriately addressed in the Commission's ongoing proceeding in Docket No. AD11-11-000, *Priority Rights to New Participant-Funded Transmission*.<sup>45</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> Petitioners' Answer at 2, 7.

<sup>41</sup> *Id.* at 7-8.

<sup>42</sup> *Id.* at 6-7.

<sup>43</sup> *Id.* at 12.

<sup>44</sup> *Id.* and at 11.

<sup>45</sup> *Id.*

## II. Discussion

### A. Procedural Issues

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Petitioners' answer because it aided us in our decision-making.

20. We will reject Arion's motion to lodge. Motions to lodge information from other proceedings may be appropriate in some instances to supplement the Commission's record.<sup>46</sup> However, because the information at issue here reports on speculation about possible future developments and consists of information posted on a website for possible use in a state proceeding, we find that the information that Arion seeks to lodge does not assist us in our decision-making.

### B. Substantive Issues

21. Under the standard determined by the Commission in *Aero* and applied in *Milford*, transmission owners with specific, pre-existing generation expansion plans and milestones for construction of generation, who have made material progress toward meeting those milestones, may have firm priority rights on their generator interconnection facilities to accommodate planned generation development.<sup>47</sup> Further, affiliates of current transmission owners, who are developing their own generation projects, may also obtain firm priority rights to the extent that they use the facility to serve their own load or demonstrate specific generation expansion plans with milestones to use the line in the future, provided that the plans include a future transfer of ownership to such affiliates.<sup>48</sup>

22. Based on the information presented, we find that Petitioners have shown the existence of specific, pre-existing plans, with definite dates and milestones, for phased development of wind power generation. Petitioners built the Peetz Logan Facilities and

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<sup>46</sup> See, e.g., *California Independent System Operator Corporation*, 139 FERC ¶ 61,072, at P 8 (2012).

<sup>47</sup> *Aero*, 116 FERC ¶ 61,149 at P 28; *Milford*, 129 FERC ¶ 61,149 at P 22; *Alta Wind I*, 134 FERC ¶ 61,109 at P16.

<sup>48</sup> See *Milford*, 129 FERC ¶ 61,149 at P 5; *SunZia*, 131 FERC ¶ 61,162, at P 37 & n.38; *Alta Wind I*, 134 FERC ¶ 61,109 at P16.

have had long-standing plans to use this facility to transmit the power from their existing and planned wind generation to be constructed in three phases. The first two phases are in service and, while the Petitioners have not indicated that the third phase is operational, or when it will become operational, they have provided evidence of specific, pre-existing plans for the PWEC Project being interconnected with the Peetz Logan Facilities.

23. Based on the record in this proceeding, Petitioners have demonstrated that they have made progress with regard to: (1) land acquisition; (2) completion of environmental studies; (3) completion of local permitting; (4) interconnection; (5) marketing of the project; (6) financing; and (7) construction. For example, Petitioners have progressed in the development of the PWEC Project by acquiring permits and land leases (commencing in 2005) needed for the project, and continuing to make lease payments for these lands since 2005. Petitioners also submitted interconnection requests for the PWEC Project (initially a 200 MW request on December 18, 2006, then a modified request reducing the project size to 150 MW on March 5, 2010). Further, Petitioners have actively marketed their proposed project to both PSC Colorado and Xcel Energy. Thus, the Peetz Logan Facilities were planned, developed, constructed, and owned specifically for affiliate use, and the development of the PWEC Project was well under way prior to the receipt of Arion's first ever third-party request for service across the Peetz Logan Facilities.

24. Petitioners have also acknowledged that, in *SunZia* and *Alta Wind I*, the Commission conditioned its granting of priority use rights to the transmission owner's affiliated wind project developer on the future transfer of ownership interest in the transmission line to such affiliate. However, Petitioners state that Peetz Logan will continue to be the sole owner of the Peetz Logan Facilities, with PWEC remaining a generating company.<sup>49</sup> They assert that, for financing reasons, it is not feasible to transfer an undivided ownership interest in the Peetz Logan Facilities to PWEC.<sup>50</sup> Petitioners argue that the Commission should waive any requirement to transfer ownership interests in the Peetz Logan Facilities to PWEC, noting that the Peetz Logan Facilities will be governed by the terms and conditions of the Peetz Logan OATT.<sup>51</sup>

25. Petitioners explain that, while their current business model precludes a transfer of ownership to PWEC, it does not compromise the Commission's stated open access goals. Petitioners state that the development of wind generation in the manner they have chosen allows the developer to deploy limited development capital in ways that are more

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<sup>49</sup> *Id.* at 26.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

efficient, less risky, and better matched to the timing of customers' needs (e.g., in response to customers' request for proposals).

26. Our review of Petitioners' request has caused us to consider the merits of the underlying policy regarding transfers of ownership interest among generation-developing affiliates of transmission owners. As noted above, the Commission has permitted affiliates of current transmission owners developing their own generation projects to obtain firm priority rights upon a demonstration of specific generation expansion plans with milestones to use the line in the future conditioned upon a future transfer of ownership to such affiliates. The Commission's application of this condition was to ensure that arrangements between affiliates did not undermine open access. Upon reflection, the Commission now concludes that the showing required to establish priority rights addresses our open access concerns and thus it is no longer appropriate to require a transfer of ownership as a condition for granting priority rights to the generation-developing affiliate of a transmission owner.<sup>52</sup>

27. The Commission's action granting the petition and priority rights is based upon Petitioners' filing of an expansion plan for the development of the PWEC Project, including the demonstration of milestones for the planning, design and construction of generation, and material progress towards meeting those milestones that pre-dates Arion's interconnection request. The Commission emphasizes, however, that Arion submitted an interconnection request for the Peetz Logan Facilities on March 16, 2010, at which point Peetz Logan had an obligation to file an OATT. Thus, all future requests for interconnection and/or transmission service would be governed by the Peetz Logan OATT, including requests related to any new project development by Petitioners.

The Commission orders:

(A) The petition for a declaratory order is hereby granted, as discussed in the body of this order.

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<sup>52</sup> We note that the Commission is more generically evaluating its policies regarding priority rights on interconnection facilities, in Docket No. AD12-14-000, *et. al.*, *Open Access and Priority Rights on Interconnection Facilities*.

(B) Arion's motion to lodge is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.