

134 FERC ¶ 61,064
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.

Sky River, LLC

Docket No. ER11-2214-000

ORDER REJECTING AGREEMENT FOR FILING AND
GRANTING IN PART AND DENYING IN PART REQUESTS FOR WAIVERS

(Issued January 31, 2011)

1. This order rejects for filing under section 205 of the Federal Power Act¹ (FPA) a Common Facilities Agreement between Sky River, LLC (Sky River) and Windstar Energy, LLC (Windstar). In addition, this order grants in part and denies in part Sky River's request for waiver of the requirements of Order Nos. 888,² 889,³ and 890⁴ and their implementing regulations, as discussed below.

¹ 16 U.S.C. § 824d (2006).

² *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. ¶ 31048, *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).

³ *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, *order on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

⁴ *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 clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

Background

2. Sky River states that it is a Delaware limited-liability company and a wholly-owned indirect subsidiary of NextEra Energy Resources, LLC (NextEra), also a Delaware limited-liability company.⁵ Sky River adds that it owns and operates a 77 MW wind-powered electric generating facility (Sky River Wind Facility) located in Kern County, California and an interest in the Wilderness Line, a 9-mile, 230 kV generator tie-line. Several qualifying facilities⁶ also own an interest in the Wilderness Line. The output of the Sky River Wind Facility and the output of the other facilities using the line are transmitted over the Wilderness Line and then over other facilities before reaching the transmission grid at Southern California Edison's (SoCal Edison) Vincent Substation.

3. Sky River states that Windstar is a Qualifying Facility and a California limited-liability company that is developing a 60 MW wind-powered electric generating facility (WindStar Wind Facility) and is not affiliated with Sky River. Sky River explains that it expects construction of the Windstar Wind Facility to start in late 2010, and that the facility will start commercial operation in the fourth quarter of 2011. Windstar has entered into a generator interconnection agreement with SoCal Edison and the California Independent System Operator Corporation, dated October 27, 2009, for the interconnection of the Windstar Wind Facility at SoCal Edison's Vincent Substation. Windstar has requested use of Sky River's unused interest in the Wilderness Line to enable the output of the Windstar Wind Facility to reach the point of interconnection with SoCal Edison, and Sky River agreed to establish its interest in the facilities as common facilities.

4. Sky River, as Owner, and Windstar, as Licensee, entered into the Common Facilities Agreement in order to authorize Windstar to connect the Windstar Wind Facility to and use the Wilderness Line to transmit power from the Windstar Wind Facility to other downstream facilities in a manner similar to that of the owners of the Wilderness Line.

Filing

5. Sky River requests that the Commission accept the Common Facilities Agreement, which authorizes Windstar to use the Wilderness Line, and grant all waivers requested, including waivers of the requirements of Order Nos. 888 and 890 to file an Open Access Transmission Tariff (OATT), and Order No 889's requirement to maintain an Open-Access Same Time Information System (OASIS).

⁵ Sky River Filing Letter at 2.

⁶ Qualifying Facilities are defined in the Public Utilities Regulatory Policies Act of 1978, as amended, 16 U.S.C. § 2601 *et seq.* (2006).

6. Windstar will pay Sky River for use of the Wilderness Line on a pro rata basis, which Windstar calculates is 27.75 percent. This pro rata share was derived from the ratio of the nameplate capacity of the Windstar Wind Facility to the aggregate nameplate capacity of the Sky River Wind Facility and other facilities using the Wilderness Line. Windstar will pay Sky River in two lump sum payments--an initial \$2 million and a subsequent payment of \$2.5 million ten years after the initial payment for service during the initial term of the Common Facilities Agreement of 20 years.

7. Sky River requests an effective date of February 1, 2011 for the Common Facilities Agreement.

Notice and Pleadings

8. Notice of Sky River's filing was published in the *Federal Register*, 75 Fed. Reg. 76,721 (2010), with protests or motions to intervene due on December 21, 2010. None were filed.

Discussion

9. Order Nos. 888 and 890 require public utilities that own, control or operate transmission facilities for use in interstate commerce to file an OATT before providing transmission service.⁷ Order No. 889 requires public utilities to establish an OASIS. In prior orders, the Commission has enunciated the standards for waiver of, or exemption from, some or all of the requirements of Order Nos. 888 and 889.⁸ The Commission has stated that the criteria for waiver of the requirements of Order No. 890 are unchanged from those used to evaluate requests for waiver under Order Nos. 888 and 889.⁹

10. The Commission may grant requests for waiver of Order Nos. 888 and 890 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.¹⁰ Should the public utility receive such a request, the Commission has determined that the public

⁷ Order No. 888, FERC Stats. & Regs. at 31,635; Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 15.

⁸ See, e.g., *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996) (*Black Creek*); *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228, at P 22 (2005) (*Entergy*).

⁹ See *Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at P 3 (2007).

¹⁰ *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)).

utility must file with the Commission a *pro forma* tariff 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.¹¹

11. The Commission has also determined that the requirements of Order No. 889 may be waived: (1) if the applicant owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid) or (2) if 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 justified.¹² Small public utilities are defined as those that dispose of no more than 4 million MWh annually.¹³ 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.¹⁴

Commission Determination

12. We will reject Sky River's proposed Common Facilities Agreement. The Commission finds that Sky River's request for waiver of the requirements of Order No. 888 and 890 to file an OATT have not been justified. We will grant Sky River's request for waiver of the requirements of Order No. 889.

13. Sky River states that the Wilderness Line is a radial line that is not an integrated component of any electricity grid and was designed solely to enable generators to transmit power from their facilities *to* the grid. Although Sky River attempts to justify these waivers by asserting that these facilities are limited and discrete transmission facilities, the Commission has made clear that owners of transmission lines interconnecting generation facilities to the integrated transmission grid, even those characterized as "generator lead lines," are subject to the requirement to file an OATT and to provide open access transmission service.¹⁵ Here, notwithstanding that Sky River

¹¹ *Black Creek*, 77 FERC at 61,941.

¹² *Id.*

¹³ *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); *see also Wolverine Power Supply Coop., Inc.*, 127 FERC ¶ 61,159, at P 15 (2009) (*Wolverine*).

¹⁴ *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota Municipal Power Agency*, 79 FERC at 62,127; *Easton Utilities Commission*, 83 FERC at 62,343).

¹⁵ *See Terra-Gen Dixie Valley, LLC, et al.*, 132 FERC ¶ 61,215, at P 47 (2010) (*Terra-Gen*) (citing *Milford Wind Corridor*, 129 FERC ¶ 61,149, at P 24 (2009)).

is proposing to allow Windstar to license a portion of the Wilderness Line, Sky River acknowledges that Windstar would “use the Wilderness Line to transmit power from its Windstar Wind Facility to other downstream facilities.”¹⁶ Thus, the Common Facilities Agreement is an attempt to govern transmission service for an unaffiliated third party over the Wilderness Line outside the context of an OATT, with all its attendant rights and obligations. That is impermissible under Order No. 888. Waiver of the obligation to file an OATT, even where warranted, applies only until such time as a request for transmission service is made. Because Sky River has received a request for transmission services from a non-affiliate, it does not meet the Commission’s requirements for waiver of the obligation to file an OATT, and any transmission over the Wilderness Line for non-owners (or affiliates of such owners, where approved by the Commission), must be made pursuant to an OATT.

14. Sky River meets the Commission’s definition of a small public utility because it has annual electric sales of no more than 4 million MWh.¹⁷ In light of these circumstances, we will grant Sky River’s waiver from the OASIS requirements of Order No. 889.¹⁸

The Commission orders:

(A) The Common Facilities Agreement is hereby rejected for filing.

¹⁶ Sky River Transmittal Letter at 2.

¹⁷ *Id.* at 5, n.8. Sky River states that the maximum amount of energy that Sky River could transmit annually over its share of the Wilderness Line, including the output from Windstar, is about 674,520 MWh, based on 137 MW multiplied by 8,760 hours in a year and a 100 percent capacity factor for these wind energy facilities. Sky River’s calculation of its maximum annual transmission level is inaccurate. The actual number should be 1,200,120 MWh. Apparently, Sky River calculated the maximum annual amount of energy it could transmit based only upon Sky River’s Wind Facility capacity (77 MW), rather than using the numbers for both Sky River’s Wind Facility and the Windstar Wind Facility (60 MW). *See Wolverine*, 127 FERC ¶ 61,159 at P 15. *See also, Terra-Gen*, 134 FERC ¶ 61,027 at P 109.

¹⁸ A waiver of the requirement to establish and maintain an OASIS remains effective until the Commission takes action in response to any complaint by an entity alleging that, in evaluating its transmission needs, the entity could not obtain from Sky River information necessary to complete its evaluation. In addition, as the Commission recently explained, Sky River must notify the Commission if there is a material change in facts that affect its waiver within 30 days of the date of such change. *See supra* n.15.

(B) Sky River's request for waiver of the requirements of Order Nos. 888 and 890 is hereby denied, as discussed in the body of this order. Sky River is directed to file an OATT with the Commission within 60 days of the date of this order.

(C) Sky River's request for waiver of the requirements of Order No. 889 is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.