

169 FERC ¶ 61,240  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

Wildhorse Wind Energy, LLC

Docket Nos. ER19-1683-000  
TS19-3-000

ORDER ON REQUEST FOR WAIVERS

(Issued December 19, 2019)

1. In this order, we address Wildhorse Wind Energy, LLC's (Wildhorse Wind) request for waiver of the Commission's requirements to file an Open Access Transmission Tariff (OATT), to establish and maintain an Open Access Same-Time Information System (OASIS), and to comply with the Commission's Standards of Conduct.

**I. Background**

2. Wildhorse Wind is a wholly-owned subsidiary of Southern Power Company (Southern Power), which is a subsidiary of Southern Company, a public utility holding company.

3. On April 26, 2019, as amended on August 12, 2019, August 15, 2019, and November 8, 2019, Wildhorse Wind filed pursuant to sections 35.28(d) and (f) of the

Commission's regulations<sup>1</sup> a request for waiver of the Commission's OATT, OASIS, and Standards of Conduct requirements under Order Nos. 888,<sup>2</sup> 889,<sup>3</sup> 890,<sup>4</sup> 2004,<sup>5</sup> and 717,<sup>6</sup>

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<sup>1</sup> 18 C.F.R. §§ 35.28(d), (f) (2019).

<sup>2</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) (cross-referenced at 77 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *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>3</sup> *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996) (cross-referenced at 75 FERC ¶ 61,078), *order on reh'g*, Order No. 889-A, FERC Stats & Regs. ¶ 31,049 (cross-referenced at 78 FERC ¶ 61,221), *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

<sup>4</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (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>5</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004, 105 FERC ¶ 61,248 (2003), *order on reh'g*, Order No. 2004-A, 107 FERC ¶ 61,032, *order on reh'g*, Order No. 2004-B, 108 FERC ¶ 61,118, *order on reh'g*, Order No. 2004-C, 109 FERC ¶ 61,325 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *see Standards of Conduct for Transmission Providers*, Order No. 690, 118 FERC ¶ 61,012, *order on reh'g*, Order No. 690-A, 118 FERC ¶ 61,229 (2007).

<sup>6</sup> *Standards of Conduct for Transmission Providers*, Order No. 717, 125 FERC ¶ 61,064 (2008), *order on reh'g and clarification*, Order No. 717-A, 129 FERC ¶ 61,043, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017 (2011).

as well as section 35.28,<sup>7</sup> and Parts 37<sup>8</sup> and 358<sup>9</sup> of the Commission's regulations, to permit the timely integration, into AEP Oklahoma Transmission Company, Inc.'s (AEP Oklahoma) high-voltage transmission system, of certain stand-alone network upgrades associated with the Wildhorse Wind generation facility (Wildhorse Wind facility), known as the Tuskahoma 138 Switching Station (Tuskahoma Upgrades). In addition, Wildhorse Wind seeks OATT, OASIS, and Standards of Conduct waivers for an interconnection customer interconnection facility consisting of a four-mile, 138 kV radial tie-line (Wildhorse Gen-Tie) between the Wildhorse Wind facility and the Tuskahoma Upgrades.

4. Wildhorse Wind constructed the Tuskahoma Upgrades at a cost of about \$6.9 million<sup>10</sup> under the Option to Build provisions of the Large Generator Interconnection Agreement (LGIA) between Southwest Power Pool, Inc. (SPP), AEP Oklahoma, and Wildhorse Wind, dated April 17, 2018. Wildhorse Wind states that the Tuskahoma Upgrades have been completed and are in the process of being tied into AEP Oklahoma's appurtenant transmission facilities while those facilities are on planned outage. Wildhorse Wind explains that, if the Tuskahoma Upgrades are not integrated with AEP Oklahoma's transmission system during the current planned outage, there is a substantial likelihood that the integration will be materially delayed until well into the fourth quarter of 2019.

5. Wildhorse Wind states that it has tendered to AEP Oklahoma a bill of sale and real estate documentation consistent with other ownership transfers that Southern Power has executed for similarly situated facilities. Wildhorse Wind notes, however, that AEP Oklahoma has declined to purchase the Tuskahoma Upgrades on these terms, and has proposed additional commercial terms beyond those which the LGIA expressly provides. Wildhorse Wind states that, as a result, the parties are continuing to negotiate the sale, which they initially expected to achieve in "a couple of months,"<sup>11</sup> but are now hoping to finalize through a dispute resolution process.<sup>12</sup>

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<sup>7</sup> 18 C.F.R. § 35.28 (2019).

<sup>8</sup> 18 C.F.R. pt. 37 (2019).

<sup>9</sup> 18 C.F.R. pt. 358 (2019).

<sup>10</sup> Wildhorse Wind April 26, 2019 Filing at 3.

<sup>11</sup> *Id.* at 4. *See also* Wildhorse Wind August 12, 2019 Amended Filing at 2.

<sup>12</sup> Wildhorse Wind November 8, 2019 Amended Filing at 7.

6. In the meantime, to ensure AEP Oklahoma's operational control over the Tuskahoma Upgrades throughout their integration into AEP Oklahoma's transmission system, Wildhorse Wind executed, contemporaneously with its petitions for waiver, a Transfer of Operational Control of Station Assets Agreement (Transfer Agreement).<sup>13</sup> The Transfer Agreement shifted operational control of the Tuskahoma Upgrades to AEP Oklahoma, expressly before their energization and integration into AEP Oklahoma's transmission system. As a result, Wildhorse Wind states that, while it will retain ownership of the Tuskahoma Upgrades for the limited period the parties require to complete the formal transfer of ownership, Wildhorse Wind will not control or operate the Tuskahoma Upgrades once they are energized, integrated, and become jurisdictional.<sup>14</sup> In addition, Wildhorse Wind states that the Tuskahoma Upgrades are covered by SPP's OATT and OASIS. Wildhorse Wind also states that it has no marketing function employees, as defined in Part 358 of the Commission's regulations. Further, to the extent that Wildhorse Wind's affiliates, Southern Power and Southern Company Services, Inc., have marketing function employees, they do not and will not have access to or be provided, directly or indirectly, any non-public information pertaining to the Tuskahoma Upgrades. Wildhorse Wind states that, out of an abundance of caution, it requests waiver of the Commission's OATT, OASIS, and Standards of Conduct requirements for this interim period until legal title of the Tuskahoma Upgrades is transferred to AEP Oklahoma.

## **II. Notice of Filing**

7. Notice of Wildhorse Wind's April 26, 2019 filing was published in the *Federal Register*, 84 Fed. Reg. 18,838 (2019), with interventions and protests due on or before May 17, 2019. None was filed.

8. Notice of Wildhorse Wind's November 8, 2019 amended filing was published in the *Federal Register*, 84 Fed. Reg. 62,523 (2019), with interventions and protests due on or before November 18, 2019. None was filed.

## **III. Discussion**

### **A. Waiver Requests for Wildhorse Gen-Tie**

9. Wildhorse Wind seeks waiver of the requirements to file an OATT, establish and maintain an OASIS, and abide by the Standards of Conduct with respect to the Wildhorse

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<sup>13</sup> Wildhorse Wind April 26, 2019 Filing at Attachment 2.

<sup>14</sup> In its November 8, 2019 Amended Filing, Wildhorse Wind states that the Tuskahoma Upgrades are now energized. November 8, 2019 Amended Filing at 6.

Gen-Tie. In support, Wildhorse Wind states that the Wildhorse Gen-Tie is limited and discrete, as it is a generator tie line that would qualify for the automatic exemption under Order No. 807<sup>15</sup> if Wildhorse Wind did not own the Tuskahoma Upgrades.

10. Order Nos. 888 and 890 and section 35.28 of the Commission's regulations require public utilities that own, operate, or control facilities used for the transmission of electric energy in interstate commerce to file an OATT. Order No. 889 and Part 37 of the Commission's regulations require public utilities to establish and maintain an OASIS. Order Nos. 889, 2004, and 717 and Part 358 of the Commission's regulations require public utilities to abide by certain Standards of Conduct.<sup>16</sup> In prior orders, the Commission has enunciated the standards for exemption from some or all of the requirements of Order Nos. 888, 889, and 890.<sup>17</sup> The Commission has stated that the criteria for waiver of the requirements of Order No. 890 and Order No. 2004 are unchanged from those used to evaluate requests for waiver under Order Nos. 888 and 889.<sup>18</sup> Order No. 717 did not change those criteria.<sup>19</sup>

11. The Commission may grant requests for waiver of the obligation to file an OATT 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. Should the public utility receive such a request, the Commission has determined that the public utility must file with the Commission a *pro forma* tariff within 60 days of the date

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<sup>15</sup> Wildhorse Wind November 8, 2019 Amended Filing at 5 (citing *Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, FERC Stats. & Regs. ¶ 31,367, at P 165 (cross-referenced at 150 FERC ¶ 61,211), *order on reh'g*, Order No. 807-A, 153 FERC ¶ 61,047 (2015)).

<sup>16</sup> Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,590; Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 16; Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 313.

<sup>17</sup> 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*).

<sup>18</sup> See *Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at P 3 (2007); *Alcoa Power Generating Inc.*, 108 FERC ¶ 61,243, at P 27 (2004).

<sup>19</sup> See Order No. 717, FERC Stats. & Regs. ¶ 31,280 at PP 31-33.

of the request, and must comply with any additional requirements that are effective on the date of the request.<sup>20</sup>

12. The Commission has also determined that waiver of the requirement to establish an OASIS and abide by the Standards of Conduct would be appropriate for a public utility if the applicant: (1) owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) is a small public utility that owns, operates, or controls an integrated transmission grid, unless other circumstances are present that indicate that a waiver would not be justified.<sup>21</sup>

13. The Commission has held that 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) or an entity complains that the public utility has unfairly used its access to information about transmission to benefit the utility or its affiliate (for Standards of Conduct waivers).<sup>22</sup>

14. We agree that the Wildhorse Gen-Tie qualifies as limited and discrete because it is a generator tie line that is used solely to take electricity from the Wildhorse Wind facility to the Tuskahoma Upgrades. As Wildhorse Wind correctly notes, now that the Tuskahoma Upgrades have become energized and Wildhorse Wind still owns (but does not control or operate) them, the Wildhorse Gen-Tie does not qualify for the blanket waiver and safe harbor provisions of Order No. 807.<sup>23</sup> Accordingly, we grant Wildhorse Wind's petition for OATT, OASIS, and Standards of Conduct waivers related to the

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<sup>20</sup> *Black Creek*, 77 FERC at 61,941.

<sup>21</sup> *Id.* Although the Commission originally precluded waiver of the requirements for OASIS and the Standards of Conduct for a small public utility that is a member of a tight power pool, in *Black Hills Power, Inc.*, 135 FERC ¶ 61,058, at PP 2-3 (2011) (*Black Hills*), the Commission explained that membership in a tight power pool is no longer a factor in the determination for waiver of Standards of Conduct. Moreover, *Black Hills* did not affect waivers based on a public utility disposing of no more than 4 million megawatt-hours annually.

<sup>22</sup> *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Cent. Minn. Mun. Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997) (*Central Minnesota*); *Easton Utils. Comm'n*, 83 FERC ¶ 61,334, at 62,343 (1998) (*Easton*)).

<sup>23</sup> Once the transfer takes place and AEP Oklahoma owns the Tuskahoma Upgrades, however, Order No. 807's blanket waiver and safe harbor provisions will cover the Wildhorse Gen-Tie.

Wildhorse Gen-Tie until Wildhorse Wind transfers ownership of the Tuskahoma Upgrades to AEP Oklahoma. Prior to the transfer, this OATT waiver will be revoked if Wildhorse Wind receives a request for transmission service; the OASIS and Standard of Conduct waivers will remain in effect only 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 waiver) or an entity complains that Wildhorse Wind has unfairly used its access to information about transmission to benefit the utility or its affiliate (for Standards of Conduct waiver).<sup>24</sup>

**B. Waiver Request for the Tuskahoma Upgrades**

15. Wildhorse Wind also seeks waiver of the requirements to file an OATT and establish and maintain an OASIS with respect to the Tuskahoma Upgrades. In support, Wildhorse Wind represents that the Tuskahoma Upgrades are limited and discrete, and that it will own the Tuskahoma Upgrades for a short period while they are being energized and integrated into AEP Oklahoma's grid during the current planned outage.

16. Based on the statements in Wildhorse Wind's application, we find that the Tuskahoma Upgrades do not qualify as limited and discrete, as they will briefly be part of AEP Oklahoma's integrated transmission grid until the parties resolve their transfer of ownership issues. However, we recognize that, during this limited period of a couple of months, Wildhorse Wind will be merely the nominal "paper" owner of the upgrades, while AEP Oklahoma exercises full operational control over them under the SPP OATT.<sup>25</sup>

17. Given that Wildhorse Wind will not control or operate the Tuskahoma Upgrades after they are energized, integrated, become jurisdictional, and are covered by SPP's OATT and OASIS, we find that Wildhorse Wind's ownership of the Tuskahoma Upgrades prior to their sale to AEP Oklahoma raises no OATT or OASIS concerns. We therefore deem Wildhorse Wind's petition for waiver of the OATT and OASIS requirements to be unnecessary. Accordingly, we dismiss Wildhorse Wind's petition for waiver as it pertains to these OATT and OASIS requirements.

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<sup>24</sup> *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota*); *Easton*, 83 FERC ¶ at 62,343. Wildhorse Wind must notify the Commission if there is a material change in facts that affects its waiver, within 30 days of the date of such change. *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) (*Material Changes Order*).

18. With regard to Wildhorse Wind's petition for waiver of the Commission's Standards of Conduct requirements for the Tuskahoma Upgrades, we note that Wildhorse Wind owns transmission facilities and is a transmission provider as that term is defined in section 358.1(b) of the Commission's regulations, until Wildhorse Wind transfers ownership of the Tuskahoma Upgrades to AEP Oklahoma, so we cannot dismiss the petition as unnecessary. Additionally, Wildhorse Wind states that it has 100 MW of generation that will be delivered using the Tuskahoma Upgrades, which further triggers the applicability of the Standards of Conduct requirements under section 358.1(b) of the Commission's regulations.<sup>26</sup>

19. Although Wildhorse Wind claims that it has no marketing function employees, this statement is not completely consistent with the facts in the instant request and in its request for market-based rate authority under section 205 of the Federal Power Act<sup>27</sup> in Docket No. ER19-2005,<sup>28</sup> where Wildhorse Wind sought and obtained the Commission's authority to engage in sales for resale in interstate commerce.<sup>29</sup> Wildhorse Wind anticipates making sales for resale in interstate commerce and employees engaged in activities related to those sales likely meet the definition of marketing function employees as defined in section 358.3(c)(1) of the Commission's regulations. Without additional information regarding the scope and function of Wildhorse Wind's staff to verify whether or not they are engaging in marketing function activities, it appears that some employees are likely engaging in marketing function activities with respect to the sale for resale of electricity generated by Wildhorse Wind's generation facilities.

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<sup>26</sup> In its August 12, 2019 amended filing, Wildhorse Wind acknowledges that it is not eligible for the blanket waiver for interconnection facilities established by Order No. 807 because of the time difference between transfer of operational control and responsibility to AEP Oklahoma and SPP, and the transfer of title to the underlying facilities and property. Wildhorse Wind August 12, 2019 Amended Filing at 2.

<sup>27</sup> 16 U.S.C. § 824d (2018).

<sup>28</sup> On May 30, 2019, Wildhorse Wind filed an application for market-based rate authority with an accompanying tariff in Docket No. ER19-2005. In that request, Wildhorse Wind stated that it was constructing a wind generating facility with a total of 100 MW of capacity which would be sold to an unaffiliated third party under a long-term firm power sale agreement. *See Wildhorse Wind Energy, LLC, Application for Market-Based Rate Authority*, Docket No. ER19-2005-000, at 3 (filed May 30, 2019).

<sup>29</sup> *Wildhorse Wind Energy, LLC*, Docket No. ER19-2005-001, at 2-3 (June 28, 2019) (delegated order).



20. Also, Wildhorse Wind acknowledges that certain employees may have access to non-public transmission information of SPP or AEP Oklahoma. Specifically, Wildhorse Wind states that employees engaged in these communications would be involved in finance, legal, real-estate, or support functions, and are not typically engaged in marketing function activities with respect to the Tuskahoma Upgrades. Wildhorse Wind asserts that such employees will abide by the Standards of Conduct prohibitions.<sup>30</sup>

21. As discussed below, we grant waiver of the Commission's Standards of Conduct requirements. Although Wildhorse Wind is a transmission owner until it sells the Tuskahoma Upgrades, it is not responsible for operation or control of the transmission facility, which is provided for consistent with SPP's OATT and performed through SPP's OASIS.<sup>31</sup> Because SPP, not Wildhorse Wind, is responsible for operating the transmission facility, Wildhorse Wind has no ability to engage in discriminatory behavior to benefit its marketing function activities or to harm non-affiliated customers. Although certain Wildhorse Wind employees might have limited access to non-public transmission information until the sale is complete, Wildhorse Wind has committed that they will be trained in the Standards of Conduct and will observe the Standards of Conduct requirements.<sup>32</sup> Additionally, Wildhorse Wind states that to the extent that its affiliates, Southern Power and Southern Company Services, Inc., have marketing function employees, they do not engage in transmission transactions on the Tuskahoma Upgrades and will not have access to or be provided, directly or indirectly, any non-public information. We expect that Wildhorse Wind will extend that commitment and observe the no-conduit rule with respect to all employees that may have access to non-public transmission information of SPP or AEP Oklahoma, including those who are engaged in marketing function activities. When Wildhorse Wind's representations are considered in this context we believe it is appropriate to grant its request for waiver of the Standards of Conduct.

22. We note that Wildhorse Wind's waiver of the requirement to comply with the Standards of Conduct will remain in effect until the Commission takes action in response to a complaint to the Commission that Wildhorse Wind has unfairly used its access to information about transmission to benefit itself or its affiliate.<sup>33</sup>

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<sup>30</sup> Wildhorse Wind August 12, 2019 Amended Filing at 3.

<sup>31</sup> Wildhorse Wind August 15, 2019 Amended Filing at 2.

<sup>32</sup> Wildhorse Wind August 12, 2019 Amended Filing at 3.

<sup>33</sup> Wildhorse Wind must notify the Commission if there is a material change in facts that affects its waiver, within 30 days of the date of such change. *Material Changes Order*, 127 FERC ¶ 61,141 at P 5.

The Commission orders:

(A) Wildhorse Wind's request for waiver of the requirements to file an OATT, to establish and maintain an OASIS, and to comply with the Standards of Conduct for the Wildhorse Gen-Tie, is hereby granted, as discussed in the body of this order.

(B) Wildhorse Wind's request for waiver of the requirements to file an OATT, and to establish and maintain an OASIS for the Tuskahoma Upgrades, is hereby dismissed as unnecessary, as discussed in the body of this order.

(C) Wildhorse Wind's request for waiver of the requirements to comply with the Standards of Conduct for the Tuskahoma Upgrades is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.