

125 FERC ¶ 61,036
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Hardee Power Partners Limited

Docket Nos. ER08-1348-000
ER08-1348-001

ORDER ACCEPTING AGREEMENT FOR FILING AND
GRANTING REQUESTS FOR WAIVERS

(Issued October 16, 2008)

1. This order accepts for filing under section 205 of the Federal Power Act¹ (FPA) a proposed Facilities Sharing Agreement between Hardee Power Partners, Limited (Hardee) and Seminole Electric Cooperative, Inc. (Seminole), effective January 1, 2013. Under the Facilities Sharing Agreement, Hardee and Seminole will share the cost of operating and maintaining limited interconnection facilities in proportion to their respective ownership interests in the rated capacity of their generation units. In addition, this order grants continued waivers of Order Nos. 888,² 889,³ and 890⁴ and their

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. ¶ 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).

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, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241,

(continued...)

implementing regulations⁵ as well as Part 358 of the Commission's regulations – Standards of Conduct.⁶

Background

2. Hardee owns and operates a generation facility in Hardee and Polk Counties, Florida (Hardee Facility). Under an Agreement for Sale and Purchase of Capacity and Energy between Hardee and Seminole (Seminole PPA) and an Agreement for Sale and Purchase of Capacity and Energy between Tampa Electric Company (Tampa) (Tampa PPA) and Hardee (collectively, PPAs), Hardee has committed to sell the Hardee Facility's energy and capacity to Seminole and Tampa through December 31, 2012.⁷ The Hardee Facility interconnects with Seminole's and Tampa's transmission systems through limited interconnection facilities, including a 230-kV switchyard (Hardee Switchyard) that Hardee owns.⁸ Hardee uses the Hardee Switchyard and interconnection facilities to deliver the Hardee Facility's power to the purchasers. Under the Seminole

reh'g denied, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g & clarification*, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008), 123 FERC ¶ 61,299 (2008).

⁵ 18 C.F.R. § 35.28 (2008); 18 C.F.R. Part 37 (2008).

⁶ 18 C.F.R. Part 358 (2008); *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (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, FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,611 (2007); Notice of Proposed Rulemaking, 73 Fed. Reg. 16,228 (Mar. 27, 2008), FERC Stats. & Regs. ¶ 32,630 (2008).

⁷ The Commission has accepted both PPAs on the grounds that the cost-based rates are just and reasonable and designated them as Hardee Rate Schedule FERC Nos. 1 and 2. *TECO Power Services Corp.*, 53 FERC ¶ 61,202 (1990).

⁸ These facilities are referred to as “common facilities” because they are used by both parties but only Hardee owns them. *See* Hardee's July 31 Transmittal Letter at 4-6.

PPA, Seminole constructed a 488 MW generating facility (Midulla Facility)⁹ on the same site as the Hardee Facility. The Midulla Facility interconnected to the Hardee Switchyard to access Seminole's transmission facilities.

3. Hardee and Seminole executed the Seminole PPA in 1989 and have amended it seven times to adjust the rates to reflect the reallocation of Tampa's and Seminole's share of the common facilities costs, including the Hardee Switchyard, based on their share of the benefits from such facilities.

4. In addition, Hardee, Tampa and Seminole are parties to a Trilateral Interconnection Agreement (Trilateral IA) that provides for the interconnection of the Hardee Facility to Tampa's and Seminole's transmission lines at the Hardee Switchyard. Under the Trilateral IA, the Hardee Switchyard serves as a point of interconnection between the Tampa and Seminole transmission facilities. Under the Trilateral IA, Seminole and Tampa do not obtain, and are not required to obtain, transmission service from Hardee with respect to power flows between Seminole's and Tampa's respective transmission facilities. Rather, the Hardee Switchyard is considered a single electrical node for power exchange purposes.

5. Hardee and Seminole recently executed a new power sale agreement (Tolling Agreement) to replace the Seminole PPA when it expires. Under the Tolling Agreement Hardee will sell the Hardee Facility's output to Seminole beginning January 1, 2013, or upon expiration of the PPAs, subject to the satisfaction of certain conditions. After the PPAs expire and the Tolling Agreement commences, Seminole will continue to use certain common facilities, including the Hardee Switchyard.

Filing

6. On July 31, 2008, as supplemented on September 4, 2008, Hardee filed the Facilities Sharing Agreement, explaining that upon expiration of the PPAs, Hardee and Seminole will continue sharing the use and expenses of the Hardee Switchyard. Hardee states that Hardee and Seminole will share the Hardee Switchyard's operation and maintenance (O&M) costs in proportion to their respective ownership interests in the rated capacity of their generation units. In addition, Hardee may seek a *pro rata* share of any capital improvement costs from Seminole. Seminole also agrees to reimburse Hardee if Seminole's use of the Hardee Switchyard adversely affects the operation or maintenance of the Hardee Facility, increases Hardee's costs, or decreases Hardee's revenues from the Hardee Switchyard. In either situation, Hardee agrees in the Facilities

⁹ In past filings to the Commission, Hardee referred to Seminole's Midulla Facility as the Payne Creek Generating Station.

Sharing Agreement to file with the Commission under section 205 of the FPA for recovery of such costs.

7. Hardee states that the Facilities Sharing Agreement supplement is designed to accommodate Tampa's request that the Facilities Sharing Agreement make clear that modifications to the Hardee Switchyard, as contemplated by section 4.1.c, are also subject, as applicable, to the prior written consent provisions of section 1.3 of the Trilateral IA.¹⁰

8. Hardee requests that the Commission confirm that it continues to meet the Commission's standards for waiver of Order Nos. 888, 889 and 890, Parts 37 and 358 and section 35.28 of the Commission's Standards of Conduct. It states that the Facilities Sharing Agreement should not disqualify it for these waivers because the Facilities Sharing Agreement will merely extend into the future the cost-sharing arrangement that is now in the Seminole PPA. Hardee states that the Hardee Switchyard will continue to be a limited, discrete facility.

9. Hardee has been granted authority to sell power and energy at market-based rates, including waiver of the accounting requirements of Parts 41, 101 and 141 of the Commission's regulations.¹¹

10. Hardee proposes an effective date of January 1, 2013 for the Facilities Sharing Agreement but states that it will not become effective until the Commission: (1) accepts it for filing; (2) issues an order redetermining that Hardee is an exempt wholesale generator (EWG);¹² (3) grants Hardee approval for the acquisition from, and disposition to, Seminole of the equipment associated with the Hardee Switchyard upgrade;¹³

¹⁰ Hardee supplemented the July 31 filing on Sept. 4, 2008. Hardee's Sept. 4 Transmittal Letter at 1-2.

¹¹ See *PMEP Investments, LLC, et al.*, 87 FERC ¶ 61,209 (1999).

¹² The Commission previously granted Hardee EWG status under section 32 of the Public Utility Holding Company Act of 1935, as amended by the Energy Policy Act of 1992. Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005); *Hardee Power Partners Ltd.*, 104 FERC ¶ 61,327 (2003). The Commission later affirmed Hardee's EWG status. *Hardee Power Partners Ltd.*, 114 FERC ¶ 62,123 (2006).

¹³ On February 7, 2006 the Commission granted Hardee's request for authorization for the disposition and acquisition of these jurisdictional transmission facilities. *Hardee Power Partners Ltd.*, 114 FERC ¶ 62,122 (2006).

(4) accepts the proposed Trilateral IA amendment; and (5) accepts any additional filings that the Commission requires. Hardee also requests waiver of section 35.3 of the Commission's regulations,¹⁴ so that this filing may become effective more than 120 days after the filing date. Hardee states that it is submitting this filing so early, because under the Tolling Agreement, Hardee must obtain the Commission's acceptance of the Facilities Sharing Agreement within 180 days after the parties executed it.

11. Hardee also requests waiver of section 35.12(b)(1) of the Commission's regulations, which requires an estimate of transactions and revenues.

Notice and Pleadings

12. Notice of Hardee's original filing was published in the *Federal Register*, 73 Fed. Reg. 47,144 (2008), with interventions and protests due on August 21, 2008. Seminole filed a timely motion to intervene and Tampa filed a timely motion to intervene and a request for an extension of the comment date to and including September 4, 2008. The Commission granted the extension, extending the comment period to September 4, 2008. No additional comments were filed.

13. Notice of the September 4, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 53,214 (2008), with protests and interventions due on September 25, 2008. None was filed.

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

Discussion

A. Facilities Sharing Agreement

15. For the reasons discussed below, we will accept the proposed Facilities Sharing Agreement, as supplemented, because it has been shown to be just, reasonable and not unduly discriminatory or preferential, or otherwise unlawful. We also find that Hardee has demonstrated good cause for waiver of the 120-day provision to make the Facilities Sharing Agreement effective January 1, 2013, as requested.¹⁵

¹⁴ 18 C.F.R. § 35.3 (2008).

¹⁵ Hardee explains that the Tolling Agreement requires Hardee to obtain the Commission's acceptance of the Facility Sharing Agreement within 180 days of its

16. The Facilities Sharing Agreement continues the cost-sharing arrangement that is in the PPAs. The use and expenses of the Hardee Facility will be allocated on an approximately 67 percent/33 percent basis between Seminole and Hardee.¹⁶ It authorizes Hardee to pass through the actual costs of O&M expenses that Hardee incurs. It also segregates the transmission O&M costs in a separate account to include direct labor, labor overheads, equipment and supplies, and the cost of outside contractors associated with the Hardee Switchyard. If the rated capacity of either the Midulla Facility or the Hardee Switchyard changes, or Seminole purchases any portion of the Hardee Switchyard, the allocation of expenses will be reset to reflect the ratios of the then-effective ownership interests in the rated capacity.

B. Waiver of Order Nos. 888, 889, 890

17. The Commission has set forth the standards for waiver of, or exemption from, some or all of the requirements of Order Nos. 888 and 889.¹⁷ The criteria for waiver of Order No. 890 are the same as in Order No. 888.¹⁸

18. The Commission may grant waivers of Order Nos. 888 and 890 to public utilities that show that they own, operate, or control only limited and discrete transmission facilities (facilities that do not form an integrated transmission grid), until the public utility receives a request for transmission service. Should the public utility receive such a request, it 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 in effect on the date of the request.¹⁹

19. The Commission has also determined that waiver of Order No. 889 would be appropriate for a public utility: (1) if the applicant owns, operates, or controls only

execution. In order to facilitate the long-term power agreement between Hardee and Seminole, the Commission finds good cause exists to grant waiver of the 120-day maximum notice requirement.

¹⁶ Given the current capacity ratings of their respective units, Seminole will be responsible for 759/1129 (67.23 percent) and Hardee will be responsible for 370/1129 (32.77 percent). The 67/33 percent ratio generally reflects the allocation of Hardee capacity costs to provide Seminole's power entitlements.

¹⁷ See, e.g., *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996) (*Black Creek*); *Entergy Mississippi, Inc.* (*Entergy*), 112 FERC ¶ 61,228, at P 22 (2005).

¹⁸ *Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at PP 3, 15 (2007).

¹⁹ *Black Creek*, 77 FERC ¶ 61,232 at 61,941.

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.²⁰ 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 or an entity complains that the public utility has used its access to information about transmission to unfairly benefit the utility or its affiliate (for Standards of Conduct waivers).²¹

20. In support of its request for the waivers, Hardee states that the Hardee Switchyard is a limited, discrete facility that Hardee built to deliver the output of the Hardee Facility to its customers.²² Under the Trilateral IA, Tampa and Seminole directly interconnect at the Hardee Switchyard and do not require or obtain transmission service from Hardee in order to exchange power or provide transmission service under their respective open access transmission tariffs (OATT). Hardee explains that, while Seminole delivers power from the Midulla Facility to its system through the Hardee Switchyard, Seminole does so using its own transmission lines. Seminole will deliver the power under the Trilateral IA, which acknowledges that Seminole does not need to obtain any transmission service from Hardee or Tampa for such deliveries.²³

21. Based on these statements, we will grant Hardee's waiver from the OASIS requirements of Order No. 889, and waiver of the requirement of Order Nos. 888 and 890 to have an OATT on file.

²⁰ *Id.* at 61,941.

²¹ *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota Mun. Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997); *Easton Utilities Comm'n*, 83 FERC ¶ 61,334, at 62,343 (1998)).

²² Hardee states that its customers are Seminole and Tampa under the PPAs and, starting January 1, 2013, Seminole under the Tolling Agreement.

²³ Hardee contends that even if it were deemed to be delivering power from Seminole through its Hardee Switchyard, waiver is appropriate when limited, discrete interconnection facilities may be used by a generator that is not owned by the same entity that owns the interconnection facilities. Hardee's July 31 Transmittal Letter at 9.

C. Waiver of Standards of Conduct for Transmission Providers

22. The Final Rule adopting Standards of Conduct for Transmission Providers (Order No. 2004)²⁴ governs the relationships between Transmission Providers and all of their Marketing and Energy Affiliates. Order No. 2004 states that Transmission Providers may request waivers or exemptions from all or some of the requirements of Part 358 for good cause.²⁵ Waiver of Order No. 2004 is granted, upon request, to: (1) a utility that owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) a small public utility that owns, operates, or controls an integrated transmission grid, unless it is a part of a tight power pool, or other circumstances are present that indicate that a waiver would not be justified.²⁶ Based on the statements in Hardee's request, we find good cause exists to grant Hardee's request for waiver of the Part 358 Standards of Conduct requirements.

D. Waiver of Filing Requirement

23. Hardee also requests waiver of section 35.12(b)(1), which requires Hardee to provide an estimate of transactions and revenues. Hardee states that the Facilities

²⁴ *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (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, FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,611 (2007); Notice of Proposed Rulemaking, 73 Fed. Reg. 16,228 (Mar. 27, 2008), FERC Stats. & Regs. ¶ 32,630 (2008).

²⁵ *See* 18 C.F.R. § 358.1(d) (2008); *Bear Creek Storage Co.*, 108 FERC ¶ 61,011 (2004); *Black Marlin Pipeline Co.*, 108 FERC ¶ 61,184 (2004); *Alcoa Power Generating Inc.*, 108 FERC ¶ 61,243 (2004).

²⁶ *Peetz Logan Interconnect, LLC*, 122 FERC ¶ 61,086 (2008) (*Peetz Logan*); *see also Alcoa Power Generating, Inc.*, 108 FERC ¶ 61,243, at P 27 (2004) (citing *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996)). A waiver of the Standards of Conduct will remain in effect until the Commission takes action on a complaint by an entity that Hardee has used its access to transmission information to unfairly benefit Hardee's own sales, or an affiliate's sales. *See Peetz Logan* at n. 22.

Sharing Agreement provides for the recovery of actual O&M costs starting January 1, 2013. The Commission hereby grants the requested waiver.

The Commission orders:

(A) The Facilities Sharing Agreement is hereby accepted for filing, to become effective on January 1, 2013, as discussed in the body of this order.

(B) Hardee's request for waiver of the requirements of Order Nos. 888, 889 and 890, and the Standards of Conduct is hereby granted, as discussed in the body of this order.

(C) Hardee's request for waiver of the Commission's 120-day requirement is granted, as discussed in the body of this order.

(D) Hardee's request for waiver of section 35.12(b)(1) is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.