

113 FERC ¶ 61,162
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Sudeen G. Kelly.

Trans-Elect NTD Path 15, LLC

Docket No. ER05-17-005

ORDER ACCEPTING COMPLIANCE FILING

(Issued November 17, 2005)

1. In an order issued on May 4, 2005,¹ the Commission found that Trans-Elect NTD Path 15, LLC (NTD Path 15) would be permitted to include, consistent with the Commission's *Policy Statement on Income Tax Allowances* (Policy Statement),² an income tax allowance in its rates (i.e., transmission revenue requirement (TRR)) if it made a compliance filing that demonstrated that its owners have an actual or potential income tax liability on NTD Path 15's income.³ In the August 19 Order, the Commission conditionally accepted NTD Path 15's compliance filing (First Compliance Filing), subject to NTD Path 15 making a further compliance filing (Second Compliance Filing). In this order, we find that NTD Path 15's Second Compliance Filing demonstrates that its owners have an actual or potential income tax liability associated with their imputed share of NTD Path 15's income. Therefore, we accept that filing and will permit NTD Path 15 to include a tax allowance in its TRR.

Background

¹ *Trans-Elect NTD Path 15, LLC*, 109 FERC ¶ 61,249 (2004) (December 2 Order), *reh'g denied*, 111 FERC ¶ 61,140 (2005) (May 4 Order), *order on compliance filing*, 112 FERC ¶ 61,202 (August 19 Order).

² 111 FERC ¶ 61,139 (2005).

³ May 4 Order, 111 FERC ¶ 61,140 at P 16.

2. In May 2001, the United States Secretary of Energy authorized the Western Area Power Administration (Western) to explore ways to relieve capacity constraints on Path 15.⁴ Through a competitive selection process, Western chose Trans-Elect Inc. (Trans-Elect) and Pacific Gas & Electric Company (PG&E) to build an 83-mile, 500 kV transmission line within the existing Path 15 transmission corridor and make related modifications to PG&E's Los Banos and Gates substations (Path 15 Upgrade) in order to increase Path 15's transmission capacity.⁵

3. Trans-Elect, in a subsequent letter agreement, agreed to be fully responsible for the construction, replacement, and maintenance costs of the 500 kV transmission line upgrade to Path 15.⁶ In order to develop, construct, and operate the upgrade to Path 15,⁷ Trans-Elect created NTD Path 15, a limited liability company (a subsidiary pass-through entity).⁸

4. On October 4, 2004, in order to recover its investment costs related to the Path 15 Upgrade, NTD Path 15 filed its Revenue Requirement and Transmission Owner (TO) Tariff. In the December 2 Order, the Commission accepted that filing and suspended it for a nominal period (to become effective upon the commencement of the commercial operation of the Path 15 Upgrade), subject to refund and the outcome of the proceeding established in Docket No. PL05-5-000.⁹

⁴ See *Western Area Power Admin.*, 99 FERC ¶ 61,306 at 62,277-78 (June 12 Order), *reh'g denied*, 100 FERC ¶ 61,331 (2002).

⁵ See *id.* at 62,278.

⁶ See Letter Agreement between the Path 15 Upgrade Participants, Docket No. ER02-1672-000 at 13-14 (Apr. 30, 2002) (Letter Agreement); see also June 12 Order, 99 FERC ¶ 61,306 at 62,278 (accepting the Letter Agreement, which, among other things, set forth the rate principles for the recovery of costs associated with the Path 15 Upgrade).

⁷ See Direct Testimony of James H. Drzemiecki, Ex. NTD-1 at 11: 7-11, Docket No. ER05-17-000 (Oct. 4, 2004).

⁸ In "pass-through" entities, such as a limited liability company, profits and losses pass directly through to an owner's income tax return.

⁹ December 2 Order, 109 FERC ¶ 61,249. In that order, the Commission also established hearing and settlement judge procedures regarding NTD Path 15's Revenue Requirement and TO Tariff Filing; however, the Commission stated that

On December 22, 2004, the California Independent System Operator (CAISO) notified the Commission that the Path 15 Upgrade achieved commercial operation on that day.

5. In the May 4 Order, the Commission stated that it would permit NTD Path 15 to retain an income tax allowance if it could demonstrate that NTD Path 15 meets the standard set out in the Policy Statement and directed NTD Path 15 to make a compliance filing to that effect.¹⁰ In the Policy Statement, the Commission concluded that it would “permit an income tax allowance for all entities or individuals owning public utility assets [including pass-through entities, such as NTD Path 15] provided that an entity or individual has an actual or potential income tax liability to be paid on that income from those assets.”¹¹

6. On June 2, 2005, NTD Path 15 filed its First Compliance Filing, as directed by the May 4 Order. That filing included four affidavits (one for each of the four individual equity owners (Equity Owners) of NTD Path 15)¹² that were intended to demonstrate that each Equity Owner has an actual or potential tax liability associated with its imputed share of NTD Path 15’s income. In the August 19 Order, the Commission found that NTD Path 15’s compliance filing did not satisfy the standard set forth in the Policy Statement (*i.e.*, a demonstration of actual or potential tax liability).¹³ Therefore, the Commission required NTD Path 15 to provide, in a further compliance filing, additional information to demonstrate that the Equity Owners indeed have an actual or potential taxable income attributable

it would not address the issue regarding the income tax allowance in those hearing procedures. *Id.* at P 31.

¹⁰ See May 4 Order, 111 FERC ¶ 61,140 at P 16 (*citing Policy Statement on Income Tax Allowances*, 111 FERC ¶ 61,139 at P 32).

¹¹ *Policy Statement on Income Tax Allowances*, 111 FERC ¶ 61,139 at P 32.

¹² The Equity Owners collectively represent 100 percent of the ownership interests in NTD Holdings LLC, which, in turn, is the 100 percent owner of NTD Path 15. The four individual Equity Owners are: EIF Path 15 Funding LLC, KB Transmission LLC (KB Transmission), Cardinal Power Funding, LLC, and New Transmission Development Company.

¹³ See August 19 Order, 112 FERC ¶ 61,202 at P 9.

to NTD Path 15's income.¹⁴ Specifically, the Commission required NTD Path 15 to provide documentation that demonstrates:

(1) the projected distributive share of corporate income (positive or negative) from NTD Path 15 that will be attributed to each Equity Owner; (2) that each of the Equity Owners has a projected taxable income level from all income sources that would result in each of them being subject to the 35 percent marginal corporate income tax bracket; and (3) that each Equity Owner is, for federal tax purposes, either automatically classified as a corporation or has elected to be taxed as a corporation and, therefore, will file a corporate income tax return, Form 1120.¹⁵

Second Compliance Filing

7. On September 19, 2005, NTD Path 15 submitted its Second Compliance Filing, which provides additional information, which the Commission requested in the August 19 Order, in response to the three issues raised in that order.¹⁶ According to NTD Path 15, its Second Compliance Filing satisfies the compliance conditions of the August 19 Order, and, therefore, the Commission should accept the filing.

8. In response to the first issue (*i.e.*, the Equity Owners' projected distributive shares of corporate income), NTD Path 15 submitted, in Attachment A-1 and A-2 to its Second Compliance Filing, documentation to show that the income that is distributed by NTD Path 15 to each of the Equity Owners on a pro rata basis is based on each Equity Owner's ownership interests in NTD Holdings LLC.¹⁷ Further, NTD Path 15 claims that the documentation lists each of the Equity Owner's projected allocation of corporate income from NTD Path 15.

9. As for the second issue (*i.e.*, the Equity Owners' projected taxable income levels), NTD Path 15 submitted, in Attachment B to its filing, each Equity Owner's

¹⁴ *Id.* at P 10.

¹⁵ *Id.* (footnote omitted).

¹⁶ *See id.*

¹⁷ *See supra* note 12.

projected federal taxable income level from NTD Path 15 for the 2005 test year (excluding deductions, credits, losses, etc.). NTD Path 15 states that the information provided in Attachment B demonstrates that NTD Path 15's aggregate public utility income is subject to federal income tax liability at the marginal tax rate of 35 percent.

10. Finally, with respect to the third issue (*i.e.*, the Equity Owners' corporate income tax returns), NTD Path 15 maintains that the supporting documentation that it filed, in Attachment C to its filing, shows that each Equity Owner has elected to be taxed as a corporation for federal tax purposes and, in turn, will have its income reported on Form 1120. However, NTD Path 15 also notes that Transvalley, LLC (Transvalley) is the owner of KB Transmission, one of the four Equity Owners, and is the tax filing entity for that Equity Owner.

Notice of Second Compliance Filing and Protest

11. Notice of the compliance filing was published in the *Federal Register*, 70 Fed. Reg. 57,590 (2005), with protests and interventions due on or before October 11, 2005.

12. On September 29, 2005, the Transmission Agency of Northern California (TANC) filed a protest. In its protest, TANC states that NTD Path 15's Second Compliance Filing fails to establish that all of its Equity Owners incur a federal income tax liability and, therefore, does not satisfy the requirements of the August 19 Order. Specifically, TANC argues that NTD Path 15 fails to establish the tax status of one of the Equity Owners, KB Transmission. TANC points out that although NTD Path 15's First Compliance Filing stated, in an affidavit, that KB Transmission is subject to actual or potential tax liability from its investment in NTD Path 15 and required to submit a Form 1120, the Second Compliance Filing lists Transvalley as the owner of and the tax filing entity for KB Transmission. Further, TANC states that NTD Path 15 did not provide, in the Second Compliance Filing, tax documentation for KB Transmission but instead provided such information for Transvalley. Accordingly, TANC maintains: "The information attested to in KB Transmission, LLC's affidavit and that presented in the [Second Compliance Filing] do not provide a complete picture of the tax filing entity. [NTD Path 15] does not demonstrate that KB Transmission, LLC is classified as a corporation for tax purposes and is required to file Form 1120."¹⁸ Since NTD Path 15's Second Compliance Filing does not, according to TANC, provide documentation for two of the requirements of the August 19 Order, TANC argues that the Commission should reject the filing.

¹⁸ TANC Protest to the Second Compliance Filing at P 10.

Corrected Affidavit Filing

13. On October 12, 2005, in response to TANC's protest to the Second Compliance Filing, NTD Path 15 filed a correction to one of the affidavits (Corrected Affidavit Filing) that it filed in its First Compliance Filing. In particular, NTD Path 15 explains that the affidavit provided by KB Transmission incorrectly identified it as the entity responsible for filing a Form 1120 and submits an affidavit that states that Transvalley is, in fact, the tax filing entity. In particular, the affidavit states: "KB Transmission LLC is wholly owned by Transvalley, LLC. Transvalley, LLC is required by federal law to file Form 1120. In accordance with this requirement, Transvalley, LLC must report KB Transmission LLC's imputed income associated with Trans-Elect NTD Path 15's public utility income."

Notice of the Corrected Affidavit Filing

14. Notice of the Corrected Affidavit Filing was published in the *Federal Register*, 70 Fed. Reg. 61,801 (2005), with protests and interventions due on or before October 25, 2005. None was filed.

Discussion

15. We find that the information NTD Path 15 provided in the Second Compliance Filing and the Corrected Affidavit Filing demonstrates, consistent with the Commission's directives in the August 4 Order: (1) the Equity Owners' projected distributive shares of corporate income; (2) the Equity Owners' projected taxable income levels; and (3) the tax status of the entities that have the ultimate tax liability with respect to the income that is imputed to the Equity Owners from NTD Path 15's income (*i.e.*, their Form 1120 tax returns). Further, based on that information, we find that NTD Path 15 has demonstrated that its owners have an actual or potential income tax liability associated with their imputed share of NTD Path 15's income. Therefore, since NTD Path 15 has satisfied the standard set forth in the Policy Statement for a pass-through entity, such as NTD Path 15, to include a tax allowance in its rates, we accept the Second Compliance Filing for filing and, consistent with the May 4 Order, will permit NTD Path 15 to include an income tax allowance in its TRR that reflects NTD Path 15's income that is imputed to the Equity Owners.¹⁹

¹⁹ May 4 Order, 111 FERC ¶ 61,140 at P 16. Although we approve, in this order, NTD Path 15's inclusion of a tax allowance in its TRR, we note that issues concerning NTD Path 15's Revenue Requirement and TO Tariff Filing are still

16. Although we agree with TANC's contention that the Second Compliance Filing does not establish that KB Transmission, which is one of the four Equity Owners, is classified as a corporation for tax purposes and required to file a Form 1120,²⁰ we note, as discussed further below, in light of the Second Compliance Filing and the Corrected Affidavit Filing, that determination is not pertinent to our consideration. As the Policy Statement states, "any pass-through entity desiring an income tax allowance on utility operating income must be prepared to establish the tax status of its owners, or if there is more than one level of pass-through entities, where the ultimate tax liability lies."²¹ Thus, if KB Transmission is not the entity that has the ultimate tax liability for the income that is imputed to it from NTD Path 15, NTD Path 15 need not establish that KB Transmission has elected to be taxed as a corporation and, in turn, files a Form 1120. In other words, NTD Path 15 must, as the quoted language from the Policy Statement suggests, establish the actual or potential tax liability of the entity where the ultimate tax liability lies.

17. In this respect, in the Second Compliance Filing, NTD Path 15 states that "Transvalley LLC is the tax filing entity for KB [Transmission], a downstream single member limited liability company owned by Transvalley, LLC."²² In addition, in the Corrected Affidavit Filing, NTD Path 15 attests that Transvalley has elected to be taxed, for federal tax purposes, as a corporation and, therefore, reports its income on Form 1120. Accordingly, consistent with the Policy Statement, we find that NTD Path 15 clearly establishes that Transvalley: (1) is the owner of KB Transmission, which is, in turn, an Equity Owner of NTD Path

being addressed in ongoing hearing procedures. *See supra* note 9 and accompanying text.

²⁰ The Commission stated in the August 19 Order that NTD Path 15 must provide, among other things, additional information to demonstrate "that each Equity Owner is, for federal tax purposes, either automatically classified as a corporation or has elected to be taxed as a corporation and, therefore, will file a corporate income tax return, Form 1120." *See* August 19 Order, 112 FERC ¶ 61,202 at P 10. That request was based on information provided in the affidavits that were attached to the First Compliance Filing in the Equity Owner's affidavits, which suggested that all of the Equity Owners are required to file Form 1120s.

²¹ 111 FERC ¶ 61,139 at P 42.

²² NTD Path 15's Second Compliance Filing at n. 8.

15; (2) bears the ultimate tax liability for the income attributed from NTD Path 15 to KB Transmission; and (3) has elected to be treated as a corporation and, therefore, files a Form 1120. As such, NTD Path 15's Second Compliance Filing demonstrates that the owner of KB Transmission, Transvalley, has an actual or potential taxable income tax liability attributable to NTD Path 15's income.

The Commission orders:

(A) NTD Path 15's Second Compliance Filing is hereby accepted, as discussed in the body of this order.

(B) NTD Path 15 is hereby permitted to include an income tax allowance in its TRR, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.