

98 FERC ¶ 61, 255
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

UBS AG

Docket No. ER02-973-000

ORDER CONDITIONALLY ACCEPTING
MARKET-BASED RATE SCHEDULE

(Issued March 7, 2002)

In this order, the Commission conditionally accepts for filing, without suspension or hearing, the proposed market-based rate schedule filed by UBS AG (UBS), to become effective on the date of this order.¹ As discussed below, we also grant UBS' requests for certain blanket waivers and authorizations under the Commission regulations consistent with those granted other entities with market-based rate authorization. This order benefits customers by authorizing a new seller in the electricity marketplace.

I. Background

On January 18, 2002, the United States Bankruptcy Court of the Southern District of New York (Bankruptcy Court) approved agreements under which UBS will acquire, by lease, from Enron Corp. and certain Enron Affiliates (collectively, Enron) currently idle assets formerly used by Enron in its wholesale trading and marketing operations.² Under the agreement approved by the Bankruptcy Court, 33 percent of the pre-tax profits of UBS' electricity and natural gas trading and marketing business will flow to the bankruptcy estate for distribution to Enron's creditors.³

¹The rate schedule designation is: UBS AG - Original Rate Schedule FERC No. 1; Original Sheets Nos. 1-4, effective on the date of this order.

²See Enron Power Marketing, Inc., 85 FERC ¶ 61,447 (1998); Enron Power Marketing, Inc., 65 FERC ¶ 61,305 (1993).

³The royalty payment obligation is subject, among other things, to acceleration at UBS' option, beginning January 1, 2005.

On February 6, 2002, UBS filed an application under section 205 of the Federal Power Act (FPA)⁴ seeking authority to sell energy, capacity and ancillary services at market-based rates under the terms of its proposed Original Rate Schedule FERC No. 1. UBS also seeks certain blanket approvals and waivers of Commission regulations. UBS states that authorization for UBS to compete in the bulk power markets will benefit Enron's creditors, prospective employees, and the public at large. UBS will acquire from Enron certain idle intellectual property licenses, computer hardware, office space leases, and other non-jurisdictional assets previously used by Enron in conducting its own trading and marketing business. UBS also states that it will hire more than 600 former Enron employees for its trading and marketing operations.

UBS is a publicly-held corporation organized under the laws of Switzerland. It has assets of approximately \$1.1 trillion and provides banking and financial services worldwide. UBS and its subsidiaries operate in 50 countries, including in the United States as UBS Warburg LLC and UBS Paine Webber, Inc. UBS states that neither UBS nor any of its affiliates currently engage in the trading and marketing of electricity or natural gas, nor does any of its affiliates own or operate any facilities for the generation, transmission or distribution of electricity in North America. Further, UBS states that Enron is not an affiliate of UBS. However, because some parties may perceive Enron as an affiliate of UBS, out of an abundance of caution, UBS has included Enron in its market analysis as though it were an affiliate.

On February 13, 2002, the Commission authorized, under section 203 of the FPA,⁵ the merger of Enron's affiliate Portland General Electric Company (PGE) with Northwest Natural Gas Company (NW Natural) through a newly formed public utility holding company created by NW Natural, Northwest Natural Holding Company.⁶

II. Notice of Filing, Interventions and Protests

Notice of UBS' filing was published in the Federal Register, 67 Fed. Reg. 7150 (2002), with motions to intervene and protests due on or before February, 20 2002. None were filed.

⁴16 U.S.C. § 824d (1994).

⁵16 U.S.C. § 824b (1994).

⁶See Northwest Natural Gas Company and Portland General Electric Company, 98 FERC ¶ 61,134 (2002).

III. Discussion

A. Overview

The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. For an affiliate of a transmission-owning public utility to demonstrate the absence or mitigation of market power, the public utility must have on file with the Commission an open access transmission tariff for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁷ As discussed below, we find that UBS' proposed market-based rate schedule meets these standards, subject to the conditions discussed below. We will also grant waiver of the Commission's 60-day prior notice requirement in order to allow UBS' market-based rate schedule to become effective on the date of this order. Accordingly, we will accept the proposed rate schedule for filing, without suspension or hearing, to become effective on the date of this order.

On November 20, 2001, in Docket No. EL01-118-000, the Commission instituted a proceeding pursuant to section 206 of the Federal Power Act in which it proposes to revise all existing market-based rate tariffs and authorizations to condition public utility sellers' market-based rate authority to ensure that such rates remain just and reasonable and do not become unjust or unreasonable as a result of anticompetitive behavior or abuse of market power.⁸ The Commission stated that it intends to condition all new market-based rate tariffs and authorizations in a similar manner. In the November 20 Order, the Commission proposed tariff language and provided for public comments. Following the comment period, the Commission will issue another order in that proceeding. The Commission's acceptance of UBS' market-based rate schedule is subject to any tariff condition adopted by the Commission in Docket No. EL01-118-000. Within 15 days of the date of issuance of an order adopting a tariff condition in Docket No. EL01-118-000, UBS is directed to make a compliance filing in the instant proceeding to amend its tariff accordingly.

⁷E.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996), *Letter Order Approving Settlement*, 79 FERC ¶ 61,149 (1997); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord*, *Heartland Energy Services, Inc., et al.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

⁸*Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 FERC ¶ 61,220 (2001) (November 20 Order), *reh'g pending*.

We further note that, under the Comprehensive License Agreement (License Agreement) between UBS and Enron, the parties contemplate "the operation of the Gas and Power Business, including the Web Site, in substantially the same manner in which it was conducted prior to the filing of the [bankruptcy] petitions."⁹ That is, UBS will operate the on-line trading platform in the same manner in which it was previously operated by Enron. On February 13, 2002, in Docket No. PA02-2-000, the Commission initiated a fact-finding investigation into whether any entity, including Enron (through its affiliates or subsidiaries), manipulated short-term prices in electric energy or natural gas markets in the West or otherwise exercised undue influence over wholesale prices in the West, for the period January 1, 2000 forward.¹⁰ Pursuant to the February 13 Order, the Associate Director, Office of Markets, Tariffs and Rates, on February 15, 2002, submitted a data request to Enron requesting, among other things, all contracts for sales of electric energy on which Enron defaulted or which have been canceled or terminated early. Accordingly, we will condition our authorization of market-based rates on UBS providing all information requested by Commission staff in its investigation, including access to any former Enron employees it has hired. Failure to provide this information in a timely manner will result in revocation of UBS' market-based rate authorization. We also reserve the right to further condition UBS' market-based rate authorization in the future should we so require as a result of the staff investigation.

B. Generation Market Power

UBS indicates that it is a power marketer and that neither UBS nor any of its affiliates owns, operates, or controls any generation facilities. By order issued on November 20, 2001, in AEP Power Marketing, Inc., et al.,¹¹ the Commission announced a new generation market power screen, the Supply Margin Assessment (SMA), to be applied to market-based rate applications on an interim basis pending a generic review of new analytical methods for analyzing market power. UBS has submitted an SMA to demonstrate that, even if Enron were viewed as an affiliate of UBS, UBS would not have market power in generation. We find that no SMA screen is required for UBS, because

⁹License Agreement, Article 11.2(c).

¹⁰Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002) (February 13 Order). On February 26, 2002, the Commission issued a notice designating Docket No. PA02-2-000 as the docket number for the fact-finding investigation.

¹¹97 FERC ¶ 61,219 (2001), reh'g pending.

UBS is not affiliated with any entity that owns or controls generation resources and has no long-term purchase power agreements in place.

C. Transmission Market Power

When an affiliate of a transmission-owning public utility seeks authorization to charge market-based rates, the Commission has required the public utility to have an open access transmission tariff on file before granting such authorization. UBS states that neither it nor any of its affiliates owns, operates or controls transmission facilities in the United States. UBS also states that PGE has a Commission approved open access tariff.¹² Accordingly, we find that UBS meets the Commission's transmission market power standard for approval of market-based rates.

D. Other Barriers to Entry/Reciprocal Dealing

UBS states that neither UBS nor any of its affiliates is engaged in the United States in the transportation or distribution of fuel or the manufacture of electric equipment, or has the ability to hinder the siting of generation plants or to block others from siting new plants. UBS states that neither UBS nor any of its affiliates owns or controls resources that could impede potential competitors from gaining access to alternative generation suppliers. Thus, UBS concludes that it cannot erect barriers to entry. UBS also states that, although Enron is affiliated with various buyers and sellers of natural gas, as well as several interstate and intrastate gas pipelines, the Commission has not considered affiliation with an interstate natural gas pipeline as an indicator of market power.¹³ Similarly, UBS states that the Commission has found that additional protective provisions are not warranted for an applicant that is affiliated with non-jurisdictional pipelines or gas suppliers.¹⁴

We are satisfied that UBS and its affiliates cannot erect barriers to entry or engage in reciprocal dealing. However, should UBS or any of its affiliates deny, delay or require unreasonable terms, conditions, or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the

¹²See, *Atlantic City Electric Company, et al.*, 77 FERC ¶ 61,144 (1996).

¹³See *US Gen Power Services, L.P.*, 73 FERC ¶ 61,302 at 61,845 (1995).

¹⁴See *PG&E Corp. and Valero Energy Corp.*, 80 FERC ¶ 61,041 at 61,135 (1997).

Commission that could result in the suspension of UBS' authority to sell power at market-based rates.¹⁵

E. Affiliate Abuse

UBS states that there is no likelihood of affiliate abuse with respect to UBS and its affiliates because no affiliate of UBS is a regulated pipeline or regulated utility with a franchised service area. Nonetheless, UBS has submitted a code of conduct governing its relationship with PGE and has included self-imposed restrictions on transactions between UBS and PGE in its market-based rate schedule. UBS states that it will treat PGE as an affiliate until the pending sale of PGE to NW Natural is consummated.

In Articles 5, 6 and 7 of its rate schedule, UBS proposes to put restrictions on sales to and purchases from PGE identical to those previously approved by the Commission for sales between Enron Power Marketing, Inc. and PGE.¹⁶ UBS states that it will not sell any ancillary services to PGE as long as PGE is owned by Enron, or to any affiliate with a franchised service area, except pursuant to a separate filing approved by the Commission under section 205 of the FPA. We will accept UBS' code of conduct and self-imposed restrictions, to be effective until the PGE sale is consummated. Within 15 days of the consummation of the PGE sale, UBS shall submit a revised rate schedule with the code of conduct and restrictions removed.

F. Sales of Ancillary Services

UBS requests authority to engage in the sale of certain ancillary services (listed in the proposed rate schedule) at market-based rates into the markets administered by ISO-New England, Inc., PJM Independent System Operator, the New York Independent System Operator, and the California ISO. Consistent with Commission precedent granting blanket authority to sellers to engage in such transactions in those markets, the Commission will grant UBS' request.¹⁷ UBS also requests authority to make sales of additional ancillary

¹⁵See, e.g., Louisville Gas & Electric Co., 62 FERC ¶ 61,016 (1993).

¹⁶See Enron Power Marketing, Inc., 85 FERC ¶ 61,447 (1998).

¹⁷See, e.g., New England Power Pool, 85 FERC ¶ 61,379 (1998), reh'g denied, 95 FERC ¶ 61,074 (2001); Atlantic City Electric Company, et al., 86 FERC ¶ 61,248, clarified, 86 FERC ¶ 61,310 (1999); Central Hudson Gas & Electric Corporation, et al., 86

services in those markets and in other geographic markets to the extent the Commission grants authority on a blanket basis to make sales of any such ancillary services to all persons then authorized to make sales of energy or capacity at market-based rates. We will grant UBS' request; however, this grant does not relieve UBS of the requirement to have current and complete tariffs on file with the Commission, pursuant to section 35.1 of our regulations, 18 C.F.R. § 35.1 (2001).¹⁸

G. Other Requests

UBS seeks Commission authorization for the reassignment of transmission capacity. The Commission finds UBS' request to be consistent with the Commission's requirements.¹⁹ UBS also requests authorization to buy and sell Firm Transmission Rights, Transmission Congestion Contracts and Fixed Transmission Rights to the same extent previously authorized by the Commission. We find UBS' request to be consistent with the Commission's requirements.²⁰

H. Waivers, Authorizations, and Reporting Requirements

UBS requests the following waivers and authorizations: (1) waiver of the filing requirements of Subparts B and C of Part 35, except sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101 and 141 of the Commission's regulations; (3) permission to file an abbreviated statement under Part 45 of the Commission's regulations relating to interlocking directorships; and (4) blanket authorization under Part 34 of the Commission's regulations of all future issuances of securities and

¹⁷(...continued)

FERC ¶ 61,062, order on reh'g, 88 FERC ¶ 61,138 (1999); AES Redondo Beach, L.L.C., et al., 85 FERC ¶ 61,123 (1998), order on reh'g, 87 FERC ¶ 61,208 (1999), order on reh'g and clarification, 90 FERC ¶ 61,036 (2000).

¹⁸See Calhoun Power Company LLC, 96 FERC ¶ 61,056 at 61,166 (2001).

¹⁹See Reliant Energy, Inc., et al., 91 FERC ¶ 61,073 at 61,258 (2000) (Reliant); Select Energy, Inc., 85 FERC ¶ 61,290 at 62,182 (1998); Enron Power Marketing, Inc., 81 FERC ¶ 61,277 (1997).

²⁰See, e.g., California Independent System Operator Corporation, 89 FERC ¶ 61,153 (1999), order on reh'g, 94 FERC ¶ 61,343 (2001).

assumptions of liabilities. We will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorization.²¹

Consistent with procedures we have adopted in other cases, UBS must file quarterly transaction summaries detailing the purchase and sale transactions undertaken in the prior quarter (including risk management transactions if they result in actual delivery of electricity). The first quarterly report will be due within 30 days of the end of the calendar quarter ending March 31, 2002.

Additionally, we will direct UBS to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. These characteristics include, but are not limited to: (1) ownership of generating or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the filing that owns generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.²² Alternatively, UBS may elect to report such changes in the updated market analysis it will be required to file every

²¹It should be noted that the Commission requested comments in Docket No. RM02-3-000, Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,558 (2001), on the continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101 and 141 (2001)), as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of obligations and liabilities (18 C.F.R. Part 34 (2001)). The continued applicability of these waivers and blanket authorizations will be reevaluated as a result of the comments received in that proceeding.

The waiver of the accounting and reporting requirements here notwithstanding, we expect that UBS will keep its accounting records in accordance with generally accepted accounting principles.

²²See, e.g., Morgan Stanley Capital Group, Inc., 69 FERC ¶ 61,175, at 61,695 (1994), order on reh'g, 72 FERC ¶ 61,082 (1995); InterCoast Power Marketing Co., 68 FERC ¶ 61,248 at 62,134 (1994), order clarified, 68 FERC ¶ 61,324 (1994).

three years.²³

I. Effective Date

We will conditionally accept UBS' proposed market-based rate schedule for filing, to become effective on the date of this order.²⁴

The Commission orders:

(A) UBS' request for waiver of the 60-day notice requirement is hereby granted.

(B) UBS' market-based schedule is hereby conditionally accepted for filing, as discussed in the body of this order subject to the compliance filing directed in Ordering Paragraph (C) below, to become effective on the date of this order.

(C) Within 15 days of the consummation of the PGE sale, UBS shall file a revised rate schedule with the code of code of conduct and restrictions removed, as discussed in the body of this order.

(D) UBS' request for waiver of Parts 41, 101 and 141 of the Commission's regulations is hereby granted, with the exception of 18 C.F.R. §§141.14 , .15 (2001) (providing for the filing both of the Form No. 80 and of the Annual Conveyance Report).

(E) Within 30 days of the date of issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by UBS should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§385.211 and 385.214 (2001).

(F) Absent a request to be heard within the period set forth in Ordering Paragraph (E)

²³The Commission reserves the right to require such an analysis at any time.

²⁴See, e.g., Central Hudson Gas & Electric Co., 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

above, UBS is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of UBS, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(G) Until further order of this Commission, the requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving UBS. Any such person, instead, shall file a sworn application providing the following information: (1) his or her full name and business address; and (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

(H) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of UBS' issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

(I) UBS' request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted.

(J) UBS must file quarterly transaction summaries of specific sales. The first quarterly report of transactions undertaken by UBS will be due within 30 days of the calendar quarter ending March 31, 2002.

(K) UBS is hereby directed to file an updated market analysis within three years of the date of this order and every three years thereafter.

(L) UBS is hereby directed to inform the Commission of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing.

By the Commission.

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(S E A L)

Magalie R. Salas,
Secretary.