

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midway Sunset Cogeneration Company

Docket Nos. EL06-59-000
ER06-736-000

ORDER DENYING PETITION FOR DECLARATORY ORDER AND
ACCEPTING MARKET-BASED RATE TARIFF

(Issued May 16, 2006)

1. In this order, the Commission denies the petition of Midway Sunset Cogeneration Company (Midway Sunset) for a declaratory order granting it a limited waiver of section 292.601(c)(1) of the Commission's regulations such that Midway Sunset will not be subject to regulation under sections 205 and 206 of the Federal Power Act (FPA)¹ for sales that Midway Sunset is required to make pursuant to the California Independent System Operator Corporation's (CAISO) must offer requirement. Separately, Midway Sunset filed a market-based rate tariff for Commission action in the event that the Commission denied its petition for declaratory order. In this order, we find that Midway Sunset's application for market-based rate authority, as discussed below, satisfies the Commission's standards for market-based rate authority and accept Midway Sunset's market-based rate tariff for filing,² effective March 17, 2006, as requested.³

¹ 16 U.S.C. §§ 824d-e (2000).

² FERC Electric Tariff, Original Vol. No. 1, Original Sheet Nos. 1- 3.

³ We will grant Midway Sunset's request for waiver of the prior notice requirement to allow the market-based rate tariff to become effective on March 17, 2006, the effective date of Order No. 671. *See Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 (2006); *order on clarification*, 114 FERC ¶ 61,128 (2006) (clarifying that the Commission will waive the 60-day prior notice requirement of section 205 of the FPA for electric energy sales that, pursuant to Order No. 671's elimination of certain regulatory exemptions, will now be subject to section 205 filings, provided that such section 205 filings are made prior to Order No. 671's effective date).

Petition for Declaratory Order in Docket No. EL06-59-000**Background**

2. Midway Sunset⁴ operates a 234 MW gas-fired cogeneration facility located in Kern County, California. The facility is interconnected with the transmission system of Pacific Gas and Electric Company (PG&E). The facility is certified as a qualifying facility (QF).⁵ The facility sells 200 MW of its output to Southern California Edison Company (SoCal Edison) pursuant to a long-term agreement, and provides approximately 16 MW of its electric output to its thermal host. The balance of the facility's electric output is sold to PG&E during on-peak and partial-peak hours pursuant to a long-term as-available agreement. During off-peak and super-off-peak hours, the balance of the facility's electric output is made available to the CAISO pursuant to the must offer obligation contained in the CAISO tariff. During calendar year 2005, the sales to the CAISO constituted approximately 0.6 percent of the total electrical output of the Midway Sunset facility.

3. Until recently, all of Midway Sunset's sales were exempt from sections 205 and 206 of the FPA pursuant to the exemption granted to QFs contained in section 292.601 of the Commission's regulations. In Order No. 671, the Commission revoked the exemption from FPA sections 205 and 206 for QFs except as to sales made pursuant to existing contracts, sales from facilities 20 MW or smaller, and sales made pursuant to a state regulatory authority's implementation of the Public Utility Regulatory Policies Act of 1978 (PURPA).⁶ In Order No. 671, the Commission reasoned that it was no longer "necessary or appropriate" to completely exempt QFs from FPA sections 205 and 206, because of the development of markets for the electric energy produced by non-utility

⁴ Midway Sunset states that it is a general partnership comprised of Aera Energy, LLC (Aera) and San Joaquin Energy Company, a wholly-owned subsidiary of Edison Mission Energy. Aera is jointly owned by affiliates of Shell Oil Company and Exxon Mobil Corporation.

⁵ The facility was originally certified in Docket No. QF86-433-000. *Sun Cogeneration Limited Partnership*, 38 FERC ¶ 62,303 (1987). It was subsequently recertified in *Midway Sunset Cogeneration Co.*, 47 FERC ¶ 61,273 (1989), in *Midway Sunset Cogeneration Co.*, 69 FERC ¶ 62,018 (1994), and in *Midway Sunset Cogeneration Co.*, 86 FERC ¶ 62,229 (1999).

⁶ 16 U.S.C. § 824a-3 (2000). PURPA was amended by the Energy Policies Act of 2005. Pub. L 109-58, 119 Stat. 594 (2005).

power producers and the participation of QFs in those markets. The Commission reasoned that the exemption from sections 205 and 206 of the FPA was no longer appropriate because of the potential impact many QFs could have on the market.

4. Midway Sunset acknowledges in its petition for declaratory order that the sales it makes pursuant to the CAISO's must offer requirement are not covered by the exemptions currently granted QFs from sections 205 and 206 of the FPA and that under Order No. 671 Midway Sunset was required to make a section 205 filing as a result of the must offer sales.⁷ Nevertheless, Midway Sunset argues that the must-offer sales it makes to the CAISO are *de minimis* and thus there is no potential that these sales will have an impact on the market. Midway Sunset also argues that its sales to the CAISO under the must-offer obligation are in all respects governed by the CAISO Tariff which is a jurisdictional tariff subject to the Commission's review and approval.

5. Midway Sunset accordingly asks the Commission to waive its regulations so that it will not be subject to sections 205 and 206 where the only sales that trigger the application of section 292.601 of the Commission's regulations are the sales that Midway Sunset is obligated to make pursuant to the CAISO must offer obligation, and are not unregulated market sales.

Procedural Matters

6. Notice of Midway Sunset's petition for declaratory order was published in the *Federal Register*, 71 Fed. Reg. 16,139 (2006), with motions to intervene and protests due on or before April 7, 2006. None was filed.

Discussion

7. We will deny Midway Sunset's request for declaratory order. While Midway Sunset acknowledges that its sales pursuant to the must offer requirement are not exempt from sections 205 and 206 of the FPA under section 292.601(c)(1),⁸ it argues that the

⁷ Midway Sunset has made the required filing pursuant to section 205 of the FPA in Docket No. ER06-736-000. Midway Sunset states that it will withdraw the section 205 application if the Commission grants its petition for declaratory order and grants it a limited waiver of the filing requirements.

⁸ This is, as noted above, the Commission regulation that exempts some QF sales from sections 205 and 206 of the FPA. Specifically it exempts "sales of energy or capacity made by qualifying facilities 20 MW or smaller, or made pursuant to a contract executed on or before March 17, 2006 or made pursuant to a state regulatory authority's implementation of [PURPA]."

Commission should waive the requirement that it seek authorization for the sales under section 205 of the FPA on the grounds that the sales are *de minimis* and that they are subject to full Commission oversight under the CAISO tariff.

8. There is no *de minimis* exemption for otherwise statutory jurisdictional transactions. And the Commission may not, on *de minimis* grounds, exempt a class of utilities from regulation. However, the Commission, in individual cases, has administrative discretion to decline to exercise jurisdiction.⁹ The Commission, under the authority of PURPA, previously granted exemptions from Commission review pursuant to sections 205 and 206 of the FPA to most sales from QFs, but, as discussed above, in Order No. 671 recently largely revoked those exemptions as no longer necessary or appropriate. Midway Sunset in its request for waiver implies that the Commission should apply a different standard on the need to make market-based rate filings for facilities that were once exempt from the filing requirements as QFs. However, in Order No. 671, the Commission has already determined that, as a class, QFs such as Midway Sunset, should not be exempt from the filing requirements of section 205. Thus, in addressing Midway Sunset's request for waiver, we treat Midway Sunset as a public utility just like any other, and the fact that its rates were once exempt from our review is irrelevant to our decision on the request for waiver. The question thus becomes whether Midway Sunset has presented the Commission a compelling reason to not exercise its jurisdiction over Midway Sunset's sales made pursuant to the CAISO's must offer requirement.

9. We do not believe that Midway Sunset has presented the Commission a sufficiently compelling reason to decline to exercise jurisdiction over its sales. First, as just noted, the Commission in Order No. 671 considered the question of exemptions and found that rates for sales largely should not be exempt from Commission review under sections 205 and 206 of the FPA. Second, the Commission was presented with similar facts in a series of cases involving New England Power Pool (NEPOOL) participants selling into the ISO New England, Inc. (ISO-NE) market under NEPOOL Market Rule 1. In those cases the Commission was asked to waive the prior notice requirement for market-based rate filings on the grounds that sales that had been made prior to filing were *de minimis*, that they were made pursuant to the NEPOOL Market Rule 1 and were mainly for balancing purposes, were caused by the actions of others, and that the price for the sales was determined not by the sellers, but by ISO-NE. The Commission denied waiver of the prior notice requirement on the ground that the size of the sale was irrelevant and that the Commission's approval of NEPOOL Market Rule 1 did not grant authority for NEPOOL members to sell energy at market-based rates and that it was each utility's responsibility to provide support to satisfy the Commission's market-based rate

⁹ See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,994-96 (1993), *order on reh'g*, 65 FERC ¶ 61,081 (1993).

analysis.¹⁰ Likewise, that Midway Sunset's sales take place pursuant to the CAISO's must offer requirement does not excuse Midway Sunset from showing that its sales satisfy our market-based rate analysis.

Application for Market-Based Rate Authority in Docket No. ER06-736-000

Background

10. On March 17, 2006, Midway Sunset filed an application for market-based rate authority, with an accompanying market-based rate tariff. The proposed market-based rate tariff provides for the sale of energy, capacity and ancillary services at market-based rates.¹¹ The proposed market-based rate tariff also provides for the reassignment of transmission capacity and the resale of firm transmission rights or their equivalents (FTRs). Midway Sunset's market-based rate tariff includes the Commission's change in status reporting requirement.¹² Midway Sunset requests waivers commonly granted to similar market-based rate applicants.

Procedural Matters

11. Notice of Midway Sunset's market-based rate filing was published in the *Federal Register*, 71 Fed. Reg. 16,138 (2006), with motions to intervene and protests due on or before April 7, 2006. None was filed.

Discussion

Market-Based Rate Authorization

12. 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. The Commission also considers

¹⁰ See *Carthage Energy, LLC*, 111 FERC ¶ 61,240 (2005); see also *Granite State Electric Co.*, 113 FERC ¶ 61,289 (2005); *Vermont Electric Cooperative, Inc.*, 108 FERC ¶ 61,223 (2004), *order on reh'g*, 110 FERC ¶ 61,232 (2005).

¹¹ Midway Sunset plans to sell certain ancillary services into the market administered by the CAISO.

¹² *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

whether there is evidence of affiliate abuse or reciprocal dealing.¹³ As discussed below, the Commission concludes that Midway Sunset satisfies the Commission's standards for market-based rate authority.

13. In its order issued in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power. Midway Sunset states that the sum of the nameplate uncommitted capacity of it and its affiliates in CAISO is approximately 468 MW.¹⁴ Midway Sunset has prepared the pivotal supplier and wholesale market share screens for the CAISO market. The Commission has reviewed Midway Sunset's generation market power screens for the CAISO market and has determined that Midway Sunset passes both the pivotal supplier and wholesale market share screens in the CAISO market. Accordingly, the Commission finds that Midway Sunset satisfies the Commission's generation market power standard for the grant of market-based rate authority.

14. Midway Sunset states that except for SoCal Edison, neither it nor any of its affiliates owns or controls any transmission facilities in CAISO, other than the interconnection equipment necessary to interconnect their generating facilities to the transmission grid. Midway Sunset states that SoCal Edison's transmission facilities are subject to the operational control of the CAISO, which has an open access transmission tariff on file with the Commission.¹⁵ Based on this representation, the Commission finds that Midway Sunset satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

15. Midway Sunset states that neither it nor any of its affiliates has dominant control over sites or other scarce inputs to generation that could be used to prevent competitors from entering the market. Midway Sunset also states that although its affiliates include entities that own or control fuel delivery systems, such affiliation does not raise concerns with respect to barriers to entry. Based on these representations, the Commission is satisfied that Midway cannot erect barriers to entry. However, should Midway Sunset or any of its affiliates deny, delay, or require unreasonable terms, conditions, or rates for

¹³ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

¹⁴ Midway Sunset states that it conservatively assumes that all 468 MW of capacity is uncommitted.

¹⁵ *Pacific Gas and Electric Co.*, 81 FERC ¶ 61,122 (1997).

natural gas service to a potential electric competitor in bulk power markets, then that electric competitor may file a complaint with the Commission that could result in the suspension of Midway Sunset's authority to sell power at market-based rates.¹⁶

16. Midway Sunset's proposed market-based rate tariff prohibits sales to any affiliated public utilities with a franchised service territory without first receiving Commission approval under section 205 of the FPA. Midway Sunset also states that its proposed tariff includes a code of conduct. Based on these representations, the Commission finds that Midway Sunset satisfies the Commission's concerns with regard to affiliate abuse.

17. Midway Sunset requests authority to engage in the sale of certain ancillary services (listed in the proposed tariff) at market-based rates into the market administered by CAISO. Consistent with Commission precedent granting authority to sellers to engage in such transactions in that market, the Commission will grant Midway Sunset's request.¹⁷

18. Midway Sunset also requests authority to sell additional ancillary services as the Commission may specify and authorize from time to time in orders that extend such authority to all sellers previously authorized to sell energy and capacity at market-based rates. The Commission will grant Midway Sunset's request; however, this grant does not relieve Midway Sunset of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2005).¹⁸

19. Midway Sunset also requests authority to reassign transmission capacity and to resell FTRs or their equivalent. The Commission finds these provisions consistent with the Commission's requirements.¹⁹ Accordingly, the Commission will grant this request.

Other Waivers, Authorizations and Reporting Requirements

20. Midway Sunset requests the following waivers and authorizations: (1) waiver of the accounting and reporting requirements contained in Parts 41, 101, and 141 of the Commission's regulations; (2) waiver of Subparts B and C of Part 35 of the

¹⁶ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

¹⁷ See, e.g., *AES Redondo Beach, L.L.C.*, 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).

¹⁸ See *Calhoun Power Co.*, 96 FERC ¶ 61,056 (2001).

¹⁹ See *Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997); *California Independent System Operator Corp.*, 89 FERC ¶ 61,153 (1999).

Commission's regulations requiring the filing of cost-of-service information, except for sections 35.12(a), 35.13(b), 35.15, and 35.16; and (3) blanket authorization under Part 34 of the Commission's regulations for the issuance of securities and the assumption of liabilities that have been granted to other applicants requesting market-based rate authority.

21. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.²⁰ We note that, by virtue of being a QF, Midway Sunset already is entitled to various exemptions pursuant to section 292.601 of the Commission's regulations. However, we will also separately grant it the waivers and authorizations it requests above, consistent with those granted other entities with market-based rate authorization. On this basis, such waivers and authorizations would be in effect in the event that Midway Sunset surrenders or loses its QF status at some point in the future.²¹

22. Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Midway Sunset to keep its accounting records in accordance with generally accepted accounting principles.

23. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or

²⁰ It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101 and 141) 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). *See Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities*, Order No. 627, 67 Fed. Reg. 67,691 (October 10, 2002), FERC Stats. & Regs., Regulations and Preambles 2001-2005 ¶ 31,134 at P 23-24 (2002).

²¹ This would not be the case, however, with regard to Part 45. The Commission has stated that it will no longer grant waivers of the full requirements of Part 45 in orders granting market-based rate authority. *See Commission Authorization to Hold Interlocking Positions*, Order No. 664, 70 Fed. Reg. 55,717 (September 23, 2005), FERC Stats. & Regs. ¶ 31,194 at P 34 (2005), *order on reh'g*, Order No. 664-A, 114 FERC ¶ 61,142 (2006).

greater) market-based power sales during the most recent calendar quarter.²² Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²³ Accordingly, Midway Sunset must file its first Electric Quarterly Report no later than 30 days after the first quarter Midway's rate schedule is in effect.

24. Midway Sunset also seeks Commission assurance that Midway Sunset will continue to be exempt from section 203 of the FPA under the provisions of section 292.601 of the Commission's regulations, as amended by Order No. 671. In addition Midway states that unless the Commission advises otherwise, Midway Sunset will continue to be exempt from the other sections of the FPA as previously provided to QFs.

25. Midway Sunset's request that the Commission offer assurance that Midway Sunset, as a QF, continues to be exempt from section 203 and other sections of the FPA as previously provided to QFs is beyond the scope of this proceeding. This proceeding involves a request for market-based rate authority and for certain waivers and authorizations typically granted to market-based rate sellers. The exemptions accorded to a QF from section 203 or other sections of the FPA by virtue of being a QF is a different and separate issue, and is beyond the scope of this proceeding.²⁴

26. Midway Sunset must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.²⁵

²² *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

²³ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2005). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²⁴ We note that Order No. 671, referred to by Midway Sunset, did not change the exemption accorded to a QF from the filing requirements of section 203 of the FPA.

²⁵ See Order No. 652, FERC Stats. & Regs. ¶ 31,175.

27. Midway Sunset is directed to file an updated market power analysis within three years of the date of this order. The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Midway Sunset's request for declaratory order is hereby denied, as discussed in the body of this order.

(B) Midway Sunset's market-based rate tariff is hereby accepted for filing, effective March 17, 2006, as discussed in the body of this order.

(C) 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.

(D) 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, 141.15 (2005).

(E) Within 30 days of the date of the 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 Midway Sunset should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 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 (2005).

(F) Absent a request to be heard within the period set forth above, Midway Sunset 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 Midway Sunset, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(G) 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 Midway Sunset's issuances of securities or assumptions of liabilities.

(H) Consistent with the procedures the Commission adopted in Order No. 2001, Midway Sunset must file electronically with the Commission Electric Quarterly Reports

no later than 30 days after the end of the reporting quarter. Midway Sunset is directed to file its first Electric Quarterly Report no later than 30 days after the first quarter Midway Sunset's tariff is in effect.

(I) Midway Sunset is hereby directed to file an updated market power analysis within three years of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.