

110 FERC ¶61,160
FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

February 15, 2005

In Reply Refer To:
Pinelawn Power, LLC
Docket Nos. ER05-305-000
and ER05-305-001

Balch & Bingham, LLP
Attn: Ms. Jennifer M. Buettner, Esq.
Counsel for Pinelawn Power, LLC
1710 Sixth Avenue North
Birmingham, Alabama 35203

Dear Ms. Buettner:

1. On December 6, 2004, as amended on January 7, 2005, Pinelawn Power, LLC (Pinelawn Power) filed an application for market-based rate authority, with an accompanying rate schedule. The proposed market-based rate schedule provides for the sale of capacity, energy, and ancillary services at market-based rates,¹ the reassignment of transmission capacity, and the resale of firm transmission rights (FTRs) or their equivalent. It also includes the Commission's market behavior rules.² Pinelawn Power's submittal, as discussed below, satisfies the Commission's standards for market-based rate authority and is accepted for filing, effective February 4, 2005, as requested.³

¹ Pinelawn Power's tariff provides for the sale of certain ancillary services in the market administered by the New York Independent System Operator, Inc. (NYISO). Pinelawn Power's tariff also allows for the sale of certain ancillary services to third party suppliers in other markets consistent with *Avista Corp.*, 87 FERC ¶ 61,223, *order on reh'g*, 89 FERC ¶ 61,136 (1999).

² *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

³ FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-5. Waiver of section 35.3 of the Commission's regulations, 18 C.F.R. § 35.3 (2004), is granted to allow for the effective date noted above.

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2. Pinelawn Power is a limited liability company with its principle place of business in Babylon, New York. Pinelawn Power will engage in the business of developing, constructing, owning, and operating a combined-cycle, dual-fueled generation facility with a capacity of 79.9 MW (Project) that recently commenced construction in the Town of Babylon, New York.

3. Pinelawn Power is indirectly owned by Harbinger Independent Power Fund II, LLC (Harbinger Fund II). Harbinger Fund II, is an investment fund managed by Harbinger Power MM II, LLC. The remaining membership interests in Pinelawn Power are owned by DJ Power, LLC. Pinelawn Power states that neither it nor its affiliates are electric utilities, electric utility holding companies, or subsidiaries, nor are any of them engaged in the generation or sale of electric power other than from qualifying cogeneration facilities, small power production facilities, or exempt wholesale generators.

4. Pinelawn Power states that DJ Power, LLC does not own any generating facilities other than a minority interest in the Project. Harbinger Fund II is engaged in the business of owning and investing in power generation assets in the United States. In addition, to the Project, through separate subsidiary companies, Harbinger Fund II owns one (1) exempt wholesale generating (EWG) facility that is located in New York (Equus Power I, L.P.); one (2) EWG facility that is located in Virginia (Tenaska Virginia Partners); and three (3) EWG facilities that are located in California (Hanford, Henrietta, Tracy). The Harbinger Group, Inc. is the investment manager of Harbinger Fund II, and it is also the investment manager of Harbinger Independent Power Fund I. Pinelawn Power states that for the purposes of this Application and as a conservative assumption, it is assumed that the generation facilities in which Harbinger Independent Power Fund I owns interests are owned or controlled by an affiliate of Pinelawn Power.⁴

Procedural Matters

5. Notice of Pinelawn Power's December 6, 2004 and January 7, 2005 filings was published in the *Federal Register*, 69 Fed. Reg. 75,531 (2004) and 70 Fed. Reg. 3,696 (2005), respectively, with motions to intervene, protests and comments to be filed by December 27, 2004 and January 24, 2005, respectively. None was filed.

⁴ Pinelawn Power states that while it would contend otherwise, it is making this assumption in the interest of conserving administrative time and resources that could be involved in determining whether, under the Commission's policies, the Harbinger Group, an affiliate of Pinelawn Power, owns or control the facilities in which Harbinger Independent Power Fund I owns interest.

Discussion**Market-Based Rate Authorization**

6. 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 whether there is evidence of affiliate abuse or reciprocal dealing.⁵ As discussed below, the Commission concludes that Pinelawn Power satisfies the Commission's standards for market-based rate authority.

7. Pinelawn Power cites section 35.27 (a) of the Commission's regulations, which provides that applicants shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity constructed after July 9, 1996.⁶ If an applicant sites generation in an area where it or its affiliates own or control other generation assets, the applicant must study whether its new capacity, when added to existing capacity, raises generation market power concerns.⁷

8. Pinelawn Power commenced construction of the Project in 2004. Pinelawn Power states that the Project is located in the NYISO control area, and the full output of the project is committed to Long Island Power Authority (LIPA) as a result of a competitive solicitation process. In addition, Harbinger Fund II owns interest in a 47 MW simple-cycle gas turbine facility (Freeport Facility) whose entire output is also committed for sale to LIPA. Finally, Harbinger Independent Power Fund I holds a 24.3 percent limited partnership interest in a 200 MW qualified cogeneration facility that is located in Lockport, New York. The full output of this facility is fully committed under a long-term contract to New York State & Electric Gas Corporation. Pinelawn Power states that the remaining generation facilities are located in other geographic regions of the country. Based on these representations, the Commission finds that Pinelawn Power satisfies the Commission's generation market power standard for the grant of market-based rate authority.

9. Pinelawn Power states that neither it nor its affiliates owns, operates or controls any transmission facilities beyond those necessary to interconnect their generation

⁵ 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).

⁶ 18 C.F.R. § 35.27 (2004). We note that the Commission intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify section 35.27(a) of its regulations.

⁷ *LG&E Capital Trimble County LLC*, 98 FERC ¶ 61,261 (2002).

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facilities to the grid. Based on this representation, the Commission finds that Pinelawn Power satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

10. Pinelawn Power states that neither Pinelawn Power nor its affiliates owns or controls any resources or inputs associated with power generation that could impede competition. Pinelawn also states that it and its affiliates do not have the ability to unilaterally site new generation plants or to block other entities from siting new plants; and they do not own or control any natural gas pipelines, any suppliers of electrical equipment, or power plant construction companies. Based on these representations, the Commission is satisfied that Pinelawn Power and its affiliates cannot erect barriers to entry.

11. Pinelawn Power states that it is not affiliated with a public utility with a franchised service territory. Based on this representation, the Commission finds that Pinelawn Power satisfies the Commission's concerns with regard to affiliate abuse.

12. Pinelawn Power requests authority to engage in the sale of certain ancillary services (listed in the proposed tariff) at market-based rates into the markets administered by the NYISO. Consistent with Commission precedent granting authority to sellers to engage in such transactions in that market, the Commission will grant Pinelawn Power's request.⁸ In addition, Pinelawn Power also proposes to sell certain ancillary services to third party suppliers in other markets consistent with *Avista*. The Commission will grant this request.

13. Pinelawn Power proposes to sell additional ancillary services in additional geographic markets 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/or capacity at market-based rates. The Commission will grant Pinelawn Power's request in this regard; however, the Commission's grant does not relieve Pinelawn Power of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2004).⁹

14. Pinelawn Power also requests authority to reassign transmission capacity, and resell FTRs or their equivalent. The Commission finds these provisions consistent with the Commission's requirements.¹⁰ Accordingly, the Commission will grant this request.

⁸ See, e.g., *Central Hudson Gas & Electric Corporation*, 86 FERC ¶ 61,062, order on reh'g, 88 FERC ¶ 61,138 (1999).

⁹ *Calhoun Power Co.*, 96 FERC ¶ 61,056 (2001).

¹⁰ See *Southwestern Public Service Company*, 80 FERC ¶ 61,245 (1997) and *California Independent System Operator, Inc.*, 89 FERC ¶ 61,153 (1999).

Other Waivers, Authorizations and Reporting Requirements

15. Pinelawn Power requests the following waivers and authorizations: (1) waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to sections 35.12(a), 35.13(b), 35.15 and 35.16; (2) waiver of Parts 41, 101 and 141 of the Commission's accounting and periodic reporting requirements; (3) abbreviated filings with respect to interlocking directorates under Part 45 of the Commission's regulations; and (4) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

16. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.¹¹ Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Pinelawn Power to keep its accounting records in accordance with generally accepted accounting principles.

17. 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 Pinelawn Power should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, 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 (2004).

18. Absent a request to be heard within the period set forth above, Pinelawn Power is hereby authorized to issue securities and assume obligations or liabilities as guarantor, endorser, 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 Pinelawn Power, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

19. Until further order of this Commission, the full 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

¹¹ 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 at P 23 and P 24 (October 10, 2002), FERC Stats. & Regs. ¶ 32,558 (2002).

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involving Pinelawn Power. Any such person instead shall file a sworn application providing the following information:

- (1) full name and business address; and
- (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

20. 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 Pinelawn Power's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

Request for Waiver of Filing Requirements Of Order Nos. 888 and 889

21. Pinelawn Power states that it also seeks waiver of certain filing requirements of Order No. 888¹² (*e.g.*, filing an open-access transmission tariff) and Order No. 889¹³ (*e.g.*, OASIS requirement) because Pinelawn Power does not own, operate, or control any transmission-related equipment other than the component allowing its Project to be interconnected with a LIPA-owned radial transmission line. Based on Pinelawn Power's representation that it does not own or control transmission facilities, no waiver is necessary. Accordingly, Pinelawn Power's request in this regard is denied.

22. 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

¹² *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., Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 (1997), *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 Study Group v. Federal Energy Regulatory Commission*, No. 97-1715 (D.C. Cir. 2000), *aff'd sub nom.*, *New York v. FERC*, 535 U.S. 1 (2002).

¹³ *Open-Access Same-time Information System (Formerly Real-Time Information Networks) and Standards of Conduct*, Order No. 889, FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. Regulations Preambles July 1996-December 2000 ¶ 31,049 (1997), *order on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997), *order on reh'g*, Order No. 889-C, 82 FERC ¶ 61,046 (1998).

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 greater) market-based power sales during the most recent calendar quarter.¹⁴ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁵ Accordingly, Pinelawn Power must file its first Electronic Quarterly Report no later than 30 days after the first quarter Pinelawn Power's rate schedule is in effect.

23. Pinelawn Power 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. Any change in status must be filed no later than 30 days after the change in status occurs. A change in status includes, but is not limited to each of the following: (1) ownership or control 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 application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.¹⁶

24. The Change in Status Final Rule requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, Pinelawn Power is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in the Change of Status Final Rule.

¹⁴ *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/Electric/eqr/eqr.htm>.

¹⁵ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). 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.

¹⁶ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 (2005)(Change in Status Final Rule). This rulemaking was in Docket No. RM04-14-000.

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25. In addition, Pinelawn Power is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

By direction of the Commission.

Linda Mitry,
Deputy Secretary.