

125 FERC ¶ 61,270  
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.

Dynegy Marketing and Trade

Docket No. ER09-20-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION

(Issued December 5, 2008)

1. In this order, the Commission grants market-based rate authorization to Dynegy Marketing and Trade (DMT), effective December 5, 2008, as requested.<sup>1</sup>
2. Additionally, we find that DMT meets the criteria for a Category 2 seller and is so designated. DMT's next updated market power analysis must be filed according to the regional schedule adopted in Order No. 697.<sup>2</sup>

**Background**

3. On October 6, 2008, DMT filed an initial application for market-based rate authority with an accompanying rate schedule. The proposed market-based rate schedule provides for the sale of energy, capacity, and ancillary services at

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<sup>1</sup> FERC Electric Tariff, Original Volume No 1, Original Sheet Nos. 1-2.

<sup>2</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 882-893 and Appendix D, *clarified*, 121 FERC ¶ 61,260, at P 9-10 (2007) (Order Clarifying Final Rule); *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008).

market-based rates.<sup>3</sup> DMT requests waivers commonly granted to similar market-based rate applicants, and an effective date of December 5, 2008.

4. DMT is a Colorado general partnership and is an indirect, wholly-owned subsidiary of Dynegy Inc. (Dynegy). DMT is currently engaged in acquiring and supplying fuel to Dynegy-affiliated generation. DMT seeks authorization from the Commission to allow it to expand the scope of its business activities to include wholesale power marketing.

5. DMT does not directly or indirectly own or control any electric power generation, transmission, or distribution facilities in the United States, Canada, or Mexico. DMT is affiliated with various entities that own or control electric power generation facilities, including various direct and indirect subsidiaries of Dynegy that own and/or operate more than 18,000 MW of net generating capacity in the United States.

6. LS Power Development LLC (LSP Development) is affiliated with companies that own approximately 40 percent of the voting securities of Dynegy. LSP Development is affiliated with approximately 1,100 MW of generating capacity in the U.S. The Commission has authorized LSP Development and Luminus Management, LLC (Luminus) to acquire up to 20 percent of the voting securities of Calpine Corporation (Calpine),<sup>4</sup> and a pending application seeks authorization to acquire 20-40 percent of Calpine's voting securities.<sup>5</sup> Calpine owns approximately 22,000 MW of generation capacity in the United States.

7. Dynegy states that it, not LSP Development and its affiliates, has ultimate control over the day-to-day activities of Dynegy's generation entities. In addition,

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<sup>3</sup> DMT requests authorization to sell ancillary services in the markets administered by Midwest Independent Transmission System Operator, Inc. (Midwest ISO), PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc. (NYISO), ISO New England Inc. (ISO-NE), and California Independent System Operator Corporation (CAISO). DMT also requests authorization to engage in the sale of certain ancillary services to third party suppliers in other markets.

<sup>4</sup> See *Calpine Corp.*, 122 FERC ¶ 62,238 (2008).

<sup>5</sup> See Application of Approval under Section 203, Docket No. EC08-126-000 (September 24, 2008).

DMT says that LSP Development, Luminus, and Calpine asserted, in a related filing under section 203 of the Federal Power Act,<sup>6</sup> that LSP Development and Luminus do not possess control with respect to Calpine's generation entities.<sup>7</sup>

8. DMT has assumed that, for the purposes of this application, electric generation facilities and inputs to generation owned or controlled by LSP Development and Calpine are under common control with facilities owned or controlled by Dynegy.

9. Notice of DMT's filing was published in the *Federal Register*, 73 Fed. Reg. 61,848 (2008), with interventions or protests due on or before October 27, 2008. None was filed.

## **Discussion**

### **Market-Based Rate Authorization**

10. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.<sup>8</sup> As discussed below, the Commission concludes that DMT satisfies the Commission's standards for market-based rate authority.

#### **1. Horizontal Market Power**

11. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.<sup>9</sup>

12. DMT prepared the pivotal supplier and wholesale market share screens for the ISO-NE, NYISO, PJM, Southern Company Services, Inc., LG&E Energy Transmission Services, Duke Power Company, Entergy Services, Inc., South

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<sup>6</sup> See Joint Application for Transaction Under Section 203 of the Federal Power Act, Docket No. EC08-39-000 (January 22, 2008) (Calpine/LS/Luminus Section 203 Application).

<sup>7</sup> See Calpine/LS/Luminus Section 203 Application at 33-34.

<sup>8</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

<sup>9</sup> *Id.* P 62.

Carolina Electric & Gas, Tennessee Valley Authority, Tampa Electric, Midwest ISO, Central and Southwest, CASIO, Western Area Power Administration – Lower Colorado, Nevada Power, Salt River Project, Bonneville Power Authority and Public Service Company of Colorado markets and the PJM-East, Southwest Connecticut (SWCT), New York City, and Long Island submarkets, consistent with the requirements of Order No. 697.<sup>10</sup>

13. The Commission has reviewed the pivotal supplier and the wholesale market share screens and has determined that DMT passes all of their screens except for the pivotal supplier screen in SWCT and the market share screens in SWCT, Long Island, and CAISO. Specifically, DMT fails the market share screen in all seasons for the SWCT submarket. DMT fails the market share screen in the Long Island submarket in one season, and DMT fails the market share screen in CAISO in one season.

14. DMT states that the Commission has adopted a rebuttable presumption that the existing Commission-approved RTO/ISO mitigation is sufficient to address market power concerns in RTO/ISO markets.

15. Indeed, the Commission adopted a rebuttable presumption in Order No. 697-A that, to the extent a seller seeking to obtain or retain market-based rate authority is relying on existing Commission-approved RTO/ISO market monitoring and mitigation, the existing mitigation is sufficient to address any market power concerns.<sup>11</sup>

16. Here, we note that the markets and submarkets, in which these screen failures occur, are subject to RTO/ISO market power monitoring and mitigation that the Commission has found sufficient to address market power concerns. Based on the foregoing market monitoring and mitigation present in the ISO-NE, NYISO, and CAISO markets, the Commission finds that DMT satisfies our horizontal market power concerns.

## 2. Vertical Market Power

17. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a

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<sup>10</sup> *Id.* P 235-36.

<sup>11</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 111.

Commission-approved OATT on file before granting a seller market-based rate authorization.<sup>12</sup>

18. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>13</sup> The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and equipment for the transportation of coal supplies, such as barges and rail cars (collectively, inputs to electric power production).<sup>14</sup> The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.<sup>15</sup>

19. DMT states that the only transmission owned by DMT and its actual and assumed affiliates consists of that necessary to connect their generating facilities to the grid.

20. With regard to other barriers to entry, DMT states that neither it, nor any of its actual or assumed affiliates, owns or controls intrastate natural gas transportation or storage facilities, or physical coal sources or access to coal supplies. In addition, DMT states that while various DMT affiliates own sites for their own existing or proposed generation, neither DMT, nor its affiliates owns or controls sites for generating capacity development that could be used to erect barriers to entry.

21. DMT affirmatively states that it has not erected barriers to entry and will not erect barriers to entry in the relevant markets in the future.

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<sup>12</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

<sup>13</sup> *Id.* P 440.

<sup>14</sup> *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include "physical coal supply sources and ownership of or control over who may access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

<sup>15</sup> Order No. 697, FERC Stats. & Regs. ¶ 31, 252 at P 447.

22. Based on DMT's representations, we find it satisfies the Commission's requirements for market-based rates regarding vertical market power.

### **Waiver Requests**

23. DMT 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; and (3) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

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

### **Reporting Requirements**

25. 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 (EQR) 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 longer) market-based power sales during the most recent calendar quarter.<sup>17</sup> Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.<sup>18</sup>

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<sup>16</sup> It should be noted that the Commission has recently examined and approved the 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 liabilities (18 C.F.R. Part 34). *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 984-85 (regarding waiver of Parts 41, 101, and 141), 999-1000 (regarding blanket approval under Part 34).

<sup>17</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No.

(continued...)

26. Additionally, DMT 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.<sup>19</sup>

27. In Order No. 697, the Commission created two categories of sellers.<sup>20</sup> Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.<sup>21</sup> Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.<sup>22</sup>

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2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports 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>.

<sup>18</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). Failure to file an EQR (without an appropriate request for extension), or failure to report an agreement in an EQR, 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.

<sup>19</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42(a) (2008).

<sup>20</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

<sup>21</sup> 18 C.F.R. § 35.36(a)(2) (2008).

<sup>22</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

28. Based on DMT's representations, we find that it meets the criteria for a Category 2 seller and is so designated. Thus, DMT must file an updated market power analysis in compliance with the regional reporting schedule adopted in Order No. 697.<sup>23</sup> The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) DMT market-based rate tariffs are hereby accepted for filing, effective December 5, 2008, as discussed in the body of this order.

(B) 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.

(C) 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 (2006).

(D) 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 DMT's issuances of securities or assumptions of liabilities.

(E) DMT is required to file EQRs in compliance with Order No. 2001. If the effective date of DMT's market-based rate tariff falls within a quarter of the year that has already expired, DMT's EQRs for the expired quarter(s) are due within 30 days of the date of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>23</sup> *Id.* P 882.