132 FERC ¶ 61,053
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

July 16, 2010

In Reply Refer To:
Eagle Creek Hydro Power, LLC
Docket Nos. ER10-1109-000
ER10-1109-001

Eagle Creek Hydro Power, LLC
1200 New Hampshire Avenue, NW
Washington, DC 20036

Attention: Donna J. Bobbish, Attorney for Eagle Creek Hydro Power, LLC

Reference: Market-Based Rate Authorization

Dear Ms. Bobbish:

1. On April 27, 2010, as amended on May 19, 2010, you filed on behalf of Eagle Creek Hydro Power, LLC (Eagle Creek) an application for market-based rate authority with an accompanying tariff. The proposed market-based rate tariff provides for the sale of energy, capacity, and ancillary services at market-based rates.[1] Eagle Creek requests waivers commonly granted to similar market-based rate applicants.

2. As discussed below, Eagle Creek's submittals satisfy the Commission's standards for market-based rate authority and are accepted for filing, effective June 25, 2010, as

[1] Eagle Creek requests authorization to sell ancillary services in the market administered by New York Independent System Operator, Inc. (NYISO). Eagle Creek also requests authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

requested.[2] Additionally, we find that Eagle Creek meets the criteria for a Category 1 seller in all regions and is so designated.[3]

3. Eagle Creek states that it plans to acquire three hydroelectric generating facilities. Two of these facilities are located in Forestburgh, New York, one with a total nameplate capacity of four megawatts (MWs) (the Mongaup Falls Hydroelectric Project, Project No. 10481), and the other with a total nameplate capacity of twelve MWs (the Swinging Bridge Hydroelectric Project, Project No. 10482). Eagle Creek states that the third facility is located in Glen Spey, New York, with a total nameplate capacity of ten MWs (the Rio Hydroelectric Project, Project No. 9690).

4. On April 30, 2010, AER NY–Gen, LLC (transferor), Eagle Creek, Eagle Creek Water Resources, LLC, and Eagle Creek Land Resources, LLC (transferees) filed an application for transfer of licenses for the Swinging Bridge Hydroelectric Project, the Mongaup Falls Hydroelectric Project, and the Rio Hydroelectric Project. They seek Commission approval to transfer the licenses for the three projects from the transferor to the transferees.[4]

5. Eagle Creeks states that it was formed for the purpose of acquiring, owning and operating the power generating assets of these three facilities and selling electric energy produced by these facilities at wholesale. It states that it will sell this energy into the markets administered by NYISO.

6. Eagle Creek states that it is wholly owned by Eagle Creek Hydro Energy, LLC, and is affiliated with several entities that own generation facilities in the NYISO and the California Independent System Operator Corp. markets. Eagle Creek states that it does not own, operate or control any transmission facilities in the United States and is not affiliated with any entities that own, operate or control transmission facilities.

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[2] FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 1, Substitute Original Sheet No. 2.

[3] *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 848-50, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

[4] AER NY-Gen, LLC, Project No. 10482-014 (filed April 30, 2010).

Eagle Creek states that it does not have a franchised service territory for the sale of electricity and is not affiliated with entities that have a franchised service territory.

7. Notice of Eagle Creek's application was published in the *Federal Register*,[5] with interventions or protests due on or before May 28, 2010. The County of Sullivan, State of New York (Sullivan) filed a motion to intervene and comments on May 27, 2010. Woodstone Lakes Development, LLC (Woodstone), the Chapin Estate Homeowners Association, Inc. (Chapin), the Iroquois Hunting and Fishing Club, Inc. (Iroquois), and the Town of Lumberland (Lumberland) filed motions to intervene and comments on June 8, 2010, July 2, 2010, and July 7, 2010, respectively. Eagle Creek filed an answer to the comments filed by Sullivan and Woodstone on June 17, 2010.[6]

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), Sullivan's timely, unopposed motion to intervene serves to make it a party to this proceeding.

9. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant Woodstone's, Chapin's, Iroquois', and Lumberland's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Eagle Creek's answer filed June 17, 2010 because it has provided information that assisted us in our decision-making process.

11. The commenters filed their comments in both this proceeding and the license transfer proceeding. In general, the commenters express concern with the operation and management of the three facilities that Eagle Creek plans to acquire. The commenters request that the Commission give consideration to the facilities' operations and proposed transferees' financial status and ability to operate and maintain the facilities in compliance with the existing license requirements prior to approving the transfer giving due consideration to the competing generational and non-developmental

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[5] 75 Fed. Reg. 24,688 (2010); 75 Fed. Reg. 30,391 (2010).

[6] We note that on June 2, 2010 the Town of Thompson (Thompson) filed comments in Project Nos. 10482, 10481, and 9690. Thompson adopts and incorporates by reference Sullivan's comments in connection with the proposed license transfer but does not include Docket Nos. ER10-1109-000 and ER10-1109-001. However, Eagle Creek's June 17, 2010 answer additionally responds to Thompson.

(i.e., environment, recreation, fish and wildlife, and other public benefit and use) values in its review of the pending market-based rate tariff, including the proposed tariff. [7] The commenters also note that Eagle Creek requested waiver from 18 C.F.R. Part 141 and the commenters specifically request that the Commission require that Eagle Creek file Form No. 80, the Licensed Hydropower Development Recreation Report required under 18 C.F.R. § 141.14.

12. Eagle Creek, in its answer, contends that most of the comments are outside the scope of this market-based rate proceeding and clarifies that it is not seeking waiver of sections 141.14 or 141.15 of the Commission's regulations.

13. As an initial matter, we reject the majority of Sullivan's, Woodstone's, Chapin's, Iroquois', and Lumberland's comments as being outside the scope of this proceeding as they relate to environment, recreation, fish and wildlife, and other public benefit and use considerations. This is not a factor the Commission considers in granting market-based rate authority. Accordingly, the Commission will not address those concerns in this proceeding. Rather, the commenters' concerns as to these issues are more appropriately addressed by the Commission in proceedings concerning the application for transfer of licenses for the Swinging Bridge Hydroelectric Project, the Mongaup Falls Hydroelectric Project, and the Rio Hydroelectric Project (Project Nos. 10482, 10481, and 9690). The remaining issue raised, waiver of 18 C.F.R. § 141.14, is no longer an issue because in its answer, Eagle Creek clarifies that it is not seeking waiver of sections 141.14 or 141.15 of the Commission's regulations.[8]

14. 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.[9]

15. Taking into account the facilities described above that it plans to acquire, Eagle Creek has prepared the pivotal supplier and wholesale market share screens for the NYISO market consistent with the requirements of Order No. 697.[10] Eagle Creek's horizontal market power screens indicate that Eagle Creek passes both the pivotal supplier and wholesale market share screens in that market. Accordingly, we find that

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[7] *See, e.g.*, Sullivan's Comments at 15, 17.

[8] Eagle Creek Answer at 5.

[9] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

[10] *Id.* P 62.

Eagle Creek satisfies the Commission's requirements for market-based rate authority regarding horizontal market power.[11]

16. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff on file before granting a seller market-based rate authorization.[12]

17. Eagle Creek states that neither it nor its affiliates own or control any transmission facilities within the United States, with the exception of the limited facilities necessary to interconnect generating facilities to the transmission grid.

18. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.[13] 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, intrastate natural gas storage or distribution facilities; sites for generation capacity development; physical coal supply sources and ownership of or control over who many access transportation of coal supplies (collectively, inputs to electric power production).[14] 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.[15]

19. Eagle Creek states that neither it nor any of its affiliates own or control intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; any sites for the construction of generation capacity; sources of coal supplies and access to the transportation of coal supplies. Additionally, consistent with Order No. 697, Eagle Creek

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[11] We note that our grant of market-based rate authority to Eagle Creek is based on Eagle Creek's representation that it was formed for the purpose of acquiring, owning and operating the power generating assets of three hydroelectric facilities and selling electric energy produced by these facilities into the markets administered by NYISO. In the event that Eagle Creek were not to own generation in NYISO and would seek to sell power as a power marketer, Eagle Creek would be required to study any markets where its affiliates own generation.

[12] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

[13] *Id.* P 440.

[14] Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

[15] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

affirmatively states that it and its affiliates have not erected any barriers to entry into NYISO and will not erect barriers to entry into NYISO.

20. Based on Eagle Creek's representations, we find Eagle Creek satisfies the Commission's requirements for market-based rates regarding vertical market power.

21. Eagle Creek's request for waiver of Subparts B and C of Part 35 of the 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 is granted. Eagle Creek's request for waiver of Part 41, Part 101, and Part 141 of the Commission's regulations concerning accounting and reporting requirements is granted, with the exception of sections 141.14 and 141.15.[16] Notwithstanding the waiver of the accounting and reporting requirements here, Eagle Creek is expected to keep its accounting records in accordance with generally accepted accounting principles.

22. Eagle Creek requests blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability. A separate notice was published in the *Federal Register*[17] establishing a period during which protests could be filed. None was filed. Eagle Creek is 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 Eagle Creek, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

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[16] We note that the Commission has examined and approved the continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141(2010)), as well as the continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities (18 C.F.R. Part 34 (2010)). *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 984-85 (regarding waiver of Parts 41, 101, and 141), and P 999-1000 (regarding blanket approval under Part 34).

[17] 75 Fed. Reg. 25,235 (2010).

23. Eagle Creek must file electronically with the Commission Electric Quarterly Reports (EQRs).[18] Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.[19]

24. Eagle Creek further 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.[20]

25. In Order No. 697, the Commission created two categories of sellers.[21] 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[22]); that are not affiliated with anyone that

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[18] *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. 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.

[19] The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2010). 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.

[20] *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 (2010). We note that a change in circumstance would include not owning generation in NYISO.

[21] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

[22] *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. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No.

(continued…)

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.[23] Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.[24]

26. Eagle Creek requests Category 1 status in all regions. Eagle Creek represents that it does not own 500 MWs of generation in any region,[25] does not own, operate or control any transmission facilities, is not affiliated with any entities which own, operate or control transmission facilities in the same region as Eagle Creek's generation assets, is not affiliated with a franchised public utility in the same region as Eagle Creek's generation assets, and does not raise any other vertical market power concerns.

27. Based on Eagle Creek's representations, Eagle Creek meets the criteria for a Category 1 seller in all regions. The Commission reserves the right to require an updated market power analysis from any market-based rate seller at any time, including for those sellers that fall within Category 1.[26]

By direction of the Commission

Kimberly D. Bose,
Secretary.

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 Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[23] 18 C.F.R. § 35.36(a)(2) (2010).

[24] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

[25] Eagle Creeks should include in its asset appendix all generation assets owned by it and its affiliates the next time it submits a filing related to its market-based rate authorization, such as when filing notices of change in status.

[26] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 853.