

111 FERC ¶ 61,411  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

	Docket Nos.
Dynegy Power Marketing, Inc.	ER99-4160-003 ER99-4160-007
El Segundo Power, LLC	ER98-1127-005 ER98-1127-006
Long Beach Generation, LLC	ER98-1796-004 ER98-1796-005
Cabrillo Power I LLC	ER99-1115-005 ER99-1115-006
Cabrillo Power II LLC	ER99-1116-005 ER99-1116-006
Rockingham Power, L.L.C.	ER99-1567-002 ER99-1567-003
Rocky Road Power, LLC	ER99-2157-002 ER99-2157-003
Calcasieu Power, LLC	ER00-1049-003 ER00-1049-004
Dynegy Midwest Generation, Inc.	ER00-1895-002 ER00-1895-004
Dynegy Danskammer, L.L.C.	ER01-140-002 ER01-140-003
Dynegy Roseton, L.L.C.	ER01-141-002 ER01-141-003
Heard County Power, L.L.C.	ER01-943-002 ER01-943-003
Riverside Generating Company, L.L.C.	ER01-1044-002 ER01-1044-004
Renaissance Power, L.L.C.	ER01-3109-002 ER01-3109-004
Bluegrass Generation Company, L.L.C.	ER02-506-002 ER02-506-004

Rolling Hills Generating, L.L.C.	ER02-553-001 ER02-553-003
AG-Energy, L.P.	ER98-2782-002 ER98-2782-003 ER98-2782-006 ER98-2782-007 ER98-2782-008
Seneca Power Partners, L.P.	ER02-2202-001
Sterling Power Partners, L.P.	ER02-2202-005
Sithe/Independence Power Partners, L.P.	ER02-2202-006
Sithe Energy Marketing, L.P.	ER02-2202-007
Power City Partners, L.P.	ER03-42-006 ER03-42-007 ER03-42-008

## ORDER ACCEPTING UPDATED MARKET POWER ANALYSES

(Issued June 16, 2005)

1. In this order we accept updated market power analyses filed by Dynegy Power Marketing, Inc.; El Segundo Power, LLC; Long Beach Generation, LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; Rockingham Power, LLC; Rocky Road Power, LLC; Calcasieu Power, LLC; Dynegy Midwest Generation, Inc.; Dynegy Danskammer, LLC; Dynegy Roseton, LLC; Heard County Power, LLC; Riverside Generating Company, LLC; Renaissance Power, LLC; Bluegrass Generation Company, LLC; Rolling Hills Generating, LLC (collectively Dynegy Companies); and AG-Energy, L.P.; Seneca Power Partners, L.P.; Sterling Power Partners, L.P.; Sithe/Independence Power Partners, L.P.; Sithe Energy Marketing, L.P.; Power City Partners, L.P. (collectively Sithe Companies) (when referred to as one entity, Applicants).

2. As discussed below, we conclude that Applicants satisfy the Commission's standards for market-based rate authority. We also accept revisions to the market-based rate tariffs of Cabrillo Power I, LLC, Cabrillo Power II, LLC, Rockingham Power, LLC, Rocky Road Power, LLC, Calcasieu Power, LLC, Dynegy Danskammer, LLC, Dynegy

Roseton, LLC, Heard County Power, LLC, Riverside Generating Company, LLC, and the Sithe Companies to include the Commission's market behavior rules.<sup>1</sup>

3. This order benefits customers by reviewing the conditions under which market-based rate authority is granted, thus ensuring that the prices charged for jurisdictional sales are just and reasonable. Applicants' next updated market power analysis is due three years from the date of this order.

### **Background**

4. On April 28, 2001, the Sithe Companies filed an updated market power analysis based on the Commission's hub and spoke analysis.

5. On February 8, 2002, as amended on February 22, 2002, the Dynegy Companies filed an updated market power analysis based on the Commission's Supply Margin Assessment (SMA) screen adopted in an order issued November 20, 2001.<sup>2</sup>

6. On August 20, 2002, the Sithe Companies filed a notice of change in status stating that Vivendi Universal, S.A., Energies USA, S.A., and certain individual stakeholders were selling their indirect interests in the Sithe Companies to Apollo Energy, LLC.

7. On April 23, 2004, the Sithe Companies filed their triennial market power update and a motion to request a waiver of compliance with the indicative screens pursuant to the April 14 Order.<sup>3</sup>

8. On September 27, 2004, the Sithe Companies filed an updated market power analysis pursuant to the Commission's May 13 Order.<sup>4</sup> This filing addresses the two

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<sup>1</sup> *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) (Market Behavior Rules Order).

<sup>2</sup> *AEP Power Marketing, Inc.*, 97 FERC ¶ 61,219 (2001) (SMA Order).

<sup>3</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

<sup>4</sup> *Acadia Power Partners, LLC* 107FERC ¶ 61,168 (2004) (May 13 Order).

indicative market power screens that the Commission recently adopted for its generation market power analysis.<sup>5</sup>

9. On November 3, 2004, Dynegy New York Holdings, Inc. (Dynegy New York), the Sithe Companies, Exelon SHC, Inc. (Exelon SHC), Exelon New England Power Marketing, L.P. (Exelon NEPM), RCSE, LLC (RCSE), ExRes SHC, Inc. (ExRes), filed an application pursuant to section 203 of the Federal Power Act (FPA) for authorization for the disposition and acquisition of jurisdictional facilities in connection with Dynegy New York's acquisition of 100 percent ownership of Sithe, which had been held at the time by Exelon SHC and RCSE, each owning a 50 percent share. This application was accepted pursuant to delegated authority on January 13, 2005.<sup>6</sup>

10. On January 5, 2005, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a deficiency letter seeking additional information relating to the Sithe Companies' submittal. On January 24, 2005, the Sithe Companies filed a motion for an extension of time to respond to the deficiency letter. This motion was granted on January 27, 2005.

11. On January 26, 2005, the Sithe Companies filed a timely partial response to the deficiency letter. On February 14, 2005, the Sithe Companies filed its final response to the deficiency letter. In addition, they filed to amend their tariffs to include the market behavior rules.

12. On February 7, 2005, as amended on February 10, 2005, the Dynegy Companies filed an updated market power analysis pursuant to the Commission's orders granting the Dynegy Companies authority to sell electric energy and capacity at market-based rates. The two filings address the two market power screens that the Commission recently adopted for its generation market power analysis.<sup>7</sup>

13. Applicants own or control generation in the following market areas: New York Independent System Operator (NYISO); PJM Interconnection, L.L.C. (PJM); Midwest Independent Transmission System Operator, Inc. (Midwest ISO), Duke Energy Company control area (Duke); Southern Company Services, Inc. control area (Southern); Nevada Power control area (Nevada Power); and the California Independent System Operator

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<sup>5</sup> April 14 Order and July 8 Order.

<sup>6</sup> *Sithe Energies, Inc.* Docket No. EC05-15-000 (January 13, 2005) (unpublished letter order).

<sup>7</sup> April 14 Order.

Corporation (CAISO). Applicants also own generation in the area of the Electric Reliability Council of Texas (ERCOT), which is nonjurisdictional for rate matters under FPA sections 205 and 206.

### **Notice and Responsive Pleadings**

14. Notices of the Dynegy Companies' February 8, 2002 filing, as amended on February 22, 2002, were published in the *Federal Register*, 67 Fed. Reg. 17,422 (2002) and 67 Fed. Reg. 10,185 (2002), with interventions or protests due on or before March 1, 2002 and March 15, 2002, respectively. The Illinois Commerce Commission (Illinois Commission) filed a timely notice of intervention and comments. Dynegy filed an answer to the Illinois Commission.

15. In its comments, the Illinois Commission requested that the Commission not renew Dynegy Companies' authorization to sell wholesale power at market-based rates for sales within the Illinois Power control area. The Illinois Commission stated that it was concerned with the methodology Dynegy used in conducting the SMA analysis in reference to the Illinois Power control area. In particular, it contended that Dynegy's use of Total Transfer Capability to represent transmission capability into the Illinois Power control area does not reflect the physical reality of that control area. Illinois Commission contended that when simultaneous import capability was used for imports, Dynegy Companies would fail the SMA test.

16. Notices of the Dynegy Companies' February 7, 2005 filing, as amended on February 10, 2005, was published in the *Federal Register*, 70 Fed. Reg. 9,068 (2005) and 70 Fed. Reg. 9,637 (2005), with interventions or protests due on or before February 28, 2005 and March 3, 2005, respectively. None was filed.

17. Notice of the Sithe Companies' April 28, 2001 filing was published in the *Federal Register*, 66 Fed. Reg. 23,020 (2001) with interventions or protests due on or before May 14, 2001. The Massachusetts Division of Energy Resources filed a timely motion to intervene. The Massachusetts Office of the Attorney General (Massachusetts Attorney General) filed a motion to intervene out of time. NSTAR Electric and Gas Corporation (NSTAR) filed a timely motion to intervene and protest. On June 4, 2001, the Sithe Companies filed an answer to NSTAR's protest.<sup>8</sup>

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<sup>8</sup> On June 29, 2001, NSTAR filed a motion to consolidate the instant dockets with a complaint filed in Docket No. EL01-79-000. On July 16, 2001, the Sithe Companies filed an answer to the motion to consolidate. In an order issued October 17, 2002, the Commission denied NSTAR's motion to consolidate proceedings. *NSTAR Electric & Gas Corporation*, 101 FERC & 61, 064 at P 22 (2002).

18. NSTAR's protest concerned relevant geographic market definition within ISO-NE. In particular, it contended that the Northeast Massachusetts (NEMA), which was subject to transmission congestion, was the relevant geographic market for Sithe generators, not the entire ISO-NE footprint.

19. Notice of the Sithe Companies' August 20, 2002 change in status filing was published in the *Federal Register*, 67 Fed. Reg. 56,544 (2001), with interventions or protests due on or before September 11, 2002. NSTAR filed a timely motion to intervene and protest. On October 1, 2002, NSTAR withdrew its protest. No other protest was filed.

20. Notice of the Sithe Companies' April 23, 2004 updated market power analysis filing and motion for waiver was published in the *Federal Register*, 69 Fed. Reg. 31,988 (2004), with interventions or protests due on or before June 8, 2004. None was filed.

21. Notice of the Sithe Companies' September 27, 2004 updated market power analysis filing was published in the *Federal Register*, 69 Fed. Reg. 60,268 (2004), with interventions or protests due on or before October 18, 2004. None was filed.

22. Notice of the Sithe Companies' February 14, 2005 response to the Commission's deficiency letter was published in the *Federal Register*, 70 Fed. Reg. 9,943 (2005), with interventions or protests due on or before March 7, 2005. None was filed.

## **Discussion**

### **Procedural Matters**

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of this proceeding and the absence of undue delay or prejudice, we find good cause to grant the Massachusetts Attorney General's motion to intervene out-of-time.

24. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the Sithe Companies' answers and will, therefore, reject them.

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

25. 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.<sup>9</sup>

26. As discussed below, the Commission concludes that Applicants satisfy the Commission's standards for market-based rate authority.

### **Generation Market Power**

27. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power: the pivotal supplier screen and the wholesale market share screen.<sup>10</sup> Also, section 35.27(a) of the Commission's regulations 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.<sup>11</sup> 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.<sup>12</sup>

28. In their February 7, 2005 updated market analysis, as corrected on February 10, 2005, Dynegy Companies prepared indicative screens for both their generating capacity and Sithe Companies' generating capacity in NYISO, PJM, Midwest ISO, which as of April 1, 2005, is the relevant market for individual control areas within the Midwest ISO,<sup>13</sup> and CAISO. Dynegy Companies also prepared indicative screens for the

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<sup>9</sup> 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).

<sup>10</sup> April 14 Order, 107 FERC ¶ 61,018 (2004).

<sup>11</sup> 18 C.F.R. § 35.27(a) (2004).

<sup>12</sup> April 14 Order, 107 FERC ¶ 61,018 at P 69.

<sup>13</sup> April 14 Order at ¶ 188. Applicants also performed separate generation market power studies for the Midwest ISO control areas in which they own generation: Illinois Power (IP); Michigan Electric Coordinated System (MECS); and Louisville Gas & Electric (LG&E) control areas.

Southern, Duke, Entergy, and Nevada Power control areas. Dynegy Companies state that they pass the pivotal supplier and market share screens.

29. The Commission has reviewed the Dynegy Companies' and Sithe Companies' generation market power screens and has determined that the Dynegy Companies and Sithe Companies pass the screens in the relevant markets. Accordingly, the Commission finds that Applicants satisfy the Commission's generation market power standard for the grant of market-based rate authority.

30. With regard to the comments filed by the Illinois Commission in response to the Dynegy Companies' updated market power analysis as filed February 8, 2002 and corrected February 22, 2002, we note that the Commission has replaced the SMA analysis with the two indicative screens, as discussed in the April 14, May 13, and July 8 Orders. The relevant market for the Dynegy Companies' Illinois Power control area capacity is now the Midwest ISO market, and the indicative screens show that Dynegy does not have market power in the Midwest ISO. In addition, we have reviewed the Dynegy Companies' and Sithe Companies' potential to exercise market power in generation under the two indicative screens, the pivotal supplier screen and the wholesale market share screen, and as discussed above, the Commission finds that the Dynegy Companies and Sithe Companies satisfy the Commission's generation market power standard for market-based rate authority. On this basis, the Illinois Commission's concerns have been addressed.

31. NSTAR's protest to the Sithe Companies' 2001 market power update concerned what were at the time affiliates of the Sithe Companies located in New England (New England Entities). The affiliate relationship between the New England Entities and the Sithe Companies ceased with the Sithe Companies' acquisition by the Dynegy Companies. Therefore NSTAR's protest is not germane to this proceeding.

### **Transmission Market Power**

32. Applicants state that neither they nor any of their affiliates own, control or operate any transmission facilities other than those necessary to interconnect their generating facilities with the transmission grid. Further, no intervenor has raised transmission market power concerns. Based on Applicants' representations, the Commission finds that Applicants satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

33. Applicants state that they do not have dominant control over generation sites or other scarce inputs into generation. Applicants state that neither they nor their affiliates have the ability to frustrate entry due to their control over fuels or fuel delivery systems. Applicants state that they control gas midstream and gathering facilities in the Gulf area

as well as offshore pipelines. With the exception of the 320 MW Calcasieu plant in the Entergy control area, these facilities are remote from Applicants' generation. Applicants state that their one intrastate natural gas pipeline serves rival gas-fired generation. They submit that ownership of these pipeline facilities cannot be used to raise rivals' costs or erect barriers to market entry.<sup>14</sup> In addition, no intervenor has raised barrier to entry concerns. Based on these representations, the Commission is satisfied that the Applicants cannot erect barriers to entry.

34. However, should Applicants or any of their affiliates deny, delay or require unreasonable terms, conditions, or rates for 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 Applicants' authority to sell power at market-based rates.<sup>15</sup>

### **Affiliate Abuse**

35. Applicants state that neither they nor any of their affiliates has a franchised service area for the sale of electricity. In addition, no intervenor has raised affiliate abuse concerns. Based on Applicants' representations, the Commission finds that Applicants satisfy the Commission's concerns with regard to affiliate abuse.

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<sup>14</sup> According to Dynegy's 2004 10-K and its 2004 Annual Report, Applicants' natural gas liquids business can be characterized by gathering facilities and processing facilities that extract natural gas liquids from natural gas, and distribution facilities that transport these liquids. These gathering and processing facilities are located primarily in the Texas-Louisiana region. Also according to these documents, Dynegy also owns a minority interest in one jurisdictional natural gas pipeline, Venice Gathering System (Venice), that is located entirely offshore Louisiana or on the outer continental shelf according to Venice's 2003 Form 2.

<sup>15</sup> See, e.g., *Louisville Gas & Electric Company*, 62 FERC ¶ 61,016 (1993).

### **Market Behavior Rules**

36. In the Market Behavior Rules Order, the Commission directed market-based rate sellers to include as an amendment to their market-based rate tariff the market behavior rules at such time as they seek continued authorization to sell at market-based rates. The Sithe Companies and the Dynegy Companies submitted revised tariff sheets to amend their tariffs to include the market behavior rules set forth in Appendix A to the Market Behavior Rules Order. The Commission accepts the revised tariff sheets for filing.

### **Reporting Requirements**

37. 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 greater) market-based power sales during the most recent calendar quarter.<sup>16</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>17</sup>

38. Applicants 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>18</sup> Order No. 652 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, Applicants are directed, within 30 days

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<sup>16</sup> *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>.

<sup>17</sup> The exact 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.

<sup>18</sup> *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 (2005).

of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the following provision:

[Insert market-based rate seller name] 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. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) 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. Any change in status must be filed no later than 30 days after the change in status occurs.

39. Applicants are directed to file an updated market 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.

The Commission orders:

(A) Applicants' updated generation market power analyses are hereby accepted for filing as discussed in the body of this order.

(B) Applicants' revised tariff sheets incorporating the market behavior rules are hereby accepted for filing effective December 17, 2003.

(C) The change of status filings submitted by the Sithe Companies are hereby accepted, as discussed in the body of this order.

(D) Applicants' next updated market power analyses are due within three years of the date of this order as discussed in the body of this order.

(E) Applicants are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to include the change in status reporting

requirement adopted in Order No. 652 and to reflect that Applicants are no longer affiliated with utilities with franchised service territories.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.