

110 FERC ¶61,089
FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

February 2, 2005

In Reply Refer To:
Unitil Energy Systems, Inc.
Docket No. ER05-320-000

LeBoeuf, Lamb, Greene & MacRae, L.L.P.
Attn: Ms. Sonia C. Mendonca, Esq.
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Dear Ms. Mendonca:

1. On December 9, 2004, Unitil Energy Systems, Inc. (UES) filed an application for market-based rate authority, with an accompanying tariff and code of conduct. The proposed market-based rate tariff provides for the sale of capacity, energy, and ancillary services at market-based rates, reassignment of transmission capacity, and the resale of firm transmission rights or their equivalents.¹ It also includes the Commission's market behavior rules.² UES' submittal, as discussed below, satisfies the Commission's standards for market-based rate authority and is accepted for filing, effective December 10, 2004, as requested.³

¹ UES plans to sell certain ancillary services in the markets administered by New York Independent System Operator, Inc. (NYISO) and ISO New England Inc. (ISO-NE).

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. 3, Original Sheet Nos. 1-7. 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.

2. UES is a New Hampshire public utility with its principal place of business in Hampton, New Hampshire. UES was formed in 2002 as a result of the merger of Exeter & Hampton Electric Company (E&H) into Concord Electric Company (Concord), two public utilities primarily engaged in the sale and distribution of electricity at retail in New Hampshire.⁴ UES succeeded E&H and Concord in all agreements and schedules on file with the Commission, including their combined open access transmission tariff (OATT).⁵ UES is affiliated with Fitchburg Gas and Electric Light Company (Fitchburg), a public utility engaged in, among other things, the sale of electric power and gas at retail in Massachusetts. UES is also affiliated with Unitol Power Corp. (UPC), a public utility engaged in the sale of electric energy at wholesale. UES states that UPC receives approximately 8 MW of Hydro-Quebec Interconnection Capability Credit, which it sells into the ISO-NE market at market-based rates.

3. UES states that all of the components of Fitchburg's power supply have been sold off with the exception of its interest in Phase I and II of the high voltage direct current interconnection with Hydro-Quebec and approximately 5 MW of Hydro-Quebec Interconnection Capability Credit. UES notes that Fitchburg also has restructured its power supply portfolio in order to meet the requirements associated with retail competition in Massachusetts. Since February 2000, Fitchburg has met all of its native load requirements through load-following contracts. Fitchburg continues to be a party to several purchased power agreements, but has sold the rights to Select Energy, Inc.⁶

4. UES serves New Hampshire retail customers in the City of Concord and twelve surrounding towns and retail customers in the towns of Exeter and Hampton and in all or part of sixteen surrounding towns. UES states that UES and its affiliates do not own or control any generation facilities, and that it relies on purchased power from Mirant Americas Energy Marketing, LP to serve its retail loads in New Hampshire.

5. UES states that on November 18, 2004, it received a proposal from Concord Steam Corporation (Concord Steam), a qualifying facility located in UES' territory, requesting UES to purchase the output of its facility, effective December 26, 2004. UES states that it would resell the power it acquires from Concord Steam into the ISO-NE market. UES also states that as a participant in the New England Power Pool (NEPOOL), UES acts as a price taker with respect to certain imbalances that are deemed "sold" to or "purchased" from the energy markets from time to time. UES says that, given the Commission's holding that sales into the ISO-NE markets at market-based rates

⁴ Subsequent to the merger, Concord changed its name to UES. *See Concord Electric Co.*, 101 FERC ¶ 62,050 (2002).

⁵ *See Concord Electric Co.*, 101 FERC ¶ 61,324 (2002) (*Concord*).

⁶ Fitchburg has sold its rights to all power associated with its ownership share of the William F. Wyman Station No. 4 unit to Select Energy, Inc.

are not properly made solely under NEPOOL Market Rule 1, UES is seeking market-based rate authority.⁷ Therefore, UES is requesting market-based rate authority, effective December 10, 2004.

Procedural Matters

6. Notice of UES' filing was published in the *Federal Register*, 69 Fed. Reg. 76,462 (2004), with interventions and protests due on or before December 30, 2004. None was filed.

Discussion

Market-Based Rate Authorization

7. 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.⁸ As discussed below, we conclude that UES satisfies the Commission's standards for market-based rate authority.

8. In its order issued in *AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power. UES has prepared both the pivotal supplier and the wholesale market share screens for the ISO-NE market.⁹ The Commission has reviewed UES' generation market power screens for the ISO-NE market, which indicate that UES passes both the pivotal supplier and wholesale market share screens in that market. Accordingly, the Commission finds that UES satisfies the Commission's generation market power standard for the grant of market-based rate authority.

⁷ See *Vermont Elec. Coop., Inc.*, 108 FERC ¶ 61,223 (2004), *reh'g pending*.

⁸ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); 79 FERC ¶ 61,149 (1997); *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).

⁹ Applicants located in markets administered by an independent system operator (ISO) or a regional transmission organization (RTO) with sufficient market structure, such as PJM Interconnection, LLC; ISO-NE; NYISO; and California Independent System Operator, Inc., may consider the geographic region under the control of the ISO/RTO as the default relevant geographic market for purposes of completing their screen analyses. See April 14 Order, 107 FERC ¶ 61,018, at P 187.

9. UES states that its affiliate Fitchburg owns very limited transmission facilities, including some 115 kV substation facilities, connected to transmission facilities owned and operated by NEPOOL, which are pool transmission facilities (PTF), as well as certain 69 kV transmission facilities which are non-PTF. UES states that service over Fitchburg's PTF is currently provided under the NEPOOL OATT, and service over Fitchburg's non-PTF is provided under Fitchburg's OATT.¹⁰

10. UES states that it owns facilities for the delivery of energy and has received Commission authorization to reclassify all of its transmission facilities as distribution.¹¹ Despite the reclassification, UES states that it maintains an OATT on file such that access over its facilities is available if the facilities are used to deliver power in interstate commerce to a wholesale purchaser. UES further states that the Commission granted its predecessors E&H and Concord a waiver of the requirements of Order No. 889¹² and reaffirmed that waiver in *Concord*. UES states that it has modified Market Behavior Rule No. 6 of its proposed tariff to reflect that UES is not required to maintain Order No. 889 standards of conduct. Specifically, the phrase "or Order No. 889 standards of conduct" is excluded from Rule No. 6. Although the Commission has previously granted UES' affiliates waiver of Order No. 889 in *Northern States* and *Concord*, this is not a basis for modifying the market behavior rules. Therefore, UES is directed to make a compliance filing within 21 days of the date of issuance of this order to revise the proposed Original Sheet No. 7 to include Market Behavior Rule No. 6 in its entirety.

11. UES notes that the Commission found that the ownership of certain local natural gas distribution and storage facilities by UES' affiliate, Fitchburg, did not raise concerns as to barriers to entry because "should Fitchburg or any of its 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 authority to sell power at market-based rates."¹³ As a result, the Commission concluded that there were no other barriers to entry or reciprocal dealing considerations of concern in *Unitil*. UES states that the facts with respect to UES and its affiliates' inability to erect barriers to entry remain unchanged since *Unitil*. Based on these representations, the Commission is satisfied that UES cannot erect barriers to entry. However, should UES or its affiliates deny, delay, or require unreasonable terms, conditions, or rates for natural gas service to a

¹⁰ *Baltimore Gas and Elec. Co.*, Docket No. OA96-156-001 (Feb. 24, 1999) (unpublished letter order) (approving Fitchburg's OATT).

¹¹ See *Concord*, 101 FERC ¶ 61,324.

¹² See *Northern States Power Co.*, 76 FERC ¶ 61,250 (1996) (*Northern States*).

¹³ *Unitil Power Corp.*, 80 FERC ¶ 61,358, at 62,226-27 (1997) (*Unitil*).

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 UES' authority to sell power at market-based rates.¹⁴

12. UES notes that it will not make any sales to its affiliates or purchase power from its affiliates except pursuant to a separate rate schedule approved by the Commission under section 205 of the Federal Power Act (FPA)¹⁵ as stated in the proposed tariff. UES also has submitted a code of conduct. However, the proposed tariff language does not state that UES will not make sales to its affiliated public utility "without first receiving" Commission authorization of the transaction under section 205 of the FPA. Therefore, consistent with Commission precedent, UES is directed to make a compliance filing within 21 days of the date of issuance of this order to revise its market-based rate tariff to include such language.¹⁶

13. UES 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 ISO-NE and NYISO. Consistent with Commission precedent granting authority to sellers to engage in such transactions in those markets, the Commission will grant UES' request.¹⁷

14. UES proposes to offer additional ancillary services in the geographic markets identified above, as the Commission may specify and authorize from time to time in orders that extend such authority to all sellers authorized to sell energy and capacity at market-based rates. The Commission will grant UES' request in this regard; however, the Commission's grant does not relieve UES of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2004).¹⁸

¹⁴ *Louisville Gas & Elec. Co.*, 62 FERC ¶ 61,016 (1993).

¹⁵ 16 U.S.C. § 824d (2000).

¹⁶ *See Aquila, Inc.*, 101 FERC ¶ 61,331, at P 7-9, 12 (2002).

¹⁷ *See, e.g., New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001); *Central Hudson Gas & Elec. Corp.*, 86 FERC ¶ 61,062, *order on reh'g*, 88 FERC ¶ 61,138 (1999).

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

15. UES' market-based rate tariff also provides for the reassignment of transmission capacity and the resale of firm transmission rights, or their equivalents. We find that these provisions are consistent with the Commission's requirements.¹⁹ Accordingly, we grant this request.

Other Waivers, Authorizations and Reporting Requirements

16. UES 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.

17. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.²⁰ Notwithstanding the waiver of the accounting and reporting requirements here, we expect UES to keep its accounting records in accordance with generally accepted accounting principles.

18. 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 UES 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).

¹⁹ See *Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997); *Calif. Indep. Sys. Operator, Inc.*, 89 FERC ¶ 61,153 (1999).

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

19. Absent a request to be heard within the period set forth above, UES 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 UES, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

20. 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 involving UES. 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.

21. 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 UES' issuances and securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

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 very 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.²¹ Electric

²¹ *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>.

Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²² Accordingly, UES must file its first Electric Quarterly Report no later than 30 days after the first quarter UES' tariff is in effect.²³

23. UES is directed to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. These include, but are not limited to: (1) ownership of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the filing that owns generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.²⁴

24. In addition, UES 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.

(S E A L)

Linda Mitry,
Deputy Secretary.

²² The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

²³ 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 The Commission issued a Notice of Proposed Rulemaking in Docket No. RM04-14-000 in which the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates. *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004). The change in status reporting requirement outlined herein is subject to the outcome of the rulemaking.