

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.

J.D. Wind 4, LLC

Docket No. ER07-1202-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND  
ORDERING REFUNDS

(Issued September 24, 2007)

1. J.D. Wind 4, LLC (J.D. Wind) filed an application requesting Commission authorization to engage in wholesale sales of electric energy and capacity at market-based rates.<sup>1</sup> J.D. Wind also requests that the Commission grant such waivers and blanket authorizations as it has granted to other sellers of wholesale power that do not have a franchised service territory, and that the Commission waive the prior notice requirement and make such market-based rate authorization effective as of July 27, 2007, one day after filing.

**Background**

2. J.D. Wind states that it owns and operates a 79.59 MW (nameplate) small power production facility near Gruver, Texas. J.D. Wind is located within the Southwestern Public Service Company (SPS) control area that lies within the regional footprint of the Southwest Power Pool, Inc. (SPP). J.D. Wind has self certified that the facility is a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978, as

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<sup>1</sup> We note that the Commission has recently revised and codified in the Commission's regulations the standards pertaining to market-based rates. *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (2007). Given that J.D. Wind filed its application prior to the effective date of Order No. 697, the Commission will examine the application based on the market-based rate analysis in effect at that time. However, J.D. Wind is reminded that it will be subject to any applicable regulations upon their effective date.

amended (PURPA).<sup>2</sup> J.D. Wind states that, as a QF, in particular a qualifying small power production facility with a power production capacity that exceeds 30 megawatts (MW), it is not exempt from the Federal Power Act (FPA), including section 205.<sup>3</sup>

3. J.D. Wind states that it has sold test energy to SPS during the testing and commissioning of its facilities. Nevertheless, J.D. Wind states that it did not seek market-based rate authority and did not have a rate on file prior to July 26, 2007, when it filed the subject application, because it was not immediately aware that Order No. 671 eliminated the exemption for QFs with capacity over 30 MW from certain provisions of the FPA.<sup>4</sup>

### **J.D. Wind Application**

4. J.D. Wind states that it is 100 percent owned by John Deere Renewables, LLC, which is owned by Deere & Company, a Delaware corporation. J.D. Wind states that neither it nor any of its affiliates is directly or indirectly engaged in the generation or sale of electric power in the United States except electric power generated from qualifying cogeneration or small power production facilities.

5. As detailed below, J.D. Wind states that neither it nor its affiliates has generation or transmission market power or the ability to erect barriers to entry and that they do not engage in affiliate abuse or reciprocal dealing. J.D. Wind states that Deere & Company

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<sup>2</sup> Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601-2645 (1978).

<sup>3</sup> J.D. Wind July 26, 2007, Application for Market-Based Rates, Certain Waivers, Blanket Authorizations and Request for Expedited Consideration (J.D. Wind Application) at 12 (citing 18 C.F.R. § 292.601(b) (2007); *Mendota Hills LLC*, 110 FERC ¶ 61,222 at P 4, n.5 (2005)).

<sup>4</sup> *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7852 (2006), FERC Stats. & Regs. ¶ 31,203 (2006).

owns five other QF wind facilities within SPS and SPP<sup>5</sup> and that Deere & Company is developing five more within SPS and SPP.<sup>6</sup>

6. As referenced above, J.D. Wind requests waiver of the prior notice requirement, stating that it only recently became aware that its ongoing daily sales into the SPS control area were subject to FPA section 205. Accordingly, J.D. Wind requests the Commission to grant a waiver for the 60-day prior notice requirement to become effective one day after filing.

7. In addition to its request for waiver of the prior notice requirement, J.D. Wind seeks the same waivers previously granted to other sellers permitted to sell at market-based rates. Specifically, J.D. Wind requests: (1) waiver of 18 C.F.R. Parts 41, 101 and 141 of the Commission's accounting and reporting regulations, with the exception of 18 C.F.R. §§ 141.14 and 141.15; (2) waiver of the Commission's regulations regarding the filing of information in subparts B and C of 18 C.F.R. Part 35, except for 18 C.F.R. §§ 35.12(a), 35.13(b), 35.15, and 35.16; (3) blanket authorization under section 204 of the FPA and 18 C.F.R. Part 34 of all future issuances of securities and assumptions of liability; and (4) waiver of such other regulations that the Commission previously has waived at the request of other entities authorized to sell energy at market-based rates.

8. J.D. Wind also submitted its proposed wholesale market-based rate tariff providing for sales of capacity and energy.<sup>7</sup>

### **Notice of Filing and Responsive Pleadings**

9. Notice of J.D. Wind's July 26, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 44,505 (2007), with comments, protests or interventions due on or before August 16, 2007. On August 16, 2007, Xcel Energy Services Inc. (Xcel Energy), on behalf of SPS, filed a timely motion to intervene and protest.

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<sup>5</sup> J.D. Wind states that Deere & Company owns five wind facilities each with a nameplate capacity of 10 MW that entered into commercial operation in December 2005 or November 2006. See J.D. Wind Application at 4-5.

<sup>6</sup> The Commission notes that nothing herein is intended to relieve J.D. Wind of any change in status filing that may result from the development of this new capacity.

<sup>7</sup> FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 1.

10. Although Xcel Energy takes no position on whether J.D. Wind should be granted market-based rate authority, Xcel Energy objects to J.D. Wind's characterization of the basis upon which it sells energy to SPS, and, specifically, J.D. Wind's assertion that SPS is legally obligated to buy energy from J.D. Wind. Xcel Energy states that the Commission should only consider J.D. Wind's application pursuant to 18 C.F.R. § 35.27(a) and should not base its decision on J.D. Wind's characterization of the output of J.D. Wind 4 as "fully committed."

## **Discussion**

### **A. Procedural Matters**

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), Xcel Energy's timely motion to intervene serves to make it a party to this proceeding.

### **B. Market-Based Rate Authorization**

12. 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>8</sup> As discussed below, we find that J.D. Wind's proposed market-based rate tariff meets these standards. Accordingly, we will accept the proposed tariff for filing, without suspension or hearing, to become effective July 27, 2007.

#### **1. Generation Market Power**

13. J.D. Wind states that because its J.D. Wind 4 facilities and the other five QF wind facilities owned by Deere and Company within SPP and SPS were constructed after July 9, 1996, based on section 35.27(a) of the Commission's regulations,<sup>9</sup> J.D. Wind does not need to demonstrate lack of generation market power with respect to these facilities. However, J.D. Wind also states that, even assuming that all 130 MW of

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<sup>8</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>9</sup> 18 C.F.R. § 35.27(a) (2007). We note that, effective September 18, 2007, Order No. 697 eliminates this exemption.

nameplate capacity J.D. Wind and its affiliates have in the relevant market is uncommitted, J.D. Wind passes both the pivotal supplier and market share screens. Accordingly, J.D. Wind's submittal satisfies the Commission's requirements regarding generation market power for this control area.<sup>10</sup>

## **2. Transmission Market Power**

14. J.D. Wind claims that it does not have market power in transmission because neither it nor its affiliates own or control any transmission facilities other than incidental interconnection facilities for its plants to interconnect to the grid.<sup>11</sup> Based on J.D. Wind's representations, J.D. Wind satisfies the Commission's transmission market power standard for approval of market-based rate authority.

## **3. Barriers to Entry**

15. J.D. Wind claims neither J.D. Wind nor any of its affiliates own or control any facilities or resources that could be used to restrict market entry by competing power suppliers, markets, or brokers. J.D. Wind also states that neither it nor its affiliates control any significant power generation construction sites, fuel supplies, fuel supply transportation facilities or other essential resources or inputs that could be used to restrict market entry of any competitors.<sup>12</sup> Based on these representations, J.D. Wind satisfies the Commission's market-based rate standard with respect to barriers to entry.

## **4. Affiliate Abuse**

16. In terms of affiliate abuse, J.D. Wind states that neither it nor any of its affiliates is affiliated with an electric public utility with a franchised service territory and therefore its application does not raise any issues with respect to affiliate abuse or reciprocal

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<sup>10</sup> Although Xcel Energy challenges J.D. Wind's characterization of the basis upon which J.D. Wind sells energy to SPS, we need not reach this argument because, even assuming that all of J.D. Wind and its affiliate's capacity is uncommitted, J.D. Wind passes the Commission's indicative screens.

<sup>11</sup> J.D. Wind Application at 12.

<sup>12</sup> *Id.* at 13.

dealing.<sup>13</sup> Based on this representation, the Commission is satisfied that J.D. Wind's filing does not raise affiliate abuse concerns.

## 5. Other Waivers, Authorizations, and Reporting Requirements

17. J.D. Wind 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 §§ 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.

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

19. J.D. Wind is required to file Electric Quarterly Reports (EQRs) in compliance with Order No. 2001.<sup>14</sup> If the effective date of its market-based rate tariff falls within a quarter of the year that has already expired, its EQRs for the expired quarter are due within 30 days of the date of this order.

20. J.D. Wind is directed to file an updated market power analysis pursuant to the regional schedule adopted in Order No. 697.<sup>15</sup> The Commission also reserves the right to require such an analysis at any intervening time.

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

<sup>14</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 (2002), *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).

<sup>15</sup> To the extent that J.D. Wind believes it falls within the newly established definition of "Category 1" sellers that will be exempt under Order No. 697 from the requirement to automatically submit updated market power analyses, it should make a filing with the Commission at the time that an updated market power analysis for its relevant market would otherwise be due. That filing should explain why it meets the

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### C. Waiver of the Prior Notice Requirement

21. J.D. Wind requests waiver of the Commission's prior notice requirement. J.D. Wind's facility currently is undergoing commissioning and testing to prepare for full commercial operation, which is expected by the fourth quarter of 2007. During the testing process, some of the individual wind turbine generators have generated test energy that was transmitted to the transmission grid and purchased by SPS. As of March 17, 2006, the effective date of Order No. 671, such sales require Commission approval.

22. The Commission will grant J.D. Wind's request for waiver of the prior notice requirement to allow its market-based rate tariff to become effective July 27, 2007. J.D. Wind submits that it is a small QF without market power and that waiver should be granted to allow it to make authorized energy and capacity sales. We find good cause to grant J.D. Wind's request to waive the 60-day prior notice requirement in this case.<sup>16</sup>

23. With respect to the unauthorized power sales of test energy made by J.D. Wind prior to the effective date of J.D. Wind's market-based rate authorization, the Commission will require J.D. Wind to refund to its customers the time value of the revenues collected, calculated pursuant to 18 C.F.R. § 35.19a of the Commission's regulations,<sup>17</sup> for the entire period that the rate was collected without Commission authorization.<sup>18</sup> In addition to returning the time value of the revenues collected for the period the rate was charged without Commission authorization, when dealing with market-based rates that are not timely filed, the Commission also has stated that:

The utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate. . . . The late-filing utility will receive the equivalent of a cost-based

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Category 1 criteria. See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 849.

<sup>16</sup> *Central Hudson Gas & Electric Corporation*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

<sup>17</sup> 18 C.F.R. § 35.19a (2007).

<sup>18</sup> *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,980, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

rate, less the time value remedy applicable to the unauthorized filing of cost-based rates, until the date of Commission authorization.<sup>19</sup>

24. For a QF like J.D. Wind, the difference between the market-based rate and the cost-justified rate would be the difference between the market-based rate and its avoided cost rate (or, if it has no such avoided cost rate, a reasonable proxy for such rate).<sup>20</sup> J.D. Wind should identify its avoided-cost rate in its refund report ordered below (or, if it has no such avoided cost rate, a reasonable proxy for such rate).<sup>21</sup> Whether or not an individual customer actually suffered any harm, we add, is irrelevant to our inquiry here. The injury being remedied by refunds for late filing is not merely redress for that customer but particularly “the Commission’s ability to enforce FPA section 205’s requirement that there be prior notice and that the rates charged be just and reasonable at the time they are being charged.”<sup>22</sup> Therefore, we conclude that refunds, plus interest, are due.

The Commission orders:

(A) J.D. Wind’s market-based rate tariff is hereby accepted for filing, effective July 27, 2007, 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 §§ 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted.

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<sup>19</sup> *Id.*; see also 16 U.S.C. § 825h (2000), *Southern California Water Co.*, 106 FERC ¶ 61,305, at P 15-16, *reh’g denied*, 108 FERC ¶ 61,168 (2004). See also *Public Service Co. of Colorado*, 85 FERC ¶ 61,146, at 61,588 (1998); *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,356 (1999) (*Carolina Power*).

<sup>20</sup> 18 C.F.R. § 292.304(a) (2007); *Mendota Hills*, 110 FERC ¶ 61,222 at P 26 (2005).

<sup>21</sup> In its refund report, J.D. Wind should also explain the relevance, if any, of the current proceeding, discussed in Xcel Energy’s protest at n.10, before the Public Utilities Commission of Texas with respect to this calculation.

<sup>22</sup> *El Paso Electric Company*, 105 FERC ¶ 61,131 at P 21 (2003) (footnote omitted) (*citing Carolina Power*, 87 FERC ¶ 61,083 at 61,356).

(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 (2007).

(D) 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 J.D. Wind should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., 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 (2007).

(E) Absent a request to be heard within the period set forth above, J.D. Wind 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 J.D. Wind, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) 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 J.D. Wind's issuances of securities or assumptions of liabilities.

(G) J.D. Wind's request for waiver of the prior notice requirement is granted, as discussed in the body of this order.

(H) J.D. Wind is hereby ordered to make refunds, with interest, within 30 days of the date of this order, as discussed in the body of this order. Such refunds shall include the period that any rates were collected without Commission authorization. J.D. Wind is hereby directed to submit a refund report within 30 days thereafter, regarding the basis for and calculations of the refunds paid.

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

(J) J.D. Wind is hereby directed to file an updated market power analysis in accordance with the regional schedule adopted in Order No. 697, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.