

125 FERC ¶ 61,140  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

November 5, 2008

In Reply Refer To:  
H.Q. Energy Services (U.S.) Inc.  
Docket Nos. ER97-851-017  
ER97-851-018  
ER97-851-019

Skadden, Arps, Slate, Meagher & Flom LLP  
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1440 New York Avenue, N.W.  
Washington, D.C. 20005-2111

Reference: Updated Market Power Analysis in Compliance with Order No. 697

Dear Mr. Pfeffer:

1. On June 26, 2008, H.Q. Energy Services (U.S.) Inc. (H.Q. Energy) filed an updated market power analysis in accordance with the regional reporting schedule adopted in Order No. 697.<sup>1</sup> H.Q. Energy also submitted revised tariff sheets to

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<sup>1</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, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008) FERC Stats. & Regs. ¶ 31,268 (2008), *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008). The Commission stated that “both the Commission and market participants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers’ rates remain just and reasonable.” Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 13.

incorporate the required provisions adopted by the Commission in Order Nos. 697 and 697-A.<sup>2</sup>

2. On July 29, 2008, H.Q. Energy submitted revised tariff sheets to provide for the sale of ancillary services in the market administered by the Midwest Independent System Operator, Inc.<sup>3</sup>

3. On September 19, 2008, H.Q. Energy filed a notice of change in status updating a representation made in its June 26, 2008 updated market power analysis. H.Q. Energy clarifies that possible changes to H.Q. Energy's Canadian transmission affiliates'<sup>4</sup> open access transmission tariffs (OATTs) to conform with the requirements of Order Nos. 890 and 890-A,<sup>5</sup> currently under consideration by the Québec Energy Board (Régie de l'énergie), will likely be implemented after January 2009 rather than before January 2009, given that the Régie de l'énergie will not rule on H.Q.-TransÉnergie's OATT by the end of the year.

4. As discussed below, H.Q. Energy's submittals satisfy the Commission's standards for market-based rate authority, and are accepted for filing,<sup>6</sup> effective September 27, 2008, as requested.

5. H.Q. Energy is a wholly-owned subsidiary of Hydro-Québec (H.Q.), a Crown corporation in the Province of Québec, Canada.

6. In the United States, H.Q. Energy has an indirect ownership interest in Bucksport Energy, LLC, a qualifying cogeneration facility located in Bucksport, Maine located in the ISO New England, Inc. (ISO-NE) market. Also, H.Q. Energy owns the Les Cedars

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<sup>2</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-18, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 382-85.

<sup>3</sup> *Midwest Independent System Operator, Inc.*, 123 FERC ¶ 61,297, at P 46 (2008).

<sup>4</sup> H.Q. Energy's Canadian transmission affiliates are Hydro-Québec TransÉnergie (H.Q. TransÉnergie) and Cedar Rapids Transmission Company (collectively, transmission affiliates).

<sup>5</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008).

<sup>6</sup> H.Q. Energy Services (U.S.) Inc., First Revised FERC Rate Schedule No. 1, Third Revised Sheet Nos. 2 (superseding Second Revised Sheet Nos. 1-2).

generating plant, which is physically located in Québec but which the New York Independent System Operator, Inc. (NYISO) models as an integral generator in the NYISO market.<sup>7</sup>

7. Notices of H.Q. Energy's June 26, 2008 filing, its July 29, 2008 filing, and its September 19, 2008 filing were published in the *Federal Register*,<sup>8</sup> with interventions or protests due on or before August 25, 2008, August 19, 2008, and October 10, 2008 respectively. On July 17, 2008, Newfoundland and Labrador Hydro filed a timely motion to intervene and provide informational comments. On July 28, 2008, H.Q. Energy filed an answer.

8. Pursuant to Rule 214 of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.214 (2008), Newfoundland and Labrador Hydro's timely, unopposed motion to intervene serves to make it a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept H.Q. Energy's answer because it has provided information that assisted us in our decision-making process.

9. Newfoundland and Labrador Hydro states that it does not take a position regarding any action the Commission may pursue with respect to H.Q. Energy's filing. Newfoundland and Labrador Hydro states that it seeks to provide background information regarding positions that it has taken before the Régie de l'énergie, which regulates electricity transmission in Québec. Newfoundland and Labrador Hydro states that its interests are directly affected by this proceeding, as it plans to export electricity to the United States beginning in 2015 from its Lower Churchill Project and is in active discussions with H.Q. Energy's Canadian transmission affiliate, H.Q. TransEnergie. Newfoundland and Labrador Hydro alerts the Commission to concerns it has regarding the sufficiency of H.Q. TransEnergie's OATT and its implementation in an open and non-discriminatory manner. Newfoundland and Labrador Hydro states that over the past

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<sup>7</sup> H.Q. Energy was authorized to sell electric energy and capacity at wholesale at market-based rates in *HQ Energy Services (U.S.) Inc.*, 81 FERC ¶ 61,184 (1997), *reh'g denied*, 82 FERC ¶ 61,234 (1998); *HQ Energy Services (U.S.) Inc.*, 79 FERC ¶ 61,152 (1997).

<sup>8</sup> 73 Fed. Reg. 40,571 (2008); 73 Fed. Reg. 46,615 (2008); 73 Fed. Reg. 56,811 (2008).

year, it has filed three complaints with the Régie de l'énergie regarding administration of H.Q. TransÉnergie's OATT in relation to its transmission service requests.<sup>9</sup>

10. Newfoundland and Labrador Hydro states that H.Q. TransÉnergie has not yet updated its OATT to be consistent with Order No. 890's additional transmission planning requirements.

11. Newfoundland and Labrador Hydro states that its present complaints before the Régie de l'énergie are to ensure that an erroneous implementation of the H.Q. TransÉnergie OATT does not deprive Newfoundland and Labrador Hydro of access to the U.S. Northeast electricity markets over the H.Q. TransÉnergie system. Newfoundland and Labrador Hydro states that its complaints before the Régie de l'énergie raise issues regarding insufficient information provided in system impact studies and failure to properly calculate and post available transmission capacity, which are similar to issues the Commission has addressed in OATT compliance cases.

12. In its reply comments, H.Q. Energy states that Newfoundland and Labrador Hydro has not objected to anything contained in H.Q. Energy's updated market power analysis. H.Q. Energy further states that the issues raised by Newfoundland and Labrador Hydro are currently pending before the Régie de l'énergie.

13. 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>10</sup> As discussed below, the Commission concludes that H.Q. Energy satisfies the Commission's standards for market-based rate authority.

14. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.<sup>11</sup> H.Q. Energy has prepared the pivotal supplier and wholesale market share screens for the ISO-NE and NYISO markets, consistent with the requirements of Order No. 697.<sup>12</sup>

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<sup>9</sup> Newfoundland and Labrador Hydro included the three complaints as an attachment to its comments: Case No. P-110-1565, *Newfoundland and Labrador Hydro v. Hydro Quebec* (filed Jan. 11, 2008); Case No. P-1566, *Newfoundland and Labrador Hydro v. Hydro Quebec* (filed Jan. 11, 2008); and P-110-1597, *Newfoundland and Labrador Hydro v. Hydro Quebec* (filed April 4, 2008).

<sup>10</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

<sup>11</sup> *Id.* P 62.

<sup>12</sup> *Id.* P 235.

15. The Commission has reviewed H.Q. Energy's pivotal supplier screen and wholesale market share screen and has determined that H.Q. Energy passes the pivotal supplier screen and the wholesale market share screen in the ISO-NE and NYISO markets. Accordingly, the Commission finds that H.Q. Energy satisfies the Commission's requirements for market-based rates regarding horizontal market power.

16. The Commission requires in cases where a market-based rate seller is a foreign utility or is affiliated with a foreign utility that owns, operates, or controls transmission facilities outside of the United States and is interconnected with the United States to demonstrate that comparable, non-discriminatory access is offered on those facilities so that competitors of the seller may reach United States markets.<sup>13</sup>

17. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>14</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>15</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>16</sup>

18. H.Q. Energy states that its transmission affiliates own transmission assets located in Québec, which are subject to OATTs accepted by the Commission as satisfying reciprocity requirements and which do not allow H.Q. Energy and its affiliates to raise barriers to entry or impede competitors in Canada from accessing U.S. electricity markets.<sup>17</sup> H.Q. Energy also states that its transmission affiliates are in the process of adapting their OATTs to the provisions of Order Nos. 890 and 890-A, and those OATTs

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<sup>13</sup> *Id.* P 1007-1008.

<sup>14</sup> *Id.* P 440.

<sup>15</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>16</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>17</sup> H.Q. Energy's June 26, 2008 Filing at 7-8.

are currently under consideration by the Régie de l'énergie.<sup>18</sup> H.Q. Energy also states that its transmission affiliates continue to provide open and non-discriminatory access to all suppliers within Canada seeking to deliver power to the U.S. markets over and through their transmission facilities, and therefore H.Q. Energy has mitigated any transmission market power.<sup>19</sup> Further, H.Q. Energy states that it does not own or control inputs to electric power production, and it affirmatively states that neither it nor its affiliates have or will erect barriers to entry in relevant markets.

19. Based on H.Q. Energy's representations, H.Q. Energy satisfies the Commission's requirements for market-based rates regarding vertical market power.

20. Order No. 697 adopted two standard required provisions that each seller must include in its market-based rate tariff: a provision requiring compliance with the Commission's regulations and a provision identifying any limitations and exemptions regarding the seller's market-based rate authority.<sup>20</sup> In addition to the required tariff provisions, Order No. 697 adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable and also requires an asset appendix.<sup>21</sup> In Order No. 697-A, the Commission also required that each seller include in its market-based rate tariff a provision identifying which category of seller it qualifies as in each region.

21. H.Q. Energy's market-based rate tariff includes the Commission's two required provisions, indicating that H.Q. Energy intends to comply with the Commission's regulations, including the affiliate restrictions. H.Q. Energy's market-based rate tariff also includes a set of standard provisions with regard to sales of certain ancillary services in various markets, as well as a provision regarding sales of ancillary services as a third party supplier, and the required category designation. H.Q. Energy's filing also includes

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<sup>18</sup> H.Q. Energy submits that its transmission affiliates anticipate that the revised terms and conditions of the OATTs will become effective after January 2009. H.Q. Energy's June 26, 2008 Filing at 7, n.16 & Attachment D. H.Q. Energy further states that on September 11, 2008, the Régie de l'énergie ruled that it required additional information to support the proposed tariff amendments in H.Q. TransÉnergie's request for tariff modifications to comply with Order Nos. 890 and 890-A. H.Q. Energy's September 19, 2008 Filing at 2.

<sup>19</sup> See *H.Q. Energy Services (U.S.) Inc.*, 79 FERC ¶ 61,152 at 61,652-53; *TransÉnergie U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,838 (2000).

<sup>20</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

<sup>21</sup> *Id.* at P 917.

the required asset appendix. We find that H.Q. Energy's market-based rate tariff satisfies the Commission's requirements set forth in Order Nos. 697 and 697-A, and accept their revised market-based rate tariffs, effective September 27, 2008, as requested.

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 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>22</sup> Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.<sup>23</sup>

23. H.Q. Energy 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>24</sup>

24. Additionally, in Order No. 697, the Commission created two categories of sellers.<sup>25</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

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<sup>22</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. 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>23</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). 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>24</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 (2008).

<sup>25</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

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<sup>26</sup>); 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>27</sup> Sellers that do not fall into Category 1 are designated as Category 2 and are required to file regularly scheduled updated market power analyses.<sup>28</sup>

25. Based on H.Q. Energy's representations, we find that H.Q. Energy meets the criteria for a Category 1 seller and is so designated.

By direction of the Commission.

Kimberly D. Bose,  
Secretary.

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<sup>26</sup> *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and 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 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and rev'd in 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).

<sup>27</sup> 18 C.F.R. § 35.36(a)(2) (2008).

<sup>28</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.