

130 FERC ¶ 61,031
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

EnergyConnect, Inc.

Docket Nos. ER09-1307-000
ER09-1307-001

ORDER CONDITIONALLY GRANTING MARKET-BASED
RATE AUTHORIZATION AND PROVIDING GUIDANCE

(Issued January 19, 2010)

1. In this order, the Commission conditionally grants market-based rate authorization to EnergyConnect, Inc. (EnergyConnect), an Aggregator of Retail Customers (ARC), effective August 17, 2009, as requested. The Commission also provides guidance in this order that an ARC is not required in all cases to have a market-based rate tariff on file with the Commission and explains why in this case EnergyConnect needs market-based rate authorization.

Background

2. On June 16, 2009, EnergyConnect filed an application for market-based rate authority with an accompanying rate schedule (June 16 Filing). EnergyConnect requests authority to sell energy, capacity, and ancillary services through the provision of demand response services in wholesale transactions at market-based rates.

3. EnergyConnect states that it is an ARC for the purpose of providing demand response services in various organized electric markets and that these markets may include PJM Interconnection, L.L.C. (PJM), ISO New England Inc., the Midwest Independent Transmission System Operator, Inc., and the New York Independent System Operator, Inc. EnergyConnect states that it provides an interface for retail end-use customers to respond to wholesale prices in energy and capacity markets. It states that it does not own any physical assets for the generation, transmission, or distribution of electricity. EnergyConnect also represents that neither it nor its affiliates is a franchised public utility with captive customers and that it has no other subsidiaries or affiliates that are active in the energy industry.

4. EnergyConnect states that its current market activity includes energy price responsive demand response, capacity for reliability, and synchronized (10-minute spinning) reserves. It also states that it currently has no active customers providing

regulation service. EnergyConnect notes that in the routine course of its business it occasionally engages in bilateral transactions with wholesale market participants for various products.

5. In the June 16 Filing, EnergyConnect maintains that it is unclear whether an ARC such as EnergyConnect needs market-based rate authority to provide demand response services for energy, capacity, and/or ancillary services in wholesale transactions compensated at market-based rates. EnergyConnect states that while it does not concede that it is a public utility, it has submitted its application out of an abundance of caution.

6. On August 14, 2009, to obtain further information about EnergyConnect's operations, the Director, Division of Tariffs and Market Development – West, issued a data request seeking further information.

7. On September 8, 2009, EnergyConnect filed its response to the August 14, 2009 data request (September 8 Response). In this response, EnergyConnect states that it currently provides the following services: (a) energy price responsive demand response, (b) synchronized/spinning reserves, and (c) capacity for reliability. EnergyConnect explains that it provides these services by contracting with end-use customers that are able to meet the requirements for these services in their respective organized markets. These requirements consist of the ability to reduce demand measurably on notice from EnergyConnect in accordance with the requirements developed by the wholesale market operator.

8. EnergyConnect states in its September 8 Response that it has no plans to provide these services from any sources other than demand response resources. It states that in all markets where it is active, delivery is validated through measurement of the end-use customer's metered load. EnergyConnect provides metering and settlement services. It states that when the market operator confirms end-use customer performance by evaluating meter data, EnergyConnect is paid for the service, and it in turn pays the end-use customer after subtracting a contracted fee. EnergyConnect states that its offerings for demand response based products are based largely on the end-use customer's requirements. EnergyConnect explains that by "customer" it is referring to end-use customers with whom it has contracted to provide services to facilitate delivery of wholesale market services to organized markets by management of retail demand.

9. EnergyConnect states that it also participates in capacity markets, which involves a commitment to provide capacity/reliability capability in future years. It states that the capacity markets design results in a fixed forward price for future delivery. EnergyConnect states that while it has the capability to meet these obligations through contracting with end-use customers, there may be occasions where it may engage in transactions to buy or sell these obligations. Thus EnergyConnect may, for example, sell an obligation (with the associated revenue stream) to another market participant with resources that can meet the requirement. Conversely, EnergyConnect may contract to

sell demand response resources that are capable of meeting another party's obligations. EnergyConnect states that these transactions will strictly involve "commodity" resources where the seller retains control of the resource and is financially responsible for performance.¹ EnergyConnect states that it does not plan to control resources other than demand response resources.

10. EnergyConnect states that it has engaged in bilateral transactions for PJM Unforced Capacity in the Reliability Pricing Model. To date, it has sold obligations (the right to a capacity related revenue stream awarded in a forward capacity auction) and purchased "commodity" capacity qualified to fulfill obligations resulting from a forward capacity auction. EnergyConnect states that it contemplates selling commodity resources based on demand response resources under its control to other market participants at market-based prices. EnergyConnect notes that it currently provides demand response resources to Southern California Edison Company under a bilateral contract.

11. On November 6, 2009, to obtain further information about EnergyConnect's operations, the Director, Division of Tariffs and Market Development – West, issued a data request seeking further information about EnergyConnect's proposed tariff.

12. On November 20, 2009, EnergyConnect filed its response to the November 6, 2009 data request (November 20 Response). In this response, EnergyConnect states that it does not currently offer every ancillary service authorized by the Commission in every market. EnergyConnect also states that neither it nor its clients inject energy into the grid. However, EnergyConnect clarifies that in the course of its business it may buy ancillary services from generation sources, including but not limited to balancing energy and capacity, for eventual resale in organized markets.

Notice of Filing and Responsive Pleadings

13. Notice of the June 16 Filing was published in the *Federal Register*, 74 Fed. Reg. 31027 (2009), with interventions or protests due on or before July 7, 2009. None was filed.

14. Notice of EnergyConnect's request for blanket authorization under Part 34 was separately published in the *Federal Register*, 74 Fed. Reg. 34006 (2009), with interventions and protests due on or before July 27, 2009. None was filed.

¹ EnergyConnect does not define the term "commodity" or otherwise explain the significance of the term in its filing.

15. Notice of the September 8 Response was published in the *Federal Register*, 74 Fed. Reg. 48255 (2009), with interventions or protests due on or before September 29, 2009. None was filed.

16. Notice of the November 20 Response was published in the *Federal Register*, 74 Fed. Reg. 64060 (2009), with interventions or protests due on or before December 4, 2009. None was filed.

Discussion

Market-Based Rate Authorization

17. 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.² As discussed below, we find that EnergyConnect satisfies the Commission's standards for market-based rate authority. However, we also note that EnergyConnect needs market-based rate authorization only in connection with certain of its activities. We thus will require EnergyConnect to submit an amended tariff that removes references to demand response services, as discussed below.

A. Horizontal Market Power

18. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.³

19. EnergyConnect states that neither EnergyConnect nor any of its affiliates, investors or owners, own or control any electric generation facilities. Based on EnergyConnect's representations, we find that EnergyConnect satisfies the Commission's requirements for market-based rate authorization regarding horizontal market power.

² *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 62, 399, 408, 440, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *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).

³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62.

B. Vertical Market Power

20. 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 (OATT) on file before granting a seller market-based rate authorization.⁴

21. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.⁵ 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 new generation capacity development; and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).⁶ 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.⁷

22. EnergyConnect represents that neither it nor any of its affiliates, investors, or owners own, operate, or control any transmission facilities in the relevant market.

23. With regard to other barriers to entry, EnergyConnect represents that it is not affiliated with intrastate natural gas transportation, storage or distribution facilities; and that neither it nor any of its affiliates, investors or owners, own or control any sites for generation capacity development; physical coal supply sources nor control who may access transportation of coal supplies.

24. EnergyConnect also affirmatively states that neither it nor any of its affiliates have erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

25. Based on EnergyConnect's representations, the Commission finds that it satisfies the Commission's requirements for market-based rate authorization regarding vertical market power.

⁴ *Id.* P 408.

⁵ *Id.* P 440.

⁶ *Id.* P 447; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

Jurisdictional Issue

26. EnergyConnect's application raises the question of whether an ARC is required to seek market-based rate authorization. We conclude that such authorization is not required in all cases but would be required in EnergyConnect's case based on its statement that it may engage in certain transactions that involve the sale of electric energy for resale. We discuss the basis for this conclusion below and how it necessitates revisions to EnergyConnect's tariff.

27. Pursuant to section 201(a) of the FPA, the Commission is charged with regulating the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce.⁸ Section 201(b) provides that the Commission shall have jurisdiction over facilities for wholesale sales of electric energy in interstate commerce or for transmission of electric energy in interstate commerce.⁹ In section 201(e), a public utility is defined as a person who owns or operates facilities subject to the jurisdiction of the Commission.¹⁰ Traditionally, jurisdictional facilities have been either physical facilities such as transmission lines or "paper" facilities such as wholesale power contracts through which entities engage in wholesale power sales. Section 205(c) states that public utilities shall file with the Commission all rate schedules for any transmission or sale subject to the jurisdiction of the Commission.¹¹

28. EnergyConnect states in its June 16 Filing that it is only providing demand response services and is doing so solely through the use of demand response resources. The Commission defines "demand response resource" as "a resource capable of providing demand response,"¹² and defines "demand response" as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy."¹³ EnergyConnect's statement that it is

⁸ 16 U.S.C. § 824(a) (2006)

⁹ *Id.* § 824(b).

¹⁰ *Id.* § 824(e).

¹¹ *Id.* § 824d(c) (2006).

¹² 18 C.F.R. § 35.28(b)(5) (2009).

¹³ *Id.* § 35.28(b)(4).

only providing demand response services could be read to mean that its services do not entail the injection of electric energy onto the grid and that EnergyConnect thus would not be engaged in sales of electric energy in interstate commerce.

29. However, EnergyConnect subsequently clarifies in its November 20 Response that in the course of its business it may buy ancillary services from generation sources, including but not limited to balancing energy, for eventual resale in organized markets. Here EnergyConnect refers to a service that does not fall within the definition of demand response as set forth in the Commission's regulations to the extent that it would entail the injection of electric energy onto the grid and a sale of that energy for resale in wholesale electric markets. On this basis, EnergyConnect would be a public utility under section 201(e) of the FPA because its agreements to make sales of balancing energy for resale in the wholesale organized markets would constitute jurisdictional facilities under FPA section 201(b).

30. Nevertheless, where an entity is only engaged in the provision of demand response services, and makes no sales of electric energy for resale, that entity would not own or operate facilities that are subject to the Commission's jurisdiction and would not be a public utility that is required to have a rate on file with the Commission. While jurisdictional facilities may include contracts, memoranda and other records utilized in connection with jurisdictional sales,¹⁴ we do not regard agreements to provide services from only demand response resources to be jurisdictional facilities because they involve agreements to reduce demand, i.e., agreements not to purchase electric energy under certain circumstances, rather than agreements to sell electric energy at wholesale. Such agreements are not jurisdictional facilities that cause a seller to be a public utility.¹⁵

31. We acknowledge that the Commission has previously characterized certain "purchases of demand reduction" as wholesale sales that "involve the sale for resale of energy that would ordinarily be consumed" by an end-use consumer.¹⁶ The Commission

¹⁴ *E.g.*, *Hartford Electric Light Co.*, 131 F.2d 953, 961 (2d Cir. 1942); *Golden Spread Electric Cooperative, Inc.*, 39 FERC ¶ 61,322, at 62,022, *reh'g denied*, 40 FERC ¶ 61,348 (1987); *Citizens Energy Corp.*, 35 FERC ¶ 61,198, at 61,452-53 (1986).

¹⁵ Section 201(e) of the Federal Power Act, 16 U.S.C. § 824(e) (2006), defines a public utility as "any person who owns or operates facilities subject to the jurisdiction of the Commission. . . ."

¹⁶ *Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 94 FERC ¶ 61,272, at 61,972, *order on reh'g*, 95 FERC ¶ 61,225, *order on reh'g*, 96 FERC ¶ 61,155 (2001); *see also PJM Interconnection, L.L.C.*, 99 FERC ¶ 61,139, at 61,573 (2002).

no longer relies on that characterization. As discussed above, the Commission's regulations now define "demand response" as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy."¹⁷

32. However, the conclusion that an entity engaged only in the provision of demand response services is not a public utility does not necessarily mean that all of such an entity's actions are outside of the Commission's authority. For example, the Commission has broad authority to regulate demand response as a practice that affects rates in organized wholesale electric markets under sections 205(a) and (c) and section 206(a) of the FPA.¹⁸ Thus, an entity that provides such services is, as a participant in RTO/ISO wholesale markets regulated by the Commission, and as a signatory to any RTO/ISO agreements required of such participants, obligated to comply with Commission-approved tariff provisions governing the provision of demand response in the organized wholesale electric markets. Further, demand response providers that are not public utilities may be subject to significant sanctions under the FPA. For example, the conclusion that such an entity is not a public utility under the FPA does not preclude a finding that it is an "entity" subject to the Commission's jurisdiction under FPA section 222 governing market manipulation in connection with Commission-jurisdictional wholesale sales of electric energy.¹⁹ Another example of the Commission's authority over demand response providers is FPA section 307 which gives the Commission authority to conduct investigations to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provisions of the FPA or any rule or regulation thereunder.²⁰ FPA section 316 also provides that any person who willfully and knowingly violates the FPA is subject to a fine of not more than

¹⁷ 18 C.F.R. § 35.28(b)(4) (2009).

¹⁸ 16 U.S.C. § 824d(a), (c) (2006) and 16 U.S.C. § 824e(a) (2006). *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008); *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292, at P 44-45, 47, 52; *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

¹⁹ 16 U.S.C. § 824w (2006).

²⁰ *Id.* § 825f.

\$1,000,000 and/or by imprisonment for not more than five years.²¹ Further, demand response providers are subject to the Commission's authority pursuant to section 220 of the FPA under which the Commission is authorized to implement rules "to facilitate price transparency in markets for sale and transmission of electric energy in interstate commerce" and, under that provision, the Commission is authorized to obtain information from demand response providers as market participants.²² The Commission has also discussed other examples of statutory authority over demand response.²³

33. In light of these considerations, we direct EnergyConnect to make a compliance filing, within 30 days of the date of this order, to revise its tariff to remove all references to provision of demand response services.

Tariff Sheets

34. In Order No. 697, the Commission 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.²⁴ In addition to the required tariff provisions, the Commission 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.²⁵

²¹ *Id.* § 825o. FPA section 316A provides that any person who violates any provision of part II of the FPA is subject to a civil penalty of not more than \$1,000,000 for each day that such violation continues. 16 U.S.C. § 825o-1 (2006).

²² *Id.* § 824t(a).

²³ *See, e.g., Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 888, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009); *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 330-334, 405-406, 573, 583, 1232, 1298, 1879, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

²⁵ *Id.* P 917.

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.²⁶

35. EnergyConnect's market-based rate tariff submitted in the September 8 Response includes the Commission's two standard required provisions and the required category designation provision. EnergyConnect's proposed tariff sheets are conditionally accepted. As discussed above, EnergyConnect is directed to submit a compliance filing, within 30 days of the date of this order removing all references to provision of demand response services from its tariff.

Waiver Requests

36. EnergyConnect requests a number of waivers and authorizations typically granted by the Commission to market-based rate sellers. In particular, EnergyConnect requests the following waivers and authorizations under the Commission's regulations: (1) waiver of the filing requirements of subparts B and C of Part 35, except sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101, and 141, except sections 141.14 and 141.15; and (3) blanket authorization under Part 34 for all future issuances of securities and assumptions of liability.

37. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.²⁷

Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects EnergyConnect to keep its accounting records in accordance with generally accepted accounting principles.

Reporting Requirements

38. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rate authorization must file electronically with the Commission an Electric Quarterly Report (EQR) containing: (1) a summary of the contractual terms

²⁶ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 391-93.

²⁷ It should be noted that the Commission has recently examined and approved the continued applicability of the waiver of its accounting and reporting requirements in Parts 41, 101, and 141 of the Commission's regulations, as well as the continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities. See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 984-85 (regarding waiver of Parts 41, 101, and 141), 999-1000 (regarding blanket approval under Part 34).

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.²⁸ Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.²⁹

39. Additionally, EnergyConnect 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.³⁰

40. In Order No. 697, the Commission created two categories of sellers.³¹ 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); 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

²⁸ *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>.

²⁹ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2009). 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.

³⁰ *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(a) (2009).

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

as the seller's generation assets; and that do not raise other vertical market power issues.³² Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.³³

41. Based on EnergyConnect's representations that neither it nor its affiliates own or control generation or transmission capacity or related assets of any type, and it is not affiliated with any franchised public utility, we find that it meets the criteria for a Category 1 seller and is so designated. The Commission also reserves the right to require an updated market power analysis at any time.

The Commission orders:

(A) EnergyConnect's market-based rate tariff is hereby conditionally accepted for filing, effective August 17, 2009, as discussed in the body of this order.

(B) EnergyConnect is hereby directed to make a compliance filing revising its market-based rate tariff, within 30 days of the date of this order, as discussed in the body of this order.

(C) Waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted.

(D) Waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted, with the exception of sections 141.14 and 141.15.

(E) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is granted. EnergyConnect 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 EnergyConnect, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

³² 18 C.F.R. § 35.36(a)(2) (2009).

³³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

(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 EnergyConnect's issuance of securities or assumptions of liability.

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

By the Commission. Commissioner Moeller concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

EnergyConnect, Inc.

Docket Nos. ER09-1307-000
ER09-1307-001

(Issued January 19, 2010)

MOELLER, Commissioner, *concurring*:

This order finds that a demand response provider, EnergyConnect, Inc., is a public utility because it is engaged in the sale of electric energy at wholesale in interstate commerce. I fully agree with this determination. In short, in those instances where a demand response provider is engaged in jurisdictional activity in addition to providing demand response as defined in section 35.28(b)(4) of our regulations,¹ those entities (like EnergyConnect) are public utilities under Section 201 of the Federal Power Act.

For example, to the extent that demand response providers are integrating their activity into the control rooms of transmission systems, then demand response providers could be public utilities to the extent that their activity involves the transmission of electric energy in interstate commerce. Unlike generating plants, which have an explicit statutory exemption from our jurisdiction (even if those plants are used to control the transmission of electric energy in interstate commerce),² facilities that reduce demand are not explicitly exempt from Section 201.

In considering our jurisdiction, I recognize that an exemption to Section 201 could be exploited by an entity trading in our jurisdictional markets because it could assert that it need not abide by our mitigation measures in Part 35 of our regulations. Since these measures protect consumers and market participants, I will continue my efforts of ensuring that this Commission exercises its lawful jurisdiction.

Philip D. Moeller
Commissioner

¹ See P28 of the order.

² In relevant part, Section 201(b) of the FPA (16 U.S.C. § 824(b)) provides that the “Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction ... over facilities used for the generation of electric energy”