

136 FERC ¶ 61,013  
FEDERAL ENERGY REGULATORY COMMISSION  
Washington, D.C. 20426

July 5, 2011

In Reply Refer To:  
Wildcat Power Holdings, LLC  
Docket Nos. ER11-3366-000 and  
ER11-3366-001

Mr. John S. Decker  
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1455 Pennsylvania Avenue, NW, Suite 600  
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Reference: Market-Based Rate Authorization

Dear Mr. Decker:

1. On April 15, 2011, as amended on May 5, 2011, pursuant to section 205 of the Federal Power Act,<sup>1</sup> Wildcat Power Holdings, LLC (Wildcat Power) filed an initial application for market-based rate authority with an accompanying tariff providing for the sale of energy, capacity, and ancillary services at market-based rates.<sup>2</sup> Wildcat Power requests that the Commission grant waivers commonly granted to similar market-based rate applicants and further requests waiver of the 60-day prior notice requirement and that the Commission accept its market-based rate tariff, effective on or before May 6, 2011.

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> Wildcat Power requests authorization to sell ancillary services in the markets administered by: PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc. (NYISO), ISO New England Inc. (ISO-NE), California Independent System Operator Corp. (CAISO), and Midwest Independent Transmission System Operator, Inc. (MISO). Wildcat Power also requests authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

2. In this order, the Commission grants Wildcat Power authority to make wholesale sales of energy, capacity, and ancillary services at market-based rates, effective May 6, 2011. Additionally, based on Wildcat Power's representations, Wildcat Power is designated as a Category 2 seller in the Southwest region and as a Category 1 seller in all other regions.<sup>3</sup> Therefore, Wildcat Power must file an updated market power analysis for the Southwest region in compliance with the regional reporting schedule adopted in Order No. 697.<sup>4</sup>

3. Wildcat Power represents that it is a special purpose entity formed for the purpose of acquiring one of three 583.5 megawatt (MW) generating units (Power Block One) that are currently owned by Gila River Power, L.P. (Gila River) at its natural gas-fired generating facility (Facility)<sup>5</sup> located in the Arizona Public Service Company (APS) balancing authority area. Wildcat Power will also own a 25 percent undivided co-ownership interest in the common assets of the Facility.

4. Wildcat Power further states that it is a wholly-owned subsidiary of Wayzata Opportunities Fund II, L.P. (Wayzata II). Wayzata II is managed by Wayzata Investment Partners LLC and is a private investment vehicle in which no single member or partner owns more than a 10 percent equity interest.

5. Wildcat Power explains that certain of its affiliates are engaged in the generation and sale of electric energy, including Sundevil. Sundevil is a wholly-owned subsidiary of Wayzata Opportunities Fund, LLC (Wayzata I), which is also managed by Wayzata Investment Partners LLC. Wildcat Power further explains that Sundevil owns Power Block Two of the Facility, along with a 25 percent undivided co-ownership interest in the common assets of the Facility.

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<sup>3</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 848-850, *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), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

<sup>4</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-893, app. D; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at apps. D, D-1, D-2; Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at app. D-2.

<sup>5</sup> Sundevil Power Holdings, LLC (Sundevil) is the owner of the fourth unit in this plant.

6. Wildcat Power states that it is also affiliated with the following generation facilities: (1) Castleton Energy Center, LLC, a wholly-owned subsidiary of Wayzata I, which owns and operates a 73 MW natural gas-fired electric generation facility located in the NYISO market; (2) California Power Holdings, a wholly owned-subsiary of Wayzata I, which owns and operates a 49 MW natural gas-fired generation facility and a 45 MW natural gas-fired generation facility, both located in the CAISO market; (3) Guadalupe Power Partners, LP, a wholly-owned subsidiary of Wayzata II, which owns and operates an approximately 1,000 MW combined cycle generating facility located in Marion, Texas; and (4) Thompson River Power, LLC, which is owned by Wayzata Recovery Fund, LLC. Wayzata Recovery Fund, LLC is managed by Wayzata Investment Partners LLC. Thompson River Power, LLC owns and operates a 14 MW wood waste cogeneration facility located in Thompson Falls, Montana.

7. Notice of Wildcat Power's April 15, 2011 filing was published in the *Federal Register*, 76 Fed. Reg. 22,689 (2011), with interventions or protests due on or before May 6, 2011. None was filed.

8. Notice of Wildcat Power's request for blanket authorization under Part 34 was separately published in the *Federal Register*, 76 Fed. Reg. 22,695 (2011), with interventions or protests due on or before May 9, 2011. None was filed.

9. Notice of Wildcat Power's May 5, 2011 filing was published in the *Federal Register*, 76 Fed. Reg. 28,017 (2011), with interventions or protests due on or before May 27, 2011. None was filed.

10. 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>6</sup> The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.<sup>7</sup> The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power.<sup>8</sup>

11. Wildcat Power has prepared the pivotal supplier and wholesale market share screens for the APS balancing authority area and the CAISO first-tier market, consistent

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<sup>6</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

<sup>7</sup> *Id.* P 62.

<sup>8</sup> *Id.* P 33, 62-63.

with the requirements of Order No. 697.<sup>9</sup> Wildcat Power's horizontal market power screens indicate that Wildcat Power passes both the pivotal supplier screen and wholesale market power screen for the CAISO market and the pivotal supplier screen for the APS balancing authority area, but fails the wholesale market share screen in the APS balancing authority area during the winter and summer seasons, where its market shares are 21.8 and 23.5 percent, respectively.

12. The Commission has stated that an applicant that fails one or more of the indicative screens is provided with several procedural options, including the right to challenge the presumption of market power by submitting a Delivered Price Test (DPT) analysis.<sup>10</sup> As the Commission has previously explained, the DPT identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity<sup>11</sup> for each season/load period.<sup>12</sup> Under the DPT, applicants must also calculate market concentration using the Hirschman-Herfindahl Index (HHI).<sup>13</sup> An HHI of less than 2,500 in the relevant market for all season/load periods, in combination with a demonstration that the applicants are not pivotal and do not possess more than a 20 percent market share in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. A detailed description of the DPT is provided in Order No. 697.<sup>14</sup>

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<sup>9</sup> *Id.* P 231-232.

<sup>10</sup> *Id.* P 63. The results of the DPT can be used for pivotal supplier, market share, and market concentration analyses.

<sup>11</sup> "Economic capacity" is the total generation capacity of a potential supplier that can compete in the destination market, given its costs and transmission availability. "Available economic capacity" is derived by subtracting each potential supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 96 n.78.

<sup>12</sup> Super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

<sup>13</sup> The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market,  $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$ .

<sup>14</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 104-117.

13. To rebut the presumption of market power in the APS balancing authority area, Wildcat Power relies on the recently accepted Gila River study, which relies on the APS DPT analysis.<sup>15</sup>

14. Wildcat Power's analysis for the APS balancing authority area indicates that it is not pivotal in any season/load period using either the economic capacity measure or the available economic capacity measure. When the economic capacity measure is used, Wildcat Power passes the market share screen in all seasons/load periods, but fails the market concentration analysis with HHIs in excess of 2,500 in all ten seasons/load periods. Wildcat Power contends that that highly concentrated market reflects the dominant presence of APS and ignores APS's obligation to serve its native load. When the available economic capacity measure is used, Wildcat Power's market shares range from 22 to 24 percent in the three summer super peak and winter super peak season/load periods and zero percent in the remainder of the season/load periods. Under the available economic capacity measure, Wildcat Power passes the market concentration analysis in all seasons/load periods with HHIs below 1,600.

15. After weighing all of the relevant factors, the Commission finds that, on balance, Wildcat Power's DPT analysis has rebutted the presumption that Wildcat Power has horizontal market power in the APS balancing authority area.

16. As noted above, Wildcat Power's DPT analysis for the APS balancing authority varies depending on whether the economic capacity or available economic capacity measure is used. As the Commission has stated, the DPT does not function like initial screens – i.e., failure of either the economic capacity or available economic capacity analyses does not result in an automatic failure of the test as a whole. Neither measure is definitive; the Commission weighs the results of both the economic capacity and the available economic capacity analyses and considers the arguments of the parties.<sup>16</sup>

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<sup>15</sup> See *Gila River Power, L.P.*, Docket No. ER05-1178-015 (Apr. 5, 2011) (delegated letter order) (April 5 Delegated Order). See also *Gila River Energy Supply, LLC*, Docket No. ER11-3329-000 (May 12, 2011) (delegated letter order); *Arizona Public Service Co.*, Docket No. ER99-4124-025 (Oct. 14, 2010) (delegated letter order). Wildcat Power notes that, “post-transaction, [Wildcat Power] will assume a virtually identical position to that of Gila River pre-transaction by controlling two power blocks at the [same facility] and presents nearly identical results in its DPT analysis” to that accepted in the April 5 Delegated Order. Wildcat Power Application at 9.

<sup>16</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 112.

17. The Commission has recognized that not all generation capacity is available all of the time to compete in wholesale markets and that some accounting for native load requirements is warranted.<sup>17</sup> Available economic capacity accounts for native load requirements. We note that certain utilities retain significant native load obligations in the APS balancing authority area. Under the available economic measure of the DPT, Wildcat Power is not pivotal and does not exceed the 2,500 HHI threshold in any season/load period. While Wildcat Power does have market shares between 22 to 24 percent in four season/load periods, it has zero percent market shares in the remainder of the season/load periods. In addition, the HHIs are below 1,600, indicating a market that is not highly concentrated. Wildcat Power is not pivotal in any season/load period using either the available economic capacity or economic capacity measure. Using the economic capacity measure, Wildcat Power's market shares range from zero to eight percent, but the market is concentrated, with HHIs over 3,000 in each season/load period. After weighing all of the relevant factors, the Commission concludes that, on balance, based on Wildcat Power's DPT analysis in the APS balancing authority area, Wildcat Power has rebutted the presumption of market power and satisfies the Commission's requirements for market-based rate authority regarding horizontal market power.<sup>18</sup>

18. With regard to vertical market power, 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 on file before granting a seller market-based rate authorization.<sup>19</sup> Wildcat Power represents that it and its affiliates do not own any transmission facilities other than those necessary to connect their generation to the grid.<sup>20</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> We note that our grant of market-based rate authority to Wildcat Power is based on Wildcat Power's representation that it was formed for the purpose of owning the power generating assets of a natural gas-fired generating facility located in the APS balancing authority area. In the event that Wildcat Power were not to own generation in the APS balancing authority area and would seek to sell power as a power marketer, Wildcat Power would be required to study any markets where its affiliates own generation.

<sup>19</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

<sup>20</sup> Wildcat Power Application, Solomon Affidavit at 11.

19. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>21</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 physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).<sup>22</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>23</sup>

20. Wildcat Power represents that it and its affiliates do not own, operate or control any natural gas supply, interstate natural gas transportation (which includes interstate natural gas storage), oil supply, and oil transportation. Wildcat Power further represents that it and its affiliates do not own or control any intrastate natural gas transportation, intrastate natural gas storage or distribution sites for generation capacity development; and sources of coal supplies and the transportation of coal supplies such as barges and rail cars. Consistent with Order No. 697, Wildcat Power affirmatively states that it has not erected barriers to entry into any relevant market and will not erect barriers to entry into any relevant market.

21. The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.<sup>24</sup> Based on Wildcat Power's representations, we find that Wildcat Power satisfies the Commission's requirements for market-based rates regarding vertical market power.

22. Wildcat Power requests a number of waivers and authorizations typically granted by the Commission to market-based rate sellers. In particular, Wildcat Power 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 related reporting requirements of Parts 41, 101, and 141, except sections 141.14 and 141.15; and

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<sup>21</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

<sup>22</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

<sup>23</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>24</sup> *Id.* P 446.

(3) blanket authorization under Part 34 for all future issuances of securities and assumptions of liability.

23. The Commission will grant these requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.<sup>25</sup>

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

24. Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is granted. Wildcat Power 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 with the corporate purposes of Wildcat Power, compatible with the public interest, and reasonably necessary or appropriate for such purposes. 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 Wildcat Power's issuances of securities or assumptions of liabilities.

25. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rate authorization must electronically file an Electric Quarterly Report (EQR) with the Commission 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>26</sup>

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<sup>25</sup> We note that the Commission has examined and approved the continued applicability of waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141), as well as the continued applicability of blanket authorization for the issuance of securities and the assumption of liabilities (18 C.F.R. Part 34). *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 984-985 (regarding waiver of Parts 41, 101, and 141), and P 999-1000 (regarding blanket approval under Part 34).

<sup>26</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, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*,

(continued...)

Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.<sup>27</sup>

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

27. Additionally, Wildcat Power 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>28</sup>

28. In Order No. 697, the Commission created two categories of sellers.<sup>29</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 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>30</sup>); that are not affiliated with anyone that

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Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit EQRs 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>27</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2011). 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.

<sup>28</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(a) (2011).

<sup>29</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

<sup>30</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities*

(continued...)

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>31</sup> Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file an updated market power analysis.<sup>32</sup>

29. Wildcat Power states that it meets the criteria for Category 1 seller status in all regions except the Southwest region. Specifically, for all regions in which it is seeking Category 1 seller status, Wildcat Power states that it: (1) owns, operates, controls or is affiliated with 500 MW or less of generation in aggregate per region; (2) does not own, operate, or control transmission facilities other than the limited equipment necessary to connect individual generating facilities to the transmission grid; and (3) is not affiliated with any entity that owns, operates, or controls transmission facilities. Wildcat Power also represents that it and its affiliates are not affiliated with a franchised public utility. In addition, Wildcat Power states that its application for market-based rate authority does not raise any vertical market power issues.

30. Based on Wildcat Power's representations, we grant Wildcat Power Category 1 seller status in all regions except the Southwest region; however, the Commission reserves the right to require an updated market power analysis at any time for those regions.<sup>33</sup> Further, based on its representations, we designate Wildcat Power as a Category 2 seller in the Southwest region; thus, Wildcat Power must file an updated market power analysis in the Southwest region in compliance with the regional reporting schedule adopted in Order No. 697.<sup>34</sup>

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*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, *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 relevant 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>31</sup> 18 C.F.R. § 35.36(a) (2011).

<sup>32</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

<sup>33</sup> *Id.* P 853.

<sup>34</sup> *Id.* P 882.

31. Wildcat Power's request for waiver of the prior notice requirement for its market-based rate tariff is hereby granted, with an effective date of May 6, 2011, as requested.

By direction of the Commission.

Kimberly D. Bose,  
Secretary.