

137 FERC ¶ 61,189  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

NEPM II, LLC

Docket Nos. ER11-4462-000  
ER11-4462-001  
ER11-4462-002

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND REQUESTS  
FOR WAIVERS

(Issued December 9, 2011)

1. In this order, we grant NEPM II, LLC (NEPM II) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates in the Northeast region, effective November 1, 2011, as requested. We also accept the Simultaneous Transmission Import Limit (SIL) values for the December 2008-November 2009 study period for the Long Island submarket. Also, as discussed below, we grant NEPM II's requests for waivers commonly granted to similar market-based rate sellers.
2. Additionally, we designate NEPM II as a Category 2 seller in the Northeast region and, therefore, NEPM II must file updated market power analyses for the Northeast region in compliance with the regional reporting schedule adopted in Order No. 697.<sup>1</sup>

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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 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), *aff'd sub nom. Montana Consumer Counsel v. FERC*, No. 08-71827, 2011 U.S. App. LEXIS 20724 (9<sup>th</sup> Cir. Oct. 13, 2011).

## **I. Background**

3. On September 8, 2011, as amended on September 8, 2011, and October 12, 2011, pursuant to section 205 of the Federal Power Act,<sup>2</sup> NEPM II filed an application for market-based rate authority with an accompanying market-based rate tariff providing for the sale of electric energy, capacity, and ancillary services at market-based rates in the Northeast region.<sup>3</sup> NEPM II requests waiver of the prior notice requirement and certain waivers and blanket approvals that, according to NEPM II, are commonly granted to similar market-based rate applicants.

4. NEPM II states that it is a Delaware limited liability company and a wholly-owned subsidiary of NextEra Energy Resources, LLC (NextEra Energy), which is the merchant power subsidiary of NextEra Energy, Inc (NextEra). NEPM II states that NextEra Energy's subsidiaries own or operate merchant generating facilities located in 26 states and Canada with a combined net generating capacity of over 18,000 megawatts (MW). NEPM II also states that NextEra owns Florida Power & Light Company, a franchised public utility that provides wholesale and retail electric service to customers in the State of Florida. Florida Power & Light Company owns approximately 22,000 MW of generation in peninsular Florida.

5. NEPM II represents that it is a power marketer that does not own or control any generation or transmission facilities. NEPM II states that its business initially will be limited to the Northeast regional markets and, accordingly, it seeks authority to sell electric energy, capacity and certain ancillary services only in the Northeast region.

## **II. Notice of Filing**

6. Notice of NEPM II's Filing in Docket No. ER11-4462-000 was published in the *Federal Register*, 76 Fed. Reg. 57,725 (2011), with interventions and comments due on or before September 29, 2011. None was filed.

7. Notice of NEPM II's request for blanket authorization under Part 34 was separately published in the *Federal Register*, 76 Fed. Reg. 57,030 (2011), with interventions or protests due on or before September 28, 2011. None was filed.

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<sup>2</sup> 16 U.S.C. § 824d (2006).

<sup>3</sup> NEPM II requests authorization to sell ancillary services in the markets administered by PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc. (NYISO), and ISO New England, Inc. (ISO-NE). NEPM II also requests authorization to engage in the sale of certain ancillary services as a third-party provider elsewhere in the Northeast Region.

8. Notice of NEPM II's Filing in Docket No. ER11-4462-001 was published in the *Federal Register*, 76 Fed. Reg. 58,259 (2011), with interventions and comments due on or before September 29, 2011. None was filed.

9. Notice of NEPM II's Filing in Docket No. ER11-4462-002 was published in the *Federal Register*, 76 Fed. Reg. 64,936 (2011), with interventions and comments due on or before November 2, 2011. None was filed.

### **III. Discussion**

10. As discussed below, we will grant NEPM II's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates in the Northeast region and NEPM II's request for certain waivers.

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

11. 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>4</sup> As discussed below, we find that NEPM II satisfies the Commission's standards for market-based rate authority in the Northeast region and will accept NEPM II's market-based rate tariff filed October 12, 2011,<sup>5</sup> effective November 1, 2011, as requested.<sup>6</sup>

##### **1. Horizontal Market Power**

12. 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

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<sup>4</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

<sup>5</sup> We note that when NEPM II submitted revised tariffs on September 8, 2011 and October 12, 2011 through the eTariff filing system, NEPM II did not properly target the tariffs that it had filed. Therefore, the tariffs filed on September 8, 2011 remained pending before the Commission despite the October 12, 2011 Filing. Accordingly, we will reject the tariffs filed on September 8, 2011 as moot and accept the tariff filed on October 12, 2011.

<sup>6</sup> We grant NEPM's request for waiver of the Commission's prior notice requirement for good cause shown to permit its market-based rate tariff to become effective on November 1, 2011. *See Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

<sup>7</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62.

Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.<sup>8</sup>

13. NEPM II performed indicative screen analyses for the ISO-NE and PJM markets and the PJM-East and Long Island submarkets. NEPM II states that with certain exceptions, it relies on data in Backbone Mountain Windpower, LLC's market power analysis<sup>9</sup> to demonstrate that NEPM II passes both the pivotal supplier and the wholesale market share screens in the Northeast region. NEPM II explains that the market share screen analysis for the ISO-NE and PJM markets as well as the PJM-East and Long Island submarkets indicate that its market shares are less than 20 percent.<sup>10</sup> NEPM II also states that its pivotal supplier screens indicate that the net uncommitted supply in the ISO-NE and PJM markets as well as the PJM-East and Long Island submarkets exceed NEPM II's uncommitted capacity in these markets.<sup>11</sup>

14. We have reviewed NEPM II's pivotal supplier and wholesale market share screens and determined that NEPM II passes both the pivotal supplier and market share screen analysis in the ISO-NE and PJM markets as well as in the PJM-East and Long Island submarkets. Accordingly, we find that NEPM II satisfies the Commission's requirements for market-based rates regarding horizontal market power in the Northeast region.

15. We note that NEPM II's analyses of the ISO-NE market, the PJM market, and the PJM-East submarket rely on SIL values previously accepted by the Commission.<sup>12</sup> For

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

<sup>9</sup> *Backbone Mountain Windpower, LLC*, Docket No. ER10-1838-001 (Dec. 9, 2011) (delegated letter order) (accepting the market power analysis in the Northeast region). The Director, Division of Electric Power Regulation-West, issued the delegated letter order in Docket No. ER10-1838-001 concurrently with this order.

<sup>10</sup> NEPM II's market shares for these relevant markets are as follows: ISO-NE market shares range from 19.52 percent to 19.7 percent; PJM market shares range from 2.5 percent to 3.1 percent; Long Island submarket shares range from 9.8 percent to 12.4 percent; and the PJM-East submarket shares range from 7.5 percent to 7.7 percent. *See* NEPM II September 8, 2011 Application, Docket No. ER11-4462-000, Appendix A, Ex. JRS-5, JRS-7, JRS-9.

<sup>11</sup> *Id.* at Ex. JRS-4, JRS-6, JRS-8.

<sup>12</sup> The Commission accepted SIL values for the ISO-NE and PJM markets as well as the PJM-East submarket in *Atlantic Renewables Projects II*, 135 FERC ¶ 61,227 (2011).

the Long Island submarket, NEPM II's analysis relies on SIL values prepared by the NYISO.<sup>13</sup> To determine SIL values for this submarket, NYISO approximated the transfer capability into the Long Island submarket by calculating the transfer capability of the controlled ties into that submarket. We find that the use of this data is acceptable for the purpose of setting SIL values for the Long Island submarket and, therefore, will accept these SIL values for this submarket.<sup>14</sup>

16. Future filers submitting screens for the Long Island submarket for the December 2008 – November 2009 study period are encouraged to use these Commission-accepted SIL values. In the alternative, a filer may propose different SIL values provided that its accompanying SIL studies comply with Commission directives and that the filer fully supports the values used and explains why the Commission should consider a different SIL value for the Long Island submarket other than the Commission-accepted SIL values provided herein.

## 2. Vertical Market Power

17. The Commission requires, in cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, that there be a Commission-approved Open Access Transmission Tariff (OATT) on file or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.<sup>15</sup>

18. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>16</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; or sources of coal supplies or the transportation of coal supplies, such as barges and rail cars (collectively, inputs to electric power production).<sup>17</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

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<sup>13</sup> See NYISO, Presentation on Simultaneous Transmission Import Limit Determination, Docket No. AD10-2-001 (filed on Mar. 3, 2011).

<sup>14</sup> The seasonal SIL values for the Long Island submarket accepted herein are: Winter 1570 MW; Spring 1670 MW; Summer 1670 MW; and Fall 1670 MW.

<sup>15</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

<sup>16</sup> *Id.* P 440.

<sup>17</sup> *Id.* P 447; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

the relevant market.<sup>18</sup> In Order No. 697, 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 interveners to demonstrate otherwise.<sup>19</sup>

19. NEPM II states that NextEra owns Florida Power & Light Company, a franchised public utility that provides wholesale and retail electric service to customers in the State of Florida, and U.S. Transmission Holdings, LLC, which owns New Hampshire Transmission and the Seabrook substation located in Seabrook, New Hampshire. Florida Power & Light Company owns and operates jurisdictional transmission facilities in the State of Florida and NEPM II states that service over Florida Power & Light Company's transmission facility is administered pursuant to the Florida Power & Light Company's OATT on file with the Commission.<sup>20</sup> NEPM II explains that ISO-NE has operational control of the regional transmission facilities associated with the Seabrook substation.<sup>21</sup> NEPM II further explains that its affiliates Sagebrush, a California Partnership, Sky River, LLC and Peetz Logan Interconnect, LLC also have OATTs on file with the Commission that adequately mitigate any transmission market power.<sup>22</sup>

20. With the exception of a 1,000 foot natural gas pipeline owned by FPLE Forney Pipeline, L.P., NEPM II states that it and its affiliates do not own or control intrastate natural gas transportation, intrastate natural gas storage or distribution facilities. NEPM II explains that the pipeline owned by FPLE Forney Pipeline L.P. is considered a Hinshaw Pipeline and therefore exempt from Commission jurisdiction pursuant to section 1(c) of the Natural Gas Act. NEPM II affirmatively states that it has not erected barriers to entry into the relevant markets and will not erect barriers to entry into such markets.<sup>23</sup>

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<sup>18</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>19</sup> *Id.* P 446.

<sup>20</sup> *Fla. Power & Light Co.*, 92 FERC ¶ 61,241 (2000).

<sup>21</sup> *See New England Power Pool*, 83 FERC ¶ 61,045 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001).

<sup>22</sup> *Sagebrush, a Cal. P'ship*, 130 FERC ¶ 61,093, *order on reh'g*, 132 FERC ¶ 61,234 (2010); *Sky River, LLC*, 136 FERC ¶ 61,162 (2011); *Peetz Logan Interconnect, LLC*, 136 FERC ¶ 61,075 (2011).

<sup>23</sup> We interpret this statement to apply to NEPM II and its affiliates. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

21. Based on NEPM II's representations, we find that NEPM II satisfies the Commission's requirements for market-based rates regarding vertical market power.

### **3. Waivers, Approvals, and Authorizations**

22. NEPM II requests the following waivers and authorizations: (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.

23. We will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.<sup>24</sup> Notwithstanding the waiver of the accounting and reporting requirements, we expect NEPM II to keep its accounting records in accordance with generally accepted accounting principles.

### **B. Reporting Requirements**

24. Consistent with the procedures that 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

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<sup>24</sup> We note that the Commission has 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 984-985 (regarding waiver of Parts 41, 101, and 141), 999-1000 (regarding blanket approval under Part 34).

calendar quarter.<sup>25</sup> Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.<sup>26</sup>

25. Additionally, NEPM II 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>27</sup>

26. In Order No. 697, the Commission created two categories of sellers.<sup>28</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); 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

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<sup>25</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 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>26</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>27</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 (2011).

<sup>28</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

issues.<sup>29</sup> Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.<sup>30</sup>

27. Based on NEPM II's representations, we designate NEPM II as a Category 2 seller in the Northeast region; thus, NEPM II must file updated market power analyses for the Northeast region in compliance with the regional reporting schedule adopted in Order No. 697.<sup>31</sup> The Commission reserves the right to require an updated market power analysis at any time.<sup>32</sup>

The Commission orders:

(A) NEPM II's market-based rate tariff is hereby accepted for filing, effective November 1, 2011, as requested, as discussed in the body of this order.

(B) NEPM II's market-based rate tariffs filed on September 8, 2011 are hereby rejected as moot, 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, with the exception of sections 141.14 and 141.15, is hereby granted.

(E) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted. NEPM II 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 NEPM II, 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

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<sup>29</sup> 18 C.F.R. § 35.36(a) (2011).

<sup>30</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

<sup>31</sup> *Id.* P 882.

<sup>32</sup> *Id.* P 853.

continued Commission approval of NEPM II's issuance of securities or assumptions of liability.

(G) The specific Commission-accepted SIL values identified in this order are hereby accepted for purposes of analyzing updated market power analyses for the Long Island submarket, as discussed in the body of this order.

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

By the Commission. Commissioner Spitzer is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.