

140 FERC ¶ 61,014
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Bounce Energy PA, LLC	Docket Nos. ER12-1152-000 ER12-1152-002
Bounce Energy NY, LLC	Docket Nos. ER12-1153-000 ER12-1153-002

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION

(Issued July 10, 2012)

1. In this order, the Commission grants Bounce Energy PA, LLC and Bounce Energy NY, LLC (collectively, the Bounce Energy Companies) authority to make wholesale sales of electric energy, capacity and ancillary services at market-based rates, effective July 10, 2012. Additionally, we find that each of the Bounce Energy Companies meets the criteria for a Category 1 seller in the Northeast, Northwest, Southeast, Southwest, Southwest Power Pool, and Central regions, and are so designated.¹

I. Background

2. On February 24, 2012, as amended on May 10, 2012, the Bounce Energy Companies each filed an initial application for market-based rate authority with an accompanying tariff providing for the sale of energy, capacity, and ancillary services at

¹ See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *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*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Public Citizen, Inc. v. FERC*, 2012 U.S. LEXIS 4820 (U.S. June 25, 2012).

market-based rates.² The Bounce Energy Companies request waivers commonly granted to other market-based rate applicants.

3. The Bounce Energy Companies represent that Bounce Energy PA, LLC and Bounce Energy NY, LLC are each limited liability companies with their principal places of business located in Houston, Texas. The Bounce Energy Companies state that Bounce Energy PA, LLC intends to participate in the wholesale electric markets operated by PJM and that Bounce Energy NY, LLC intends to participate in the wholesale electric markets operated by the NYISO.

4. The Bounce Energy Companies state they are each a wholly-owned subsidiary of Bounce Energy, Inc. (Bounce Energy), a retail electric provider serving residential and business customers in the State of Texas. The Bounce Energy Companies represent that the outstanding voting securities of Bounce Energy are owned by individual investors and entities, with each holding a minority interest.

5. The Bounce Energy Companies state that one of Bounce Energy's minority interest owners, Whale Capital, LP (Whale Capital), owns greater than 10 percent of the outstanding voting securities in Bounce Energy. The principal of Whale Capital, Michael P. Whalen (Mr. Whalen), owns an interest in Vista Energy Marketing, LP (Vista Marketing).

6. The Bounce Energy Companies note that the Commission has expressed concerns regarding the potential for involvement of Mr. Whalen in the affairs of jurisdictional public utilities.³ They state that they are willing to make and keep similar commitments

² The Bounce Energy Companies request authorization to sell ancillary services in the markets administered by California Independent System Operator Corporation, ISO New England, Inc., Midwest Independent Transmission System Operator, Inc., New York Independent System Operator, Inc. (NYISO), and PJM Interconnection, LLC (PJM). They also request authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

³ Mr. Whalen previously pled guilty to charges involving the delivery of false, misleading or inaccurate reports of market information to natural gas price indices. In its market-based rate application, Vista Marketing made certain representations and commitments regarding its management and operations and how it intends to ensure compliance with the Commission's rules and regulations. In the order granting Vista Marketing market-based rate authority, the Commission accepted these commitments as appropriate safeguards against Vista Marketing's employees engaging in market manipulation. In addition, the Commission informed Vista Marketing that it is subject to

(continued...)

precluding such involvement as were made by Vista Marketing in relation to the Commission's grant of market-based rate authority to Vista Marketing. Specifically, the Bounce Energy Companies represent and commit that:

- Mr. Whalen has no role in Bounce Energy or the Bounce Energy Companies (together, Bounce), other than indirectly through his investment in Whale Capital and its minority equity interest in Bounce Energy;
- The Bounce management team has sole management authority over Bounce, subject to the direction of the Bounce Energy board of directors, and Mr. Whalen is not a member of the Bounce Energy board of directors or the Bounce management team;
- Other than by way of the power to direct Whale Capital's exercise of voting rights associated with its minority interest in Bounce Energy, Inc. (as discussed below, these voting rights have been extinguished for the time being, with the exchange of Whale Capital's voting shares for non-voting shares), Mr. Whalen has no right to participate in the management of the conduct of Bounce Energy's business and affairs, nor any power or authority to act for or on behalf of Bounce Energy in any respect whatsoever;
- Mr. Whalen has no day-to-day operational responsibilities and has no other managerial or operational responsibilities in Bounce;
- Mr. Whalen will not take part in the management of Bounce Energy's business and also will have no power to sign for, or to bind, Bounce Energy. Thus, Mr. Whalen is prohibited by this commitment from engaging in the management of Bounce Energy, which, in turn, eliminates his ability to exert any control over the management or day-to-day operations of the Bounce Energy Companies;
- Mr. Whalen is not now an officer of Bounce;

audit to ensure its compliance with the representations and commitments, and with Commission rules, regulations and policies. The Commission also directed Vista Marketing to report to the Commission if the terms of any of the representations and commitments change. *See Vista Energy Marketing, L.P.*, 128 FERC ¶ 61,188 (2009) (Vista Marketing Order).

- Mr. Whalen has no right or authority to control or influence or attempt to exert control or influence control over the Bounce Energy Companies, or the 7,057 voting shares of Series A Preferred Stock of Bounce Energy, Inc. held by Whale Capital that have been exchanged for approximately 7,057 non-voting shares of Series A-1 Preferred Stock. The shares of Series A-1 Preferred Stock will remain non-voting for a period of two years after the date of an order approving an Agreement with the Office of Enforcement.⁴ After the two year period expires, the Series A-1 Preferred Stock may be converted to voting shares, except in the event conversion would or likely would result in a violation of any other applicable law, rule, regulation, or order of any court or other government agency;
- In order to ensure that all relevant Bounce employees are fully cognizant of the Commission's rules and regulations, all Bounce employees with wholesale electric market responsibilities will undergo comprehensive Commission compliance training prior to participating in Commission-jurisdictional markets;
- Bounce will, at all times, have an experienced Compliance Officer to monitor compliance with the Commission's rules and regulations;
- The Compliance Officer is tasked with monitoring all of Bounce's activities in order to ensure compliance with the Commission's rules and regulations and with bringing any concerns regarding Bounce's trading and activities to the attention of the Office of Enforcement at the Commission in the event he observes any activities or practices that cause concern or in any way may be in violation of the Commission's rules and regulations;

⁴ On May 24, 2012, the Commission approved a Stipulation and Consent Agreement (Agreement) between the Office of Enforcement, Vista Marketing and Mr. Whalen. *In re Vista Energy Marketing, L.P.*, 139 FERC ¶ 61,154 (2012). The Agreement resolved the Office of Enforcement's investigation under Part 1b of the Commission's regulations into whether Vista Marketing accurately described Mr. Whalen's role in Vista Marketing in connection with Vista Marketing's application for market-based rate authority. The Agreement also resolved an investigation into whether Vista Marketing and Mr. Whalen violated the terms of the Vista Marketing Order.

- The activities of Bounce's Senior Vice President, Operations (who oversees Bounce's wholesale trading activities) will be monitored by the Compliance Officer;
- The Compliance Officer will not trade natural gas or electricity or direct others to trade natural gas or electricity for Bounce;
- If the individual currently serving as Compliance Officer leaves Bounce or otherwise ceases to perform his duties as Compliance Officer, Bounce will notify the Commission within 30 days of his departure and will inform the Commission as to the name and relevant background of the new Compliance Officer.⁵

7. On April 13, 2012, the Director, Division of Electric Power Regulation – West, issued a data request seeking information about the Bounce Energy Companies' commitments and the affiliations of the Bounce Energy Companies' owners.⁶ Among other things, the data request asked the recipients to explain “what assurances and safeguards, if any, are in place to ensure that these officers will not act as conduits of information between the aforementioned individual investor [Mr. Whalen] and the managers of the day-to-day activities of the Bounce Energy Companies.”

8. On May 10, 2012, the Bounce Energy Companies filed their response to the data request (May 10 Response). In the response, the Bounce Energy Companies revised their commitments to state that Mr. Whalen “is not now, nor will he be in the future, an officer of the Bounce Energy Companies or Bounce Energy.”

9. In the May 10 Response, the Bounce Energy Companies also represent that none of the officers of the Bounce Energy Companies hold, or have held, positions with Vista Marketing.

10. In the May 10 Response, the Bounce Energy Companies represent that Mr. Whalen's business relationship with the Bounce Energy Companies' officers is limited to his role as a shareholder of Bounce Energy. The Bounce Energy Companies further state that on May 10, 2012, the Bounce Energy Companies issued a compliance directive to their officers. The Bounce Energy Companies state that the compliance directive

⁵ These commitments are from the application, as amended.

⁶ *Bounce Energy PA, LLC.*, Docket No. ER12-1152-000 (Apr. 13, 2012) (delegated letter order).

identifies the commitments made in the Bounce Energy Companies' market-based rate applications, establishes an express "no-conduit rule," and requires strict compliance with those policies.

11. In the May 10 Response, the Bounce Energy Companies also amended their market-based rate applications to inform the Commission that on April 30, 2012, Bounce Energy and Whale Capital converted all of Whale Capital's voting shares in Bounce Energy to non-voting shares for a period of two years or longer. The Bounce Energy Companies state that 7,057 voting shares of Series A Preferred Stock of Bounce Energy, Inc. held by Whale Capital have been exchanged for approximately 7,057 non-voting shares of Series A-1 Preferred Stock. The Bounce Energy Companies explain that the shares of Series A-1 Preferred Stock will remain non-voting for a period of two years after the date of an order approving the Agreement and after the two year period expires, the Series A-1 Preferred Stock may be converted to voting shares, except in the event conversion would, or likely would, result in a violation of any other applicable law, rule, regulation, or order of any court or other government agency.

II. Notice of Filing and Responsive Pleadings

12. Notice of the Bounce Energy Companies' market-based rate applications was published in the *Federal Register*, 77 Fed. Reg. 13,113-114, with interventions or protests due on or before March 16, 2012. None was filed.

13. Notice of the Bounce Energy Companies' requests for blanket authorization under Part 34 was separately published in the *Federal Register*, 77 Fed. Reg. 12,829, with interventions and protests due on or before March 19, 2012. None was filed.

14. Notice of the May 10 Response was published in the *Federal Register*, 77 Fed. Reg. 29,628, with interventions or protests due on or before June 1, 2012. None was filed.

III. Discussion

15. As discussed below, we will grant the Bounce Energy Companies' requests for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and we will accept the Bounce Energy Companies' market-based rate tariff, effective July 10, 2012. We will also grant the Bounce Energy Companies' requests for certain waivers.

A. Market-Based Rate Authorization

16. 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.⁷

1. Horizontal Market Power

17. The Commission adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.⁸

18. The Bounce Energy Companies state that neither the Bounce Energy Companies nor any of their affiliates owns, operates, or controls any electric generation facilities. Based on the Bounce Energy Companies' representations, we find that the Bounce Energy Companies satisfy the Commission's requirements for market-based rate authorization regarding horizontal market power.

2. Vertical Market Power

19. 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 or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.⁹

20. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁰ 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 coal supplies (collectively, inputs to electric power production).¹¹ The Commission also requires sellers to make an affirmative statement

⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

⁸ *Id.* P 62.

⁹ *Id.* P 408.

¹⁰ *Id.* P 440.

¹¹ *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

that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.¹²

21. The Bounce Energy Companies represent that neither they nor any of their affiliates own, operate, or control any transmission assets.

22. With regard to other barriers to entry, the Bounce Energy Companies represent that neither the Bounce Energy Companies nor any of their affiliates own or control intrastate natural gas transportation, storage or distribution facilities; any unique sites for generation capacity development; physical coal supply sources and ownership or control over who may access transportation of coal supplies; or other essential resources or inputs that could be used to restrict market entry by competing power suppliers.

23. The Bounce Energy Companies also affirmatively state that neither the Bounce Energy Companies nor any of their affiliates have erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

24. Based on the Bounce Energy Companies' representations, the Commission finds that the Bounce Energy Companies satisfy the Commission's requirements for market-based rate authorization regarding vertical market power.

B. Additional Commitments

25. As noted above, in their market-based rate applications and the May 10 Response, the Bounce Energy Companies made certain additional representations and commitments regarding their management and operations and how they intend to ensure compliance with the Commission's rules and regulations. We will accept these representations and commitments as additional safeguards against Bounce Energy's and the Bounce Energy Companies' employees engaging in violations of Commission rules, regulations, and orders. As such, for so long as Mr. Whalen is associated with the Bounce Energy Companies, we will monitor the Bounce Energy Companies' compliance with these representations and commitments on a regular basis. In addition, we note that Mr. Whalen is also subject to comply with the terms of the Agreement with the Office of Enforcement. We direct the Bounce Energy Companies to report to the Commission if the terms of any of the representations and commitments as accepted herein undergo a

control over who may access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

change, including any change in the voting status of the Series A Preferred Stock of Bounce Energy, Inc. held by Whale Capital or any concerns observed by the Compliance Officer as discussed above. Such report should be submitted no later than 30 days of the date of such change.

C. Waiver Requests

26. The Bounce Energy Companies request the following waivers and authorizations: (1) waiver of the filing requirements of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to 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 of the Commission's accounting and periodic reporting requirements except sections 141.14 and 141.15; and (3) blanket authorization under section 204 of the FPA¹³ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

27. The Commission will grant the requested waivers and authorizations consistent with those granted to some other entities with market-based rate authorizations.¹⁴ Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects the Bounce Energy Companies to keep their accounting records in accordance with generally accepted accounting principles.

28. We will direct the Bounce Energy Companies to submit a compliance filing containing revisions to the limitations and exemptions sections of their market-based rate tariffs to include a citation to this order.¹⁵

¹³ 16 U.S.C. § 824c (2006).

¹⁴ It should be noted that the Commission has examined and approved the continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141), as well as continued applicability of the 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 PP 984-985 (regarding waiver of Parts 41, 101, and 141), 999-1000 (regarding blanket approval under Part 34).

¹⁵ *See* Order No. 697 FERC Stats. & Regs. ¶ 31,252 at App. C; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 384. *See also* *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275, at P 8 (2007). These tariff revisions may be filed no later than the next time the Bounce Energy Companies make a market-based rate filing with the Commission.

D. Reporting Requirements

29. 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 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.¹⁶ Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.¹⁷

30. Additionally, the Bounce Energy Companies 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.¹⁸

31. In Order No. 697, the Commission created two categories of sellers.¹⁹ 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

¹⁶ *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>.

¹⁷ 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.

¹⁸ *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).

¹⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888²⁰); 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.²¹ Sellers that do not fall into Category 1 are designated as Category 2 and are required to file updated market power analyses.²²

32. The Bounce Energy Companies represent that they meet the criteria for Category 1 seller status in all regions. The Bounce Energy Companies state that they do not own, operate or control any generation capacity in any region. The Bounce Energy Companies further state that they do not own, operate or control transmission facilities in any region. Further, the Bounce Energy Companies state that they are not affiliated with a franchised public utility in any region and do not raise any other vertical market power concerns. Based on the Bounce Energy Companies' representations, we designate the Bounce Energy Companies as Category 1 sellers in the Northeast, Northwest, Southeast, Southwest, Southwest Power Pool, and Central regions. The Commission also reserves the right to require an updated market power analysis at any time for these regions.²³

The Commission orders:

(A) The Bounce Energy Companies' market-based rate tariffs are accepted for filing, effective July 10, 2012, as discussed in the body of this order.

²⁰ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; 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, *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).

²¹ 18 C.F.R. § 35.36(a)(2) (2011).

²² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

²³ *Id.* P 853.

(B) The Bounce Energy Companies are hereby directed to revise the limitations and exemptions section of their tariffs to include a citation to 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, are 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. The Bounce Energy Companies are hereby granted authority to issue securities and assume obligations or liabilities as guarantors, indorsers, sureties, 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 the Bounce Energy Companies, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of the Bounce Energy Companies' issuances of securities or assumptions of liabilities.

(G) The Bounce Energy Companies' representations and commitments regarding their management and operations are hereby accepted and the Bounce Energy Companies are hereby directed to report any change to the terms of these representations and commitments within 30 days of such a change, as discussed in the body of this order.

(H) The Bounce Energy Companies are subject to audit to determine whether they are in compliance with the representations, conditions and requirements upon which the authorizations are granted and with Commission rules, regulations and policies. In the event of a violation, the Commission may take action within the scope of its oversight and enforcement authority.

(I) The Bounce Energy Companies are required to file EQRs in compliance with Order No. 2001. If the effective dates of the Bounce Energy Companies' market-based rate tariffs fall within a quarter of the year that has already expired, the Bounce Energy Companies' EQRs for the expired quarter(s) are due within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.