

144 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NEXTENERGY SERVICES LLC

Docket No. ER13-1661-001

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION

(Issued August 22, 2013)

1. In this order, the Commission grants NEXTENERGY SERVICES LLC (NextEnergy) authority to make wholesale sales of electric energy and capacity at market-based rates, effective August 10, 2013, as requested. We also grant NextEnergy's request for other waivers commonly granted to market-based rate sellers.

2. Additionally, we find that NextEnergy meets the criteria for a Category 1 seller in all regions and is so designated.¹

I. Background

3. On June 11, 2013, as amended July 1, 2013, pursuant to section 205 of the Federal Power Act (FPA),² NextEnergy filed an application for market-based rate authority with an accompanying tariff providing for the sale of electric energy and capacity at market-based rates.

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, at PP 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*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

² 16 U.S.C. § 824d (2006).

4. NextEnergy represents that it is a New York Limited Liability Company managed by its owners with its principal place of business in Astoria, New York. NextEnergy states that it plans to sell electricity and natural gas to retail end use customers, both residential and commercial located in the New York Independent System Operator, Inc. (NYISO) market. NextEnergy states that from time to time it will purchase energy and capacity in excess of amounts required to service its retail customer loads and that it plans to sell such excess energy and capacity into the wholesale market administered by NYISO. NextEnergy states that neither it nor its members own or operate any generation or transmission facilities, sit on the board of any energy companies, or hold interests in any other energy-related companies. NextEnergy further states that it has no affiliates at this time.

II. Notice of Filing and Responsive Pleadings

5. Notice of NextEnergy's filing was published in the *Federal Register*,³ with interventions and comments due on or before July 22, 2013. On June 28, 2013, NextEra Energy, Inc. (NextEra Energy) filed a motion to intervene and protest. NextEra Energy states that NextEnergy's name is likely to create confusion among consumers and market participants in the energy industry who may think that NextEnergy is affiliated with NextEra Energy. NextEra Energy states that it is not asking the Commission to adjudicate the trademark dispute regarding the name, which they state is beyond the Commission's jurisdiction. However, NextEra Energy requests that the Commission "consider conditioning any issuance of market-based rate authority to NextEnergy on it having to change its name if and when it relents in the trademark dispute with NextEra Energy, or is forced by a court to cease this apparent trademark infringement."⁴

6. Notice of NextEnergy's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*, 78 Fed. Reg. 38,026 (2013), with interventions or protests due on or before July 5, 2013. None was filed.

III. Discussion

7. As discussed below, we will grant NextEnergy's request for authorization to make wholesale sales of electric energy and capacity at market-based rates and also its request for certain waivers.

³ 78 Fed. Reg. 36,766; 78 Fed. Reg. 41,793 (2013).

⁴ NextEra Energy Protest at 3-4.

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), NextEra Energy's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Analysis

1. Market-Based Rate Authorization

9. 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.⁵

a. Horizontal Market Power

10. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.⁶ The 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.⁷

11. NextEnergy represents that it does not own, operate, or control any electric generation facilities. NextEnergy further represents that consequently it has no uncommitted capacity attributed to it. Based on NextEnergy's representations, we find that NextEnergy satisfies the Commission's requirements for market-based rate authorization regarding horizontal market power.

b. Vertical Market Power

12. 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.⁸

⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

⁶ *Id.* P 62.

⁷ *Id.* PP 33, 62-63.

⁸ *Id.* P 408.

13. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.⁹ 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).¹⁰ 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.¹¹ 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.¹²

14. NextEnergy represents that it does not own, operate, or control any transmission assets.

15. With regard to other barriers to entry, NextEnergy represents that it does not own or control intrastate natural gas transportation, storage or distribution facilities; any 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.

16. NextEnergy also affirmatively states that it has not and will not erect barriers to entry into the relevant market.

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

2. Other Waivers Approvals and Authorizations

18. NextEnergy requests the following waivers and authorizations: (1) waiver of the filing requirements of subparts B and C of Part 35 of the Commission's regulations, 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 of the Commission's regulations, except

⁹ *Id.* P 440.

¹⁰ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

¹² *Id.* P 446.

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.

19. The Commission will grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.¹⁴ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects NextEnergy to keep its accounting records in accordance with generally accepted accounting principles.

3. Reporting Requirements

20. 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.¹⁵

¹³ 16 U.S.C. § 824c (2006).

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

¹⁵ *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*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (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>.

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

21. Additionally, NextEnergy 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.¹⁷

22. In Order No. 697, the Commission created two categories of sellers.¹⁸ 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. 888¹⁹); 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

¹⁶ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2013). 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.

¹⁷ *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 (2013).

¹⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

¹⁹ *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).

issues.²⁰ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.²¹

23. NextEnergy represents that it meets the criteria for Category 1 Seller status in all regions because: (1) it does not own or control generation in any region; (2) it does not own, operate, or control transmission facilities; (3) it is not affiliated with a franchised public utility; and (4) it does not raise any other vertical market power issues.

24. Based on NextEnergy's representations, we designate it as a Category 1 seller in all regions.

4. Other Matters

25. Finally, we note that NextEra Energy's trademark objection to NextEnergy's name is beyond the scope of our review of market-based rate applications. The Commission has no authority under the FPA, 16 U.S.C. § 824 *et seq.* (2006), to direct the modification of or otherwise limit the name a filing party chooses to call itself. However, in the event that NextEnergy or any other market-based rate seller changes its name, it is required to report this to the Commission in a notice of succession filing within 30 days of the date of the name change, pursuant to section 35.16 of the Commission's regulations.²²

The Commission orders:

(A) NextEnergy's market-based rate tariff is hereby accepted for filing, effective August 10, 2013, as discussed in the body of this order.

(B) 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.

(C) 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.

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

²⁰ 18 C.F.R. § 35.36(a) (2013).

²¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

²² 18 C.F.R. § 35.16 (2013).

such issue or assumption is for some lawful object within the corporate purposes of NextEnergy, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(E) 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 NextEnergy's issuance of securities or assumptions of liability.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.