

148 FERC ¶ 61,017
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

The Dow Chemical Company
Union Carbide Corporation

Docket Nos. ER14-1348-002
ER14-1349-002

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND DENYING
WAIVER OF PRIOR NOTICE REQUIREMENT

(Issued July 11, 2014)

1. In this order, we grant Dow Chemical Company (Dow) and Union Carbide Corporation (Union Carbide) (together, Applicants) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective April 22, 2014. Additionally, we grant Applicants waiver of the requirements to file an Open Access Transmission Tariff (OATT), to establish an Open Access Same-Time Information System (OASIS), and to comply with the Commission's Standards of Conduct. We also deny Applicants' request for waiver of the prior notice requirement and grant Applicants' request for other waivers commonly granted to market-based rate sellers, except as noted herein.
2. Additionally, we find that Applicants meet the criteria for Category 2 sellers in the Central region and are so designated. Further, we find that Applicants meet the criteria for Category 1 sellers in all other regions and are so designated. Applicants must file updated market power analyses for the Central region in compliance with the regional reporting schedule adopted in Order No. 697.¹

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) (Clarification Order), *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. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

I. Background

3. On February 20, 2014, as amended on April 11, 2014 and May 13, 2014, pursuant to section 205 of the Federal Power Act (FPA),² Applicants each filed an application for market-based rate authority with an accompanying tariff providing for the sale of electric energy, capacity, and ancillary services at market-based rates.³ Applicants also request that the Commission waive the 60-day prior notice requirement and accept their market-based rate tariffs to be effective February 21, 2014, one day after filing.

4. Applicants state that Union Carbide owns and operates a 353 megawatt (MW) plant in Hahnville, St. Charles Parish, Louisiana, and that Dow owns and operates a 1,491 MW Dow complex in Plaquemine, Iberville and West Baton Rouge Parishes, Louisiana.⁴ Applicants represent that these facilities are used primarily to support chemical manufacturing at St. Charles and Plaquemine; however, excess energy and capacity are periodically sold to third parties when not required for plant operations. Applicants state that Dow's generation at the Plaquemine site is connected to the electric transmission system by transmission facilities consisting of three 230 kilovolt (kV) tie lines, all less than 2.5 miles in length. Applicants further state that Union Carbide's generation at the St. Charles site is connected to the electric transmission system by transmission facilities consisting of a 230 kV tie line approximately 300 feet in length.

² 16 U.S.C. § 824d (2012).

³ Applicants request authorization to sell ancillary services in the markets administered by New York Independent System Operator, Inc., ISO New England Inc., Midcontinent Independent System Operator, Inc. (MISO), and Southwest Power Pool, Inc. Applicants also request authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁴ Applicants state that Dow and its subsidiaries own or operate electric generation located in Texas within the Electric Reliability Council of Texas (ERCOT), and state that sales within ERCOT are beyond the Commission's jurisdiction under the FPA. Further, Applicants state that Dow also owns a 0.5 MW facility located in the California Independent System Operator Corp. (CAISO) market and Union Carbide owns a 2 MW facility located in the PJM Interconnection, L.L.C. (PJM) market. Applicants represent that these facilities are used exclusively to support operations at plant sites where the units are located, and that sales are not made into the grid from these resources, and for this reason they did not perform market power analyses for the CAISO and PJM markets. In addition, Applicants' proposed market-based rate tariffs prohibit sales of energy, capacity, and ancillary services into the markets administered by CAISO and PJM.

Additionally, Applicants request that the Commission waive the requirements under Order Nos. 888⁵ and 890⁶ and section 35.28 of the Commission's regulations⁷ to file an OATT, the requirements under Order No. 889⁸ and Part 37 of the Commission's regulations⁹ to establish an OASIS, and the requirements under Order Nos. 889, 2004,¹⁰

⁵ *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).

⁶ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁷ 18 C.F.R. § 35.28 (2013).

⁸ *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

⁹ 18 C.F.R. pt. 37 (2013).

¹⁰ *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *see Standards of Conduct for Transmission Providers*, Order No. 690, FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,611 (2007); Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,630 (2008).

and 717,¹¹ and Part 358 of the Commission's regulations¹² to comply with the Standards of Conduct with respect to these transmission facilities.

5. Applicants represent that all of their electric generation in Texas and Louisiana are Qualifying Cogeneration Facilities (QFs) within the meaning of section 292 of the Commission's regulations and section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).¹³ Applicants further state that their generation in Louisiana is located within the Entergy balancing authority area, which was integrated into MISO as of December 19, 2013.

6. Applicants also request that the Commission exercise discretion and not impose a refund requirement for any sales made between December 19, 2013 and February 21, 2014. Applicants submitted calculations of the gross revenues and variable costs associated with their market-based rate sales during the period between December 19, 2013 and February 21, 2014. Applicants state that their variable costs exceeded gross revenues during the three consecutive months in which market-based rate sales were made and, accordingly, no refunds would be owed even if the Commission denied Applicants' request and imposed a refund obligation.¹⁴

¹¹ *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017 (2011).

¹² 18 C.F.R. pt. 358 (2013).

¹³ 16 U.S.C. § 824a-3 (2012).

¹⁴ *See* Dow April 11, 2014 Filing at 1-2 & 2 n.3 (citing *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999) (stating that the "time value refund is not open-ended" and that the imposition of the time value remedy is limited to "any amount that permits a public utility to recover its variable costs")); *see also id.* at Attachment A; Union Carbide April 11, 2014 Filing at Attachment A.

II. Notice of Filing

7. Notices of Applicants' February 20, 2014, April 11, 2014, and May 13, 2014 filings¹⁵ were published in the *Federal Register*, 79 Fed. Reg. 11,778 (2014), with interventions and comments due on or before June 3, 2014. None was filed.

8. Notice of Applicants' request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*, 79 Fed. Reg. 13,051 (2014), with interventions or protests due on or before March 20, 2014. None was filed.

III. Discussion

9. As discussed below, we will grant Applicants' request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and we will accept their market-based rate tariffs effective April 22, 2014.¹⁶ We will also deny Applicants' request for waiver of prior notice, and grant Applicants' request for certain other waivers.

A. Market-Based Rate Authorization

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.¹⁷

¹⁵ 79 Fed. Reg. 11,778 (2014); 79 Fed. Reg. 22,131 (2014); 79 Fed. Reg. 29,180 (2014).

¹⁶ We note that Applicants are not being granted authority to make third-party sales of operating reserves to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers. If Applicants seek such authority, they must make the required showing and receive Commission authorization prior to making such sales. *See Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies*, Order No. 784, FERC Stats. & Regs. ¶ 31,349, at PP 200-202 (2013), *order on clarification*, Order No. 784-A, 146 FERC ¶ 61,114 (2014).

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

1. Horizontal Market Power

11. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹⁸ 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.¹⁹

12. Applicants rely on Cleco Power LLC's recently accepted market power analysis²⁰ to demonstrate that Applicants pass both the pivotal supplier and the wholesale market share screens for the MISO market.²¹ Based on Applicants' representations, we find that Applicants satisfy the Commission's requirements for market-based rates regarding horizontal market power.

2. Vertical Market Power

13. 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 OATT on file or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.²²

14. In this case, as discussed more fully below, the Commission will grant Applicants' requests for waiver of the requirement to have an OATT on file for their transmission facilities.²³

¹⁸ *Id.* P 62.

¹⁹ *Id.* PP 33, 62-63.

²⁰ *See Cleco Power LLC*, Docket No. ER10-1827-003 (Feb. 21, 2014) (delegated letter order).

²¹ As noted above, Applicants did not perform market power analyses for the CAISO and PJM markets. *See supra* note 4.

²² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

²³ A generator lead line is a transmission facility. *See* 16 U.S.C. §§ 796(23), 824(a)-(b) (2012). Applicants are subject to the requirement under Order Nos. 888 and 890 to file an OATT, or seek a waiver of the requirement to file an OATT, unless and until it receives a request for transmission service. *See Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149, at P 24 (2009) (noting that the fact that the facilities merely tie a

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15. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.²⁴ 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, intrastate natural gas storage or distribution facilities; sites for new generation capacity development; and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).²⁵ 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.²⁶ 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.²⁷

16. Regarding other barriers to entry, Applicants represent that neither they nor any of their affiliates or subsidiaries own, operate, or control facilities classified as electric transmission facilities in the United States and that the identified interconnection facilities are used to connect Applicant-affiliated QF generation resources to the transmission grid, are small in scope and are considered part of the QF resources to which they are connected. Applicants represent that they and certain of their subsidiaries own, operate, or control intrastate natural gas transportation, intrastate natural gas storage or distribution facilities in the United States, but the ownership, operation, and/or control of such facilities does not create vertical market power or enable Applicants or their affiliates or subsidiaries to erect barriers to entry.²⁸ Further, Applicants represent that

generator to the grid does not render a line exempt from the Commission's regulation of transmission facilities). *See also Evergreen Wind Power III, LLC*, 135 FERC ¶ 61,030, at P 15 n.18 (2011).

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

²⁵ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

²⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

²⁷ *Id.* P 446.

²⁸ Applicants represent that their affiliate, Dow Pipeline Company (Dow Pipeline), owns certain intrastate natural gas pipeline facilities in Texas, which are used primarily for aggregating and delivering feedstock natural gas supplies to a Dow-affiliated industrial complex and are subject to the jurisdiction of the Texas Railroad Commission. Dow's wholly owned subsidiaries, UCAR Louisiana Pipeline Company and Dow

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neither they nor any of their affiliates or subsidiaries own or control sites for generation capacity development. Applicants also represent that neither they nor their affiliates or subsidiaries own, operate, or control sources of coal supplies or facilities used in the transportation of coal supplies such as barges or rail cars.

17. Finally, consistent with Order No. 697, Applicants affirmatively state that they and their affiliates have not erected barriers to entry and will not erect barriers in the relevant geographic market.

18. Based on Applicants' representations, we find that Applicants satisfy the Commission's requirements for market-based rates regarding vertical market power.

B. Waiver Requests

1. Waiver of Order Nos. 888, 889, and 890

19. Applicants seek waiver of the requirements to file an OATT, establish and maintain an OASIS, and abide by the Standards of Conduct with respect to the transmission facilities located at the Plaquemine and St. Charles sites. In support, Applicants represent that the transmission facilities described in the instant application are limited and discrete facilities designed to connect the Plaquemine site and St. Charles site to the transmission grid. Applicants represent that the transmission facilities are not networked and do not form an integrated transmission grid.

20. Order Nos. 888 and 890 and section 35.28 of the Commission's regulations require public utilities that own, operate, or control facilities used for the transmission of electric energy in interstate commerce to file an OATT. Order No. 889 and Part 37 of the Commission's regulations require public utilities to establish and maintain an OASIS. Order Nos. 889, 2004, and 717 and Part 358 of the Commission's regulations require public utilities to abide by certain Standards of Conduct.²⁹ In prior orders, the

Intrastate Gas Company, own and operate certain intrastate natural gas pipeline facilities in Louisiana, which are used to transport natural gas between an unaffiliated natural gas storage facility and Union Carbide's industrial complex in St. Charles, and to transport natural gas to Dow's industrial complex in Plaquemine, respectively. Dow's wholly owned subsidiary, Seadrift Pipeline Corporation, owns and operates certain intrastate natural gas pipeline facilities in Texas, which are used to transport natural gas to a Dow plant site in Seadrift, Texas.

²⁹ Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,590; Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 16; Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 313.

Commission has enunciated the standards for exemption from some or all of the requirements of Order Nos. 888, 889, and 890.³⁰ The Commission has stated that the criteria for waiver of the requirements of Order No. 890 and Order No. 2004 are unchanged from those used to evaluate requests for waiver under Order Nos. 888 and 889.³¹ Order No. 717 did not change those criteria.³²

21. The Commission may grant requests for waiver of the obligation to file an OATT to public utilities that can show that they own, operate, or control only limited and discrete transmission facilities (facilities that do not form an integrated transmission grid), until such time as the public utility receives a request for transmission service. Should the public utility receive such a request, the Commission has determined that the public utility must file with the Commission a *pro forma* tariff within 60 days of the date of the request, and must comply with any additional requirements that are effective on the date of the request.³³

22. The Commission has also determined that waiver of the requirement to establish an OASIS and abide by the Standards of Conduct would be appropriate for a public utility if the applicant: (1) owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) is a small public utility that owns, operates, or controls an integrated transmission grid, unless other circumstances are present that indicate that a waiver would not be justified.³⁴ The Commission has held that waiver of Order No. 889 will remain in effect until the Commission takes action in response to a complaint to the Commission that an entity

³⁰ See, e.g., *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996) (*Black Creek*); *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228, at P 22 (2005) (*Entergy*).

³¹ See *Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at P 3 (2007); *Alcoa Power Generating Inc.*, 108 FERC ¶ 61,243, at P 27 (2004).

³² See Order No. 717, FERC Stats. & Regs. ¶ 31,280 at PP 31-33.

³³ *Black Creek*, 77 FERC ¶ 61,232 at 61,941.

³⁴ *Id.* Although the Commission originally precluded waiver of the requirements for OASIS and the Standards of Conduct for a small public utility that is a member of a tight power pool, in *Black Hills Power, Inc.*, 135 FERC ¶ 61,058, at PP 2-3 (2011), the Commission explained that membership in a tight power pool is no longer a factor in the determination for waiver of Standards of Conduct. Moreover, *Black Hills* did not affect waivers based on a public utility disposing of no more than 4 million MW hours annually.

evaluating its transmission needs could not get the information necessary to complete its evaluation (for OASIS waivers) or an entity complains that the public utility has unfairly used its access to information about transmission to benefit the utility or its affiliate (for Standards of Conduct waivers).³⁵

23. Based on Applicants' representations, we find that their transmission facilities qualify as limited and discrete. Accordingly, we will grant Applicants waiver of the requirements of Order Nos. 888 and 890 and section 35.28 of the Commission's regulations to have an OATT on file. However, if either Dow or Union Carbide receives a request for transmission service, it must file with the Commission a *pro forma* OATT within 60 days of the date of the request.³⁶

24. The Commission will also grant Applicants waiver of the requirements of Order No. 889 and Part 37 of the Commission's regulations with respect to OASIS and Order Nos. 889, 2004, and 717 and Part 358 with respect to the Standards of Conduct. We note that Applicants' waiver of the requirement to establish an OASIS will remain in effect until the Commission takes action in response to a complaint to the Commission that an entity evaluating its transmission needs could not get the information necessary to complete its evaluation.³⁷ Likewise, Applicants' waiver of the Standards of Conduct will remain in effect unless and until the Commission takes action on a complaint by an entity that Applicants have unfairly used their access to information to unfairly benefit themselves or their affiliates.³⁸

³⁵ *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997); *Easton Utils. Comm'n*, 83 FERC ¶ 61,334, at 62,343 (1998)).

³⁶ *Black Creek*, 77 FERC ¶ 61,232 at 61,941.

³⁷ *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997); *Easton Utils. Comm'n*, 83 FERC ¶ 61,334, at 62,343 (1998)).

³⁸ *Id.* Applicants must notify the Commission if there is a material change in facts that affect their waivers within 30 days of the date of such change. *Material Changes in Facts Underlying Waiver of Order No. 889 and Part 358 of the Commission's Regulations*, 127 FERC ¶ 61,141, at P 5 (2009).

2. Other Waivers, Approvals, and Authorizations

25. Applicants also 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, 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 sections 141.14 and 141.15; and (3) blanket authorization under section 204 of the FPA³⁹ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

26. The Commission will grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.⁴⁰ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects Applicants to keep their accounting records in accordance with generally accepted accounting principles.

3. Prior Notice Requirement and Refunds

27. Applicants represent that their QF facilities at Plaquemine and St. Charles are used primarily to support chemical manufacturing at those locations; however, excess energy and capacity are periodically sold to third parties when not required for plant operations.

³⁹ 16 U.S.C. § 824c (2012).

⁴⁰ 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 in Part 34 of the Commission's regulations. 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). However, waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Hydropower licensees are required to comply with the requirements of the Uniform System of Accounts pursuant to 18 C.F.R. Part 101 to the extent necessary to carry out their responsibilities under Part I of the FPA. We further note that a licensee's status as a market-based rate seller under Part II of the FPA does not exempt it from its accounting responsibilities as a licensee under Part I of the FPA. See *Seneca Gen., LLC*, 145 FERC ¶ 61,096, at P 23 n.20 (2013) (citing *Trafalgar Power, Inc.*, 87 FERC ¶ 61,207, at 61,798 (1999) (noting that "all licensees are required to comply with the requirements of the Uniform System of Accounts to the extent necessary to carry out their responsibilities under [s]ections 4(b), 10(d) and 14 of the FPA")).

Applicants represent that their wholesale sales have historically consisted of (1) PURPA put sales to Entergy and (2) sales made to their affiliate, Dow Pipeline, for resale under Dow Pipeline's market-based rate authority pursuant to an agreement executed prior to March 17, 2006. Applicants state that both methods qualify for FPA section 205 exemptions set forth in 18 C.F.R. § 292.601(c)(1) (2013). Applicants state that they had intended to continue making both types of sales following Entergy's integration into MISO, and avoid making other sales that would require section 205 authority from the Commission. Applicants believed they could use a "Behind-the-Meter" option provided for by Entergy and MISO that would enable QFs to continue making PURPA put sales to Entergy without participating in the MISO market.⁴¹

28. Applicants state that they recently determined that reliance on the Behind-the-Meter option, as currently structured, could cause Applicants to incur significant costs. Applicants state that the Behind-the-Meter option requires QFs to make PURPA put sales at avoided cost rates that are derived from prices in the MISO market and that such prices are likely to be negative on occasions due to transmission congestion on the Entergy system. Applicants explain that this would result in Applicants having to make payments in order to make PURPA put sales to Entergy. Applicants also state they would have little ability to avoid such payments under the Behind-the-Meter option because they would not be MISO market participants and, therefore, they would not have access to the MISO market data needed to determine when market prices are negative.⁴²

29. Applicants represent that they are also using a different "Hybrid" option provided under the QF integration plan to make sales of excess energy that requires QFs to become market participants within MISO and make sales into the MISO market. However, Applicants state that this option requires that they must make such sales directly in order to meet MISO creditworthiness standards and other market requirements, rather than rely on their preexisting market arrangement with Dow Pipeline. Therefore, Applicants are submitting these requests for market-based rate authority under section 205 of the FPA.

⁴¹ Applicants also state that they would not be registered market participants in MISO until on or about March 1, 2014. As a result, Applicants' sales of excess energy into the MISO market was coordinated by an existing MISO market participant with whom Applicants' had contracted, but that participant did not take title to the excess energy or otherwise participate in the sale.

⁴² Applicants further represent that they and other QF owners and operators in the Entergy region believe that this option and other aspects of the QF integration plan violate PURPA.

30. Applicants request waiver of the Commission's 60-day prior notice requirement and request a market-based rate tariff effective date of February 21, 2014. Applicants represent that they believed, in good faith, that they could continue to make sales through Dow Pipeline once Entergy joined MISO. Applicants represent that their failure to submit their market-based rate applications sooner was caused by confusion regarding the QF integration plan being followed by Entergy and MISO and the requirements that Applicants would need to meet in order to continue making sales after Entergy joined MISO. Applicants state that, under these circumstances, it would not be just and reasonable or equitable to strictly enforce the 60-day prior notice requirement.

31. Section 205 of the FPA explicitly requires that, absent waiver, proposed rates be filed with the Commission at least 60 days in advance of their proposed effective date.⁴³ In this regard, the Commission has explained that it cannot "ignore its statutory duty to determine whether rates are just and reasonable by permitting utilities to submit filings whenever convenient," and that it "must have the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences."⁴⁴ Thus, a public utility must timely file its rates—that is, absent waiver, file at least 60 days in advance of the proposed effective date—to allow the Commission to fulfill its statutory mandate, namely, timely determining whether the rates being charged are just and reasonable. The Commission has further made clear that, for market-based rates in particular, it "does not allow market-based rates to go into effect before a filing has been tendered with the Commission."⁴⁵ The Commission has explained that it would grant waiver of the prior notice requirement for proposals to charge market-based rates filed on or after the date service commenced only in extraordinary circumstances.⁴⁶

⁴³ See *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 9-11 (2003).

⁴⁴ *Id.* P 14.

⁴⁵ *El Segundo Power, LLC*, 84 FERC ¶ 61,011, at 61,060, *order on reh'g*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC ¶ 61,208 (1999), *order on reh'g*, 90 FERC ¶ 61,036 (2000); see also *FC Landfill Energy, LLC*, 133 FERC ¶ 61,041 (2010) (citing *El Segundo Power, LLC*, 84 FERC ¶ 61,011); *BC Landfill Energy, LLC*, 127 FERC ¶ 61,113 (2009) (citing *El Segundo Power, LLC*, 84 FERC ¶ 61,011).

⁴⁶ See *Cent. Hudson Gas & Elec. Co.*, 60 FERC ¶ 61,106 (*Central Hudson I*), *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson II*); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,984, *clarified*, 65 FERC ¶ 61,081 (1993).

32. In *Central Hudson II*, the Commission elaborated that when a filing is made after the commencement of service, the filing utility must make a stronger showing of good cause than if the filing had been made sometime prior to the commencement of service.⁴⁷ The Commission acknowledged that, while it was sensitive to the dynamic nature of the wholesale power market and the need to compete for sales on short-notice, it has to balance that concern against the statutory requirement that utilities promptly file their rates and the need for prompt Commission review of filings.⁴⁸ In *Arlington Valley Solar Energy II, LLC*,⁴⁹ the Commission clarified that, absent extraordinary circumstances shown, the Commission will deny waiver of prior notice when an applicant for initial market-based rate authority files on or after the day service has commenced. Thus, filing utilities' applications that request initial market-based rate authorization that are filed on or after the day service has commenced will become effective 61 days after the date of filing absent a showing of extraordinary circumstances.

33. Based on the information presented by Applicants, they have failed to demonstrate extraordinary circumstances warranting waiver of the prior notice requirement. The Commission has previously stated that an applicant's lack of awareness does not constitute extraordinary circumstances.⁵⁰ Therefore, the Commission denies Applicants' request for waiver of the prior notice requirement and accepts Applicants' market-based rate tariff, to be effective April 22, 2014, 61 days after filing.

34. Further, the Commission has noted that, if a utility files a market-based rate tariff less than 60 days prior to the proposed effective date of new service, and waiver is denied, the Commission will require the utility to refund to its customers the time-value of the gross revenues collected, calculated pursuant to 18 C.F.R. § 35.19a of the Commission's regulations,⁵¹ for the entire period that the rate was collected without

⁴⁷ *Central Hudson II*, 61 FERC ¶ 61,089 at 61,355-56 (finding the press of other business does not provide good cause for waiver where an agreement was filed seven days after service commenced).

⁴⁸ *Id.*

⁴⁹ 144 FERC ¶ 61,010, at P 30 (2013).

⁵⁰ *Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044 (2007); *see also OREG I, Inc.*, 135 FERC ¶ 61,150 (2011), *order denying rehearing*, 138 FERC ¶ 61,110 (2012).

⁵¹ 18 C.F.R. § 35.19a (2013).

Commission authorization.⁵² In addition to returning the time value of the revenues collected for the period the rate was charged without Commission authorization, when dealing with market-based rates that are not timely filed, the Commission also has stated that:

The utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate. . . . The late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized filing of cost-based rates, until the date of Commission authorization.⁵³

35. Whether or not an individual customer actually suffered any harm is irrelevant to our inquiry here. The injury being remedied by refunds for late filing is not merely redress for that customer but particularly “the Commission’s ability to enforce FPA section 205’s requirement that there be prior notice and that the rates charged be just and reasonable at the time they are being charged.”⁵⁴

36. Applicants request that the Commission not impose a refund requirement for any sales made between December 19, 2013 and February 21, 2014, the date Entergy joined MISO through the requested effective date. Applicants represent that their variable costs exceeded gross revenues during these three consecutive months in which unauthorized market-based rate sales were made and, accordingly, no refunds would be owed even if the Commission denied Applicants’ request and imposed a refund obligation.⁵⁵

37. Based on Applicants’ representations, we direct Applicants to make a compliance filing within 30 days of this order providing additional information on variable costs and revenues to include the period from February 21, 2014 to the effective date of their

⁵² *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,980.

⁵³ *Id.*

⁵⁴ *El Paso Elec. Co.*, 105 FERC ¶ 61,131 at P 21 (footnote omitted) (citing *Carolina Power Co.*, 87 FERC ¶ 61,083, at 61,356 (1999)).

⁵⁵ See Dow April 11, 2014 Filing at 1-2 & 2 n.3 (citing *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1998) (stating that the “time value refund is not open-ended” and that the imposition of the time value remedy is limited to “any amount that permits a public utility to recover its variable costs”)).

market-based rate tariffs, April 22, 2014. In addition, we will address Applicants' request regarding any refund obligation after that compliance filing has been filed and reviewed.

4. Reporting Requirements

38. 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.⁵⁶ Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.⁵⁷

⁵⁶ *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>.

⁵⁷ 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.

39. Additionally, Applicants 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.⁵⁸

40. In Order No. 697, the Commission created two categories of sellers.⁵⁹ 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 issues.⁶⁰ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.⁶¹

41. Applicants represent that they and their affiliates own or operate over 500 MW of capacity in the MISO market. Applicants also represent that they own or control less than 500 MW of generation in aggregate in each region other than the Central region. Applicants also represent that they do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid. Applicants further state that they are not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as generation assets owned or controlled by Applicants or their affiliates. Applicants also represent that they are not affiliated with a franchised public utility in the same region as generation assets owned or controlled by Applicants or their affiliates. Applicants further state that there are no vertical market power concerns.

42. Based on Applicants' representations, we grant Applicants Category 2 seller status in the Central region. Further, based on Applicants' representations, we find that

⁵⁸ *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).

⁵⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

⁶⁰ 18 C.F.R. § 35.36(a) (2013).

⁶¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

Applicants meet the criteria for a Category 1 seller in all other regions. Applicants must file updated market power analyses for the Central region in compliance with the regional reporting schedule adopted in Order No. 697.⁶² The Commission also reserves the right to require such an analysis at any time for any region.⁶³

The Commission orders:

(A) Applicants' market-based rate tariffs are hereby accepted, effective April 22, 2014, 61 days after filing, as discussed in the body of this order.

(B) Applicants are hereby directed to submit a compliance filing, within 30 days from the date of this order, as discussed in the body of this order.

(C) Applicants' request for waiver of the prior notice requirement is denied, as discussed in the body of this order.

(D) 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.

(E) Waiver of Parts 101 of the Commission's regulations is hereby granted, with the exception that waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Waiver of Parts 41 and 141 of the Commission's regulations is hereby granted, with the exception of sections 141.14 and 141.15.

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

(G) 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

⁶² *Id.* P 882.

⁶³ *Id.* P 853.

continued Commission approval of Applicants' issuance of securities or assumptions of liability.

(H) Applicants' requests for waiver of the requirements to file an OATT, to establish and maintain an OASIS, and to comply with the Standards of Conduct are hereby granted, as discussed in the body of this order.

(I) Applicants are hereby required to file EQRs in compliance with Order No. 2001. If the effective date of Applicants' market-based rate tariffs falls within a quarter of the year that has already expired, Applicants' 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.