

148 FERC ¶ 61,090
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Danskammer Energy, LLC

Docket No. ER14-2102-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION

(Issued August 1, 2014)

1. In this order, we grant Danskammer Energy, LLC (Danskammer Energy) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective July 10, 2014, as requested. We also grant Danskammer Energy's request for waivers commonly granted to market-based rate sellers, except as noted herein.

2. Additionally, we find that Danskammer Energy meets the criteria for a Category 1 seller in the Northwest, Southwest, Southeast, Central, and Southwest Power Pool regions and a Category 2 seller in the Northeast region and is so designated. Danskammer Energy must file updated market power analyses for the Northeast 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), *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 June 2, 2014, as amended on June 13, 2014, pursuant to section 205 of the Federal Power Act (FPA),² Danskammer Energy 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

4. Danskammer Energy states that, upon approval by the New York Public Service Commission, it will own, commence to repair, and operate the Danskammer Generating Facility (Facility). Danskammer Energy states that the Facility has a capacity rating of approximately 537 megawatts (MW) and is located in Newburgh, New York, within the NYISO market. Danskammer Energy states that the Facility is comprised of six units: two natural gas- and coal-fired units with a combined capacity rating of approximately 387 MW; two oil- and natural gas-fired units with a combined capacity rating of approximately 146 MW; and two emergency diesel generators, each with a capacity rating of approximately 3 MW.

5. Danskammer Energy claims that the Facility was damaged in October 2012 and is currently an inoperable, non-jurisdictional facility, considered mothballed by NYISO. Danskammer Energy states that in 2013, the former owner of the Facility, Dynegy Danskammer, L.L.C. (Dynegy), received Commission approval to sell the Facility and other assets to Helios Power Capital, LLC (Helios) for salvage.⁴

6. Danskammer Energy represents that it is a limited liability company formed for the sole purpose of acquiring and returning the Facility to service. Danskammer Energy states that Mercuria Energy America, Inc. (Mercuria Energy) owns the controlling interest in Danskammer Energy. Danskammer Energy states that Mercuria Energy is a power marketer authorized by the Commission to make sales of energy, capacity, and ancillary services at market-based rates. Danskammer Energy states that Mercuria Energy is wholly-owned by Mercuria Energy Company, LLC, and is a wholly-owned indirect subsidiary of Mercuria Energy Group Limited, the parent holding company of an

² 16 U.S.C. § 824d (2012).

³ Danskammer Energy requests authorization to sell ancillary services in the markets administered by PJM Interconnection, L.L.C., New York Independent System Operator, Inc. (NYISO), ISO New England Inc., California Independent System Operator Corp., Midcontinent Independent System Operator, Inc., and Southwest Power Pool, Inc., as well as authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁴ June 30 Filing at 4 n.7 (citing *Dynegy Danskammer, L.L.C.*, Docket No. EC13-144-000 (Oct. 22, 2013) (delegated letter order)).

international group of companies principally engaged in the sourcing, trading, marketing, shipping, and/or logistics relative to energy products. Danskammer Energy states that Helios owns a non-controlling interest of less than 10 percent in Danskammer Energy and that there are no other owners of Danskammer Energy.

II. Notice of Filings and Responsive Pleadings

7. Notice of Danskammer Energy's filings was published in the *Federal Register*,⁵ with interventions and comments due on or before June 23, 2014. On June 23, 2014, Entergy Nuclear Power Marketing, LLC (Entergy Nuclear) filed a motion to intervene and comments. On June 30, 2014, Danskammer Energy filed an answer.

8. Notice of Danskammer Energy's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*,⁶ with interventions or protests due on or before June 24, 2014. None was filed.

9. In its comments, Entergy Nuclear refers to the application filed by Dynegy in 2013 pursuant to section 203 of the FPA,⁷ in which Dynegy requested approval to transfer the Facility to Helios. Entergy Nuclear states that in Dynegy's FPA section 203 application, Dynegy represented that Helios intended to demolish the Facility once Helios acquired ownership. Entergy Nuclear states that the Commission authorized the transaction and Dynegy transferred the Facility to Helios on November 1, 2013.⁸ Entergy Nuclear contends that circumstances have changed since the Commission issued the order in the FPA section 203 proceeding given that, rather than demolishing the Facility, Helios intends to transfer the Facility to Danskammer Energy and Danskammer Energy intends to return the Facility to service. Entergy Nuclear contends that changes in circumstance raise the question of how Dynegy, Helios, and/or Danskammer Energy plan to comply with the requirements of the FPA section 203 proceeding, which impose the obligation that the Commission be informed of any changes in circumstance that would reflect a departure from the facts the Commission relied on in that proceeding.

⁵ 79 Fed. Reg. 32,935; 79 Fed. Reg. 35,750 (2014).

⁶ 79 Fed. Reg. 33,546 (2014).

⁷ 16 U.S.C. § 824b (2012).

⁸ Entergy Nuclear Filing at 2 n. 3 (citing *Dynegy Danskammer, L.L.C.*, Docket No. EC13-144-000 (Oct. 22, 2013) (delegated letter order); *Dynegy Danskammer, L.L.C.*, Notice of Consummation, Docket No. EC13-144-000 (filed Nov. 12, 2013)).

10. In response, Danskammer Energy contends that Entergy Nuclear's comments are beyond the scope of this proceeding. Danskammer Energy states that the intent of its filing pursuant to section 205 of the FPA was to secure market-based rate authorization for Danskammer Energy. Danskammer Energy states that its filing described the eventual ownership of the Facility and that its filing also provided indicative screens, which assume that the Facility will become operable, and will be owned by Danskammer Energy. Danskammer Energy further states that its filing demonstrated that Danskammer Energy meets the requirements for market-based rate authorization under section 205 of the FPA. Danskammer Energy maintains that whether another filing is necessary or appropriate under another section of the FPA is beyond the scope of this proceeding. Danskammer Energy further states that it has made, or at the appropriate time will make, any and all filings that are required to consummate the subject transactions and to operate the Facility.

III. Discussion

11. As discussed below, we will grant Danskammer Energy's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and we will accept its market-based rate tariff, effective July 10, 2014, as requested.⁹ We will also grant Danskammer Energy's request for certain waivers.

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motion to intervene by Entergy Nuclear makes it a party to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Danskammer Energy's answer because it has provided information that assisted us in our decision-making process.

⁹ We note that Danskammer Energy is 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 Danskammer Energy seeks such authority, it 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).

B. Market-Based Rate Authorization

14. 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.¹⁰

1. Horizontal Market Power

15. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹¹ 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.¹²

16. Danskammer Energy has prepared the pivotal supplier and wholesale market share screens for the NYISO market consistent with the requirements of Order No. 697.¹³

17. Danskammer Energy demonstrates that it passes both the pivotal supplier and the wholesale market share screens for the NYISO market. Danskammer Energy indicates that its market share in the NYISO market ranges from 3.7 to 5.1 percent. Accordingly, we find that Danskammer Energy satisfies the Commission's requirements for market-based rate authority regarding horizontal market power.

2. Vertical Market Power

18. 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.¹⁴

19. Danskammer Energy represents that neither it nor any of its affiliates own or control transmission facilities in the United States other than limited facilities needed in order to interconnect the Facility to the transmission grid.

¹⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

¹¹ *Id.* P 62.

¹² *Id.* PP 33, 62-63.

¹³ *Id.*

¹⁴ *Id.* P 408.

20. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁵ 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).¹⁶ 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.¹⁷ 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.¹⁸

21. Regarding other barriers to entry, Danskammer Energy represents that neither it nor its affiliates own or control intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; physical coal supply sources; or have ownership or control over who may access transportation of coal supplies.

22. Finally, consistent with Order No. 697, Danskammer Energy affirmatively states that it and its affiliates have not erected and will not erect in the future, barriers to entry in any geographic market.

23. Based on Danskammer Energy's representations, we find that Danskammer Energy satisfies the Commission's requirements for market-based rate authority regarding vertical market power.

C. Other Waivers and Authorizations

24. Danskammer Energy also 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 sections 141.14 and 141.15; and (3) blanket authorization under

¹⁵ *Id.* P 440.

¹⁶ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

¹⁸ *Id.* P 446.

section 204 of the FPA¹⁹ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

25. The Commission will grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.²⁰ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects Danskammer Energy to keep its accounting records in accordance with generally accepted accounting principles.

26. We direct Danskammer Energy to submit a compliance filing containing revisions to the limitations and exemptions sections of its market-based rate tariff to include a citation to this order.²¹

D. Reporting Requirements

27. 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

¹⁹ 16 U.S.C. § 824c (2012).

²⁰ 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")).

²¹ *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C, *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 384. These tariff revisions may be filed the next time Danskammer Energy makes a market-based rate filing with the Commission.

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.²² Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.²³

28. Additionally, Danskammer Energy 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.²⁴

29. In Order No. 697, the Commission created two categories of sellers.²⁵ 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

²² *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>.

²³ 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.

²⁴ *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).

²⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

waiver of the requirements of Order No. 888²⁶); 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.²⁷ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.²⁸

30. Danskammer Energy requests Category 1 Seller status in the Northwest, Southwest, Southeast, Central, and Southwest Power Pool regions. Danskammer Energy represents that it will not own, operate, or control any generation facilities located in these regions and will not operate or control transmission facilities other than the limited equipment necessary to connect the Facility to the transmission system. Danskammer Energy further represents that it will not be affiliated with anyone that owns, operates or controls transmission facilities in the same region as Danskammer Energy's generation assets and that it is not affiliated with a franchised public utility in any of the regions. Danskammer Energy states that there are no other vertical market power concerns.

31. Based on Danskammer Energy's representations, we grant Danskammer Energy Category 1 seller status in the Northwest, Southwest, Southeast, Central, and Southwest Power Pool regions. Danskammer Energy states that because it and its affiliates control more than 500 MW of generation in the Northeast region, Danskammer Energy is a Category 2 Seller in the Northeast region. Based on Danskammer Energy's representations, we find that Danskammer Energy meets the criteria for a Category 2 seller in the Northeast region. Danskammer Energy must file an updated market power analysis for the Northeast region in compliance with the regional reporting schedule

²⁶ *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).

²⁷ 18 C.F.R. § 35.36(a) (2013).

²⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

adopted in Order No. 697.²⁹ The Commission also reserves the right to require such an analysis at any time for any region.³⁰

E. Other Matters

32. Finally, we find that Entergy Nuclear's comments are beyond the scope of our review of Danskammer Energy's request for market-based rate authority. However, we note Danskammer Energy's commitment to ensure that the appropriate filings are submitted to the Commission, and we expect Danskammer Energy to honor this commitment.

The Commission orders:

(A) Danskammer Energy's market-based rate tariff is hereby accepted for filing, effective July 10, 2014, as requested, as discussed in the body of this order.

(B) Danskammer Energy is hereby directed to revise the limitations and exemptions section of its tariff 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, is hereby granted.

(D) Waiver of Part 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.

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

²⁹ *Id.*

³⁰ *Id.* P 853.

(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 Danskammer Energy's issuance of securities or assumptions of liability.

(G) Danskammer Energy is hereby required to file EQRs in compliance with Order No. 2001. If the effective date of Danskammer Energy's market-based rate tariff falls within a quarter of the year that has already expired, Danskammer Energy'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.