

158 FERC ¶ 61,058
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

4C Acquisition, LLC

Docket No. ER16-2602-002

ORDER ACCEPTING AND SUSPENDING MARKET-BASED RATE TARIFF AND
GRANTING REQUEST FOR WAIVERS

(Issued January 24, 2017)

1. In this order, the Commission accepts and suspends, for a nominal period, to become effective January 9, 2017, subject to refund and subject to the outcome of the pending proceeding in Docket No. ER10-3246-008¹ and a subsequent order in the instant proceeding, a proposed tariff filed by 4C Acquisition, LLC (4C Acquisition). The proposed tariff would permit 4C Acquisition to make wholesale sales of electric energy and capacity at market-based rates. Our acceptance is also subject to the compliance filing ordered herein. We also grant 4C Acquisition's request for other waivers commonly granted to market-based rate sellers.
2. Additionally, we find that 4C Acquisition meets the criteria for a Category 1 seller in the Northeast, Southeast, Central, Southwest Power Pool, and Northwest regions and is so designated.² Further, we find that 4C Acquisition meets the criteria for a Category 2

¹ *PacifiCorp*, Docket No. ER10-3246-008 (filed Jun. 30, 2016).

² See *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, FERC Stats. & Regs. ¶ 31,374, at P 320-322 (2015), *order on reh'g*, Order No. 816-A, FERC Stats. & Regs. ¶ 31,382 (2016); *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).

seller in the Southwest region and is so designated. 4C Acquisition must file updated market power analyses for the Southwest region in compliance with the regional reporting schedule adopted in Order No. 697.³ The Commission also reserves the right to require such an analysis at any intervening time.⁴

I. Background

3. On September 16, 2016, as amended on November 2, 2016 and December 21, 2016, pursuant to section 205 of the Federal Power Act (FPA),⁵ 4C Acquisition 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.

4. 4C Acquisition states that it is a newly-formed limited liability company doing business under the laws of the State of Delaware. 4C Acquisition represents that it owns a seven percent interest in the Four Corners Power Plant (Four Corners), a coal-fired generating facility located in New Mexico within the Arizona Public Service Company (APS) balancing authority area. 4C Acquisition states that it owns generation totaling 108 megawatts (MW) in the Southwest region. 4C Acquisition further represents that Public Service Company of New Mexico (PNM), Salt River Agricultural Improvement and Power District (Salt River), and Tucson Electric Power Company (Tucson Electric) own the remaining 93 percent of Four Corners in varying shares. 4C Acquisition represents that it is wholly owned by Pinnacle West Capital Corporation. 4C Acquisition states that it is an affiliate of APS, a public utility doing business in Arizona.

5. 4C Acquisition requests market-based rate authorization to sell energy and capacity in all regions within the United States with the following exceptions. 4C Acquisition is not requesting market-based rate authorization for the Tucson Electric balancing authority area at this time due to its affiliate APS's pending section 206 proceeding regarding its market-based rate authorization in that balancing authority area.⁶

³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 882-893.

⁴ *Id.* P 853.

⁵ 16 U.S.C. § 824d (2012).

⁶ *See Arizona Public Service Co.*, 154 FERC ¶ 61,123 (2016) (APS 206 Proceeding).

4C Acquisition is also not requesting market-based rate authorization in the APS balancing authority area.⁷

II. Notice of Filings

6. Notice of 4C Acquisition's filings was published in the *Federal Register*,⁸ with interventions and protests due on or before January 3, 2017. On September 26, 2016, Public Citizen, Inc. filed a timely motion to intervene.

7. Notice of 4C Acquisition's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*,⁹ with interventions or protests due on or before October 11, 2016. None was filed.

III. Discussion

8. As discussed below, we will accept and suspend, for a nominal period, 4C Acquisition's market-based rate tariff, to be effective January 9, 2017 subject to refund and subject to the outcome of the pending proceeding in Docket No. ER10-3246-008 and a subsequent order in the instant proceeding. We will also grant 4C Acquisition's request for certain waivers.

A. 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.¹⁰

1. 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.¹¹ The Commission has stated that passage of both screens establishes a rebuttable presumption

⁷ 4C Acquisition September 16, 2016 Filing at 2. *See also Arizona Public Service Co.*, 153 FERC ¶ 61,161 (2015) (revoking APS' market-based rate authority in the APS balancing authority area).

⁸ 81 Fed. Reg. 66,008; 81 Fed. Reg. 79,466; 81 Fed. Reg. 95,979 (2016).

⁹ 81 Fed. Reg. 66,006 (2016).

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

¹¹ *Id.* P 62.

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

11. 4C Acquisition prepared the pivotal supplier and wholesale market share screens for the CAISO market and the PacifiCorp - East (PACE), Salt River, Western Area Power Administration – Lower Colorado (WALC), Western Area Power Administration – Colorado/Missouri (WACM), Imperial Irrigation District (IID), Los Angeles Department of Water and Power (LADWP), and PNM¹³ balancing authority areas, consistent with the requirements of Order No. 697.¹⁴

12. We reviewed 4C Acquisition's pivotal supplier screens and wholesale market share screens and determined that 4C Acquisition passes both screens in the CAISO, PACE, Salt River, WALC, WACM, IID, and PNM balancing authority areas. However, 4C Acquisition's screen analysis for the PACE balancing authority area relies upon the simultaneous transmission import limit (SIL) values filed by PacifiCorp which is pending before the Commission in Docket No. ER10-3246-008. Thus, our preliminary analysis indicates that 4C Acquisition's request for market-based rate authorization has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the proposed market-based rate tariff for filing, suspend it for a nominal period, and make it effective January 9, 2017, subject to refund, and subject to the outcome of the pending proceeding in Docket No. ER10-3246-008.

13. The Commission will determine whether 4C Acquisition passes the indicative screens in the PACE balancing authority area upon completion of its review of the filing submitted in Docket No. ER10-3246-008. In this regard, we will direct 4C Acquisition to make a compliance filing in this docket (Docket No. ER16-2602-002) updating the record in this proceeding to reflect the results of the Commission's determination(s) with respect to the SIL values in Docket No. ER10-3246-008, within 30 days after the Commission has issued an order in that proceeding.

¹² *Id.* PP 33, 62-63.

¹³ We note that 4C Acquisition submitted screens for LADWP, which is not first-tier to the APS balancing authority area where 4C Acquisition owns and controls generation capacity, and thus the LADWP screens were not required for 4C Acquisition's market power analysis. *See id.* P 232.

¹⁴ *Id.* PP 231-232.

2. Vertical Market Power

14. 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 such entity has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) or satisfies the requirements for blanket waiver under 18 C.F.R. § 35.28(d)(2).¹⁵

15. 4C Acquisition states that its affiliate, APS, provides transmission service pursuant to its Commission-approved OATT.¹⁶ 4C Acquisition states that in a proceeding that was pending before the Commission at the time of filing, but which has since been approved by the Commission,¹⁷ 4C Acquisition had requested Commission approval of an agreement between 4C Acquisition and APS that would transfer functional control of the limited transmission facilities owned by 4C Acquisition to APS. 4C Acquisition further states that following the Commission's approval of that agreement, 4C Acquisition's limited transmission facilities will be subject to the terms and conditions of APS's Commission-approved OATT, and that all requests for new transmission service over facilities owned by 4C Acquisition will be governed by the APS OATT.¹⁸

16. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁹ 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; and physical coal supply sources and ownership of or control over who may

¹⁵ See *Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, FERC Stats. & Regs. ¶ 31,367, at P 57, *order on reh'g*, Order No. 807-A, 153 FERC ¶ 61,047 (2015) (waiving the OATT requirements of 18 C.F.R. § 35.28, the Open Access Same-Time Information System requirements of Part 37, and the Standards of Conduct requirements of Part 358, under certain conditions, for entities that own interconnection facilities). See also *Balko Wind Transmission, LLC*, 152 FERC ¶ 61,011, at PP 24-25 (2015).

¹⁶ *Arizona Public Service Co.*, 87 FERC ¶ 61,314 (1999) (letter order approving settlement).

¹⁷ The agreement was approved effective October 19, 2016. See *4C Acquisition, LLC*, Docket No. ER16-2446-000 (Sept. 22, 2016) (delegated letter order).

¹⁸ 4C Acquisition September 16, 2016 Filing at 8.

¹⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

access transportation of coal supplies (collectively, inputs to electric power production).²⁰ 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.²¹ 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.²²

17. Regarding other barriers to entry, 4C Acquisition represents that it does not own or control, and is not affiliated with entities that own or control, intrastate natural gas transportation, storage or distribution facilities. 4C Acquisition further represents that it and its affiliates do not own or control any sources of coal supplies or transportation of coal supplies.

18. Finally, consistent with Order No. 697, 4C Acquisition affirmatively states that it and its affiliates have not erected barriers to entry into any market and will not erect barriers in any market.

19. Based on 4C Acquisition's representations, we find that 4C Acquisition satisfies the Commission's requirements for market-based rates regarding vertical market power.

²⁰ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176. *See also* Order No. 816, FERC Stats. & Regs. ¶ 31,374 at PP 207-212 (removing the requirement that sellers report the acquisition of control of a site or sites for new generation capacity development for which site control has been demonstrated). Order No. 816 added that the Commission will continue to require market-based rate sellers to affirmatively state that they and their affiliates have not and will not raise any barriers to entry in the relevant market, including of land acquisitions, as part of the Commission's vertical market power analysis required in initial applications, triennials, and notices of change in status that affect the vertical market power analysis. *See* Order No. 816-A, FERC Stats. & Regs. ¶ 31,382 at P 57.

²¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447. *See also* Order No. 816, FERC Stats. & Regs. ¶ 31,374 at PP 354, 356 (confirming that the affirmative statement regarding barriers to entry must be made with regard to a seller and its affiliates and amending 18 C.F.R. § 35.37(e)(3) to specify that "a Seller is required to make an affirmative statement that it and its affiliates have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.").

²² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

B. Waiver Requests**1. Other Waivers and Authorizations**

20. 4C Acquisition 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 (with the exception of the provisions of Part 101 that apply to hydropower licensees with respect to licensed hydropower projects), and 141 of the Commission's regulations, except sections 141.14 and 141.15; and (3) blanket authorization under section 204 of the FPA²³ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

21. The Commission will grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.²⁴ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects 4C Acquisition to keep its accounting records in accordance with generally accepted accounting principles.

C. Reporting Requirements

22. Consistent with the procedures adopted by the Commission, 4C Acquisition must file an Electric Quarterly Report (EQR) with the Commission, consistent with

²³ 16 U.S.C. § 824c (2012).

²⁴ 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.

Order Nos. 2001²⁵ and 768.²⁶ 4C Acquisition must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.²⁷ Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which 4C Acquisition may be subject to refund, civil penalties, and/or revocation of market-based rate authority.²⁸

23. Additionally, 4C Acquisition 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.²⁹

24. In Order No. 697, the Commission created two categories of sellers.³⁰ Category 1 sellers are not required to file regularly scheduled updated market power

²⁵ *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). *See also Filing Requirements for Electric Utility Service Agreements*, 155 FERC ¶ 61,280 (2016) (order clarifying reporting requirements and updating data dictionary).

²⁶ *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, FERC Stats. & Regs. ¶ 31,336 (2012), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

²⁷ *See Revisions to Electric Quarterly Report Filing Process*, Order No. 770, FERC Stats. & Regs. ¶ 31,338, at P 3 (2012) (citing Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 31).

²⁸ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2016). Forfeiture of market-based rate authority may require a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²⁹ 18 C.F.R. § 35.42 (2016); *see also 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).

³⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

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. 888³¹); 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.³² Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.³³

25. 4C Acquisition requests Category 1 Seller status in the Northeast, Southeast, Central, Southwest Power Pool, and Northwest regions. 4C Acquisition represents that it does not own or control generation in any of these regions. 4C Acquisition represents that it does not operate or control any transmission facilities in these regions and is not affiliated with anyone that owns, operates or controls transmission facilities in these regions. 4C Acquisition states that it is not affiliated with a franchised public utility in any of these regions. 4C Acquisition further represents that it does not raise other vertical market power issues.

26. Based on 4C Acquisition's representations, we grant 4C Acquisition Category 1 seller status in the Northeast, Southeast, Central, Southwest Power Pool, and Northwest regions. Further, based on 4C Acquisition's representations, we find that 4C Acquisition meets the criteria for a Category 2 seller in the Southwest region. 4C Acquisition must file an updated market power analysis for the Southwest region in compliance with the

³¹ *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).

³² 18 C.F.R. § 35.36(a) (2016).

³³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

regional reporting schedule adopted in Order No. 697.³⁴ The Commission also reserves the right to require such an analysis at any time for any region.³⁵

The Commission orders:

(A) 4C Acquisition's market-based rate tariff is hereby accepted for filing and suspended for a nominal period, to become effective January 9, 2017, as requested, subject to refund and subject to the outcome of the proceeding in Docket No. ER10-3246-008 and a subsequent order in the instant proceeding, as discussed in the body of this order.

(B) 4C Acquisition is hereby directed to submit a compliance filing, within 30 days from the date an order has been issued for the pending proceeding in Docket No. ER10-3246-008, 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. 4C Acquisition 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 4C Acquisition, 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 4C Acquisition's issuance of securities or assumptions of liability.

³⁴ *Id.*

³⁵ *Id.* P 853.

(G) 4C Acquisition is hereby required to file EQRs in compliance with Order Nos. 2001 and 768. If the effective date of 4C Acquisition's market-based rate tariff falls within a quarter of the year that has already expired, 4C Acquisition'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.