

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

March 1, 2005

In Reply Refer To:

Alpena Power Generation, L.L.C.
Docket Nos. ER04-1004-000,
ER04-1004-001,
ER04-1004-002 and
ER04-1004-003

Bruder, Gentile & Marcoux, L.L.P.
Attn: William Booth, Esq.
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Washington, D.C. 20006-5807

Dear Mr. Booth:

1. On July 9, 2004, as amended on August 27, 2004, November 5, 2004, and January 5, 2005, Alpena Power Generation, L.L.C. (Alpena) filed an application for market-based rate authority, with an accompanying tariff and code of conduct, as well as three power sales agreements (PSAs). The proposed market-based rate tariff provides for the sale of capacity, energy and ancillary services at market-based rates and the reassignment of transmission capacity.¹ It also includes the Commission's market behavior rules.² Alpena's market-based rate tariff, as discussed below, satisfies the Commission's standards for market-based rate authority and is accepted for filing, effective September 8, 2004, after sixty days notice.

¹ Alpena plans to sell certain ancillary services in the markets administered by PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc. (NYISO), ISO New England (ISO-NE), and California Independent System Operator, Inc. (CAISO). Alpena also intends to engage in the sale of certain ancillary services to third party suppliers in other markets consistent with *Avista Corp.*, 87 FERC ¶ 61,223, *order on reh'g*, 89 FERC ¶ 61,136 (1999)(*Avista*).

² *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

2. Alpena is a limited liability company with its principal place of business in Michigan. Alpena is wholly-owned by Alpena Power Resources Ltd. (Alpena Resources), a privately-held exempt public utility holding company. Alpena Resources also owns Alpena Power Company (Alpena Distribution) who serves approximately 16,000 retail customers in Northern Michigan, but has no wholesale customers.
3. Alpena states that it owns thirty separate diesel-fueled electric generators with an aggregate capacity rating of approximately 54 MW, constructed after July 9, 1996. Alpena further states that ownership of this generating capacity is miniscule and fails to afford it the ability to exercise market power in the relevant market.
4. With regard to the three PSAs, PSA I and PSA II are capacity and energy sales agreements between Alpena and Consumers Energy Company (Consumers) dated January 28, 1999 and January 21, 2000, respectively. PSA III is an agreement between Alpena and its affiliate Alpena Distribution and is dated June 12, 2000.
5. Alpena requests waiver of the Commission's prior notice requirement to allow an effective date of January 28, 1999 for its market-based rate tariff and PSA I. In addition, Alpena requests effective dates of January 21, 2000 and June 12, 2000, respectively, for PSAs II and III. Alpena states that Commission authorization was not requested prior to this filing because it was unaware of the requirement to receive prior authorization. It states that Alpena and Alpena Distribution have an extremely small staff and conduct very limited utility operations. Alpena explains that as soon as it became aware of its non-compliance and potential refund liability for failure to file the three PSAs, it submitted the instant filing. As discussed below, Alpena's request for waiver of the Commission's prior notice requirement with regard to the proposed tariff and the three PSAs is denied.
6. On January 4, 2005, the Director, Division of Tariffs and Market Development-South, acting pursuant to delegated authority, issued a data request seeking additional information relating to whether all of Alpena Distribution's retail customers have the option to choose their electricity supplier and a clarification as to whether the exhibits submitted by Alpena in its November 5, 2004 filing reflect losses/revenue deficiencies of the corporation or losses/revenue deficiencies relating specifically to the PSAs, and for what years. In Alpena's response on January 5, 2005, Alpena states that Alpena's retail customers are all located in Michigan, a state that offers retail access. Alpena submits that because its retail customers may choose between suppliers, the Commission should not consider them to be captive. Alpena further states that the losses/revenue deficiencies identified by Alpena relate specifically to the PSAs for 1999 through 2004. Alpena notes that its only business has been and is the sale of power from its diesel generation assets and that the entirety of the output of those generators is sold pursuant to the PSAs. Consequently, Alpena states that its losses relate specifically to the PSAs for the years 1999 through 2004.

Procedural Matters

7. Notice of Alpena's filing, as amended, was published in the *Federal Register*, 69 Fed. Reg. 43,576 (2004), 69 Fed. Reg. 54,777 (2004), 69 Fed. Reg. 67,716 (2004), 70 Fed. Reg. 3,013 (2005), with interventions or protests due on or before November 26, 2004. None were filed.

Discussion

Market-Based Rate Authorization

8. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.³ As discussed below, the Commission concludes that Alpena satisfies the Commission's standards for market-based rate authority.

9. In its order issued in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power. Alpena cites section 35.27(a) of the Commission's regulations, which provides that applicants shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity constructed after July 9, 1996.⁴ If an applicant sites generation in an area where it or its affiliates own or control other generation assets, the applicant must study whether its new capacity, when added to existing capacity, raises generation market power concerns.⁵ Alpena states that it commenced construction of half of its generators in the Spring of 1999 and that construction of the remaining generators began in early 2000. Alpena states that none of its affiliates owns or controls generation. Accordingly, the Commission finds that Alpena satisfies the Commission's generation market power standard for the grant of market-based rate authority.

³ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶61,223 at 62,062-63 (1994).

⁴ 18 C.F.R. § 35.27(a) (2004). We note that the Commission intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify section 35.27 of its regulations.

⁵ *AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,018 at P 69, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

10. Alpena states that neither it nor any of its affiliates, including Alpena Distribution, owns any transmission facilities. Based on this representation, the Commission finds that Alpena satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

11. Alpena states that neither it nor its affiliates owns or controls any key input to power plant construction, generation, or transportation. Alpena states that it and its affiliates lack market power regarding fuel transportation facilities and any other factors that could create entry barriers to market participation. Accordingly, Alpena concludes that it and its affiliates do not have the ability, through the ownership of inputs, to erect any significant barrier to entry in the relevant markets for the sale of power and energy. Based on this representation, the Commission is satisfied that neither Alpena nor its affiliates can erect barriers to entry.

12. With regard to affiliate abuse/reciprocal dealing, the Commission has stated that affiliate abuse takes place when a utility and its affiliate transact in ways that result in a transfer of benefits from the utility (and its captive customers) to the affiliate (and its shareholders). Where an affiliate makes sales to its affiliated utility, the concern is that such sales not be made at a rate that is too high (*i.e.*, above the prevailing market price).

13. Article IX of Alpena's proposed market-based rate tariff includes a provision that prohibits the sale or purchase of power between Alpena and Alpena Distribution "without Commission approval of a separate section 205 filing under the Federal Power Act (FPA)."⁶ Alpena also has submitted a code of conduct. However, the proposed tariff language does not state that Alpena will not make sales to its affiliated public utility "without first receiving" Commission authorization of the transaction under section 205 of the FPA. Therefore, consistent with Commission precedent, Alpena is directed to make a compliance filing within 30 days of the date of issuance of this order to revise its market-based rate tariff to include such language.⁷

14. Alpena also requests authority to make sales to its affiliate Alpena Distribution under PSA III, waiver of the Commission's market-based rate code of conduct, or, in the alternative waiver of the separation of employees and information sharing provisions. Alpena states that it has two part-time employees and Alpena Distribution has 43 full-time employees. Alpena shares seven of Alpena Distribution's employees. Alpena states that it would no longer be able to operate if it is required to "triple its work force by hiring seven new full time employees." On this basis, if the Commission does not waive

⁶ 16 U.S.C. § 824d (2000).

⁷ *See Aquila, Inc.*, 101 FERC ¶ 61,331 at P 7-9, 12 (2002).

the code of conduct in its entirety, Alpena requests that it waive the separation of employees and information sharing provisions.

15. With respect to wholesale sales of energy to Alpena Distribution under PSA III, Alpena states that it sells a very small amount of energy generated by its diesel generators during testing periods. Tests are conducted weekly during the periods in which the PSA I and II call options may be exercised to ensure that the units can produce energy.⁸ Alpena states that these tests are short in duration, typically less than an hour. The price for the test energy is set at a value that is less than or equal to the price Alpena Distribution would have to pay to Consumers under that company's existing power purchase agreements with Consumers.⁹ Alpena states that on average it sells less than 225 MWh of test energy under PSA III. In addition, PSA III also provides that, during periods when energy prices are very high, Alpena Distribution may call upon Alpena to supply energy subject to Consumers' right of first call under PSAs I and II. Alpena adds that it has lost money every year it has been in operation, is close to insolvency and is considering filing for bankruptcy.

16. Additionally, Alpena argues that PSA III is an affiliate transaction that satisfies the *Mountainview* criteria¹⁰ because: Alpena sells only energy under the contract; there is no capacity sale or reservation of any kind; in most instances, the sale is for a limited amount of energy that is available pursuant to tests conducted by Alpena to determine operating ability of its diesel generators; energy sales have averaged only about 225 MWh annually; the price for this test energy is based on the energy prices contemporaneously available from Consumers; and the price has been well below Alpena's out-of-pocket energy costs. In addition, Alpena argues that other energy sales

⁸ Under PSAs I and II, Consumers pays a call-option premium that allows Consumers to call upon Alpena's generation to supply energy from Alpena's units at certain times of the year at predetermined strike prices that are tied annually to fuel oil prices. Consumers must notify Alpena the day before it exercises its call option and has done so only when Consumer's demand is at its peak.

⁹ Alpena states that, Alpena Distribution owns no generation and purchases approximately 88 percent of its power needs from Consumers, 9 percent from independently-owned local run-of-the-river hydro units, and the remainder from two customers with non-QF cogeneration capability.

¹⁰ In *Southern California Edison Company (Mountainview)*, 106 FERC ¶ 61,183 (2004), the Commission stated, among other things, that it would closely scrutinize affiliate transactions and would require that all affiliate long-term (one year or longer) power purchase agreements, whether at cost or market, be subject to the conditions set forth in *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (requiring a showing that a sale of power at market-based rates to a franchised utility from an affiliate is reasonably priced compared to alternatives in the market).

under PSA III are the result of Alpena Distribution reducing energy prices it would otherwise pay to Consumers and such sales would be made infrequently due to the high out of pocket cost of operating Alpena's units.

17. With respect to Alpena's request to make power sales to its affiliate pursuant to PSA III, the Commission will grant Alpena's request for sales of "test power" (incidental power) and grant Alpena's request with regard to other energy sales. With respect to sales of this incidental power, Alpena provides a limited service that is unique to its existing power sales contracts. During periods when Consumers can call upon Alpena's generation capacity, Alpena performs weekly tests of its generators to be sure that they can produce power and meet Alpena's obligations under PSAs I and II. These incidental power sales are priced at a value that is less than or equal to the price Alpena Distribution would have to pay to Consumers under the company's existing power purchase agreements. In this regard, Alpena Distribution is no worse off by purchasing this power from Alpena rather than from Consumers. Because of the limited nature of this service, the price protections, and the lack of captive customers, we are satisfied that our affiliate abuse concerns have been addressed.

18. In support of its request for waiver of the market-based rate code of conduct, Alpena states that Alpena Distribution does not own Commission-jurisdictional facilities, including transmission facilities, owns no generation facilities, and sells no electrical power at wholesale. Alpena Distribution's activities are restricted to supplying retail power and distribution services and, consequently, Alpena Distribution has no wholesale sales or transmission customers to whom costs could be shifted and Alpena Distribution is not subject to Commission jurisdiction. Alpena states that because Alpena Distribution's retail customers have retail choice and thus may choose between suppliers, the Commission should not consider them to be captive.

19. The Commission has granted requests for waiver of the code of conduct requirement where there are no captive customers (and thus no potential for affiliate abuse) or where the Commission is satisfied that the utility's captive wholesale and retail customers are adequately protected against affiliate abuse.¹¹ As noted above, Alpena Distribution has no captive wholesale customers, and its retail customers have retail choice. Accordingly, the Commission will grant Alpena's request for waiver of the code of conduct requirement.¹²

¹¹ See, e.g., *Green Power Partners I LLC.*, 88 FERC ¶ 61,005 (1999).

¹² We note that the Commission intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify its policy for waiver of the code of conduct.

20. We caution that should Alpena obtain captive customers in the future, Alpena is directed to notify the Commission and we reserve the right to impose the code of conduct requirement and the affiliate sales prohibition. In any event, the Commission's action here does not constitute a waiver of the separate standards of conduct requirements contained in 18 C.F.R. Part 37 (2004), nor does it constitute a waiver of the FPA requirement that all rates be just and reasonable and not unduly discriminatory or preferential.

21. Alpena requests authority to engage in the sale of ancillary services (listed in the proposed tariff) at market-based rates into the markets administered by ISO-NE, PJM, NYISO, and CAISO. Consistent with Commission precedent granting authority to sellers to engage in such transactions in those markets, the Commission will grant Alpena's request.¹³

22. Alpena also requests authority to make sales of ancillary services to third party suppliers in other markets. In *Avista*, the Commission stated that, among other things, third party ancillary service sellers that cannot perform a market power study should be allowed to sell ancillary services at flexible rates, but only in conjunction with a requirement that such third parties establish an Internet-based OASIS-like site for providing information regarding the ancillary services transactions.

23. Alpena states that if and when Alpena decides to make sales of ancillary services, it will implement an Internet-based OASIS-like site that provides information about Alpena, the prices of the ancillary services offered, the procedures to facilitate transactions and the actual transaction prices after the transactions are consummated. Further, Alpena has committed to file with the Commission a compliance filing notifying the Commission when it establishes the Internet-based OASIS-like site and it commits to file with the Commission one year after the Internet site is operational (and at least every three years thereafter) a report describing its activities in the ancillary services markets.¹⁴ The Commission will grant this request conditioned upon Alpena establishing an Internet-based OASIS-like site prior to offering ancillary services as a third party provider, pursuant to *Avista*, and notifying the Commission in a compliance filing.

¹³ See, e.g., *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001); *Atlantic City Electric Company*, 86 FERC ¶ 61,248, *clarified*, 86 FERC ¶ 61,310 (1999); *Central Hudson Gas & Electric Corporation*, 86 FERC ¶ 61,062, *order on reh'g*, 88 FERC ¶ 61,138 (1999); *AES Redondo Beach, L.L.C.*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC ¶ 61,208 (1999), *order on reh'g and clarification*, 90 FERC ¶ 61,036 (2000).

¹⁴ Alpena's July 9 Application at p.11.

24. Alpena's proposed tariff also includes a provision governing reassignment of transmission capacity. The Commission finds this provision to be consistent with the Commission's requirements.¹⁵ Accordingly, we grant this request.

Other Waivers, Authorizations and Reporting Requirements

25. Alpena requests the following waivers and authorizations: (1) waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to sections 35.12(a), 35.13(b), 35.15 and 35.16; (2) waiver of Parts 41, 101 and 141 of the Commission's accounting and periodic reporting requirements; (3) abbreviated filings with respect to interlocking directorates under Part 45 of the Commission's regulations; and (4) blanket authorization under 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 other entities with market-based rate authorizations.¹⁶ Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Alpena to keep its accounting records in accordance with generally accepted accounting principles.

27. Within 30 days of the date of the issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Alpena should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (2004).

28. Absent a request to be heard within the period set forth above, Alpena 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 Alpena,

¹⁵ See *Southwestern Public Service Company*, 80 FERC ¶ 61,245 (1997).

¹⁶ It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101 and 141) as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of obligations and liabilities, (18 C.F.R. Part 34). See *Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities*, Order No. 627, 67 Fed. Reg. 67,691 at P 23 and P 24 (October 10, 2002), FERC Stats. & Regs. ¶ 32,558 (2002).

compatible with the public interest, and reasonably necessary or appropriate for such purposes.

29. Until further order of this Commission, the full requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving Alpena. Any such person instead shall file a sworn application providing the following information:

- (1) full name and business address; and
- (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

30. 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 Alpena's issuances or securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

31. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report 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 greater) market-based power sales during the most recent calendar quarter.¹⁷ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁸ Accordingly, Alpena must file its first Electric Quarterly Report no later than 30 days after the first quarter Alpena's tariff is in effect.¹⁹

¹⁷ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted 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>.

¹⁸ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

¹⁹ Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, 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.

32. Additionally, Alpena 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.²⁰ A change in status includes, but is not limited to each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

33. Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, Alpena is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in Order No. 652.

34. Alpena is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission reserves the right to require such an analysis at any intervening time.

Waiver of Prior Notice Requirement

35. Alpena requests waiver of the Commission's prior notice requirement.²¹ Alpena notes that it entered into three long-term PSAs (PSAs I, II, and III as discussed above) for the sale of capacity and energy on January 28, 1999, January 21, 2000, and June 12, 2000 respectively. However, Alpena states that Commission authorization was not requested prior to this filing because it was unaware of the requirement to receive prior authorization. Alpena argues that upon learning that market-based rate authorization was required by the Commission, it filed the instant application. Alpena states that its revenues have been well below the cost-based level since it began transacting at market-based rates in calendar year 1999. Alpena states that it has lost money every year since it began operation, is close to insolvency and is considering filing for bankruptcy. Alpena states that its principal customer, Consumers, has not been injured by Alpena's failure to timely file its tariff and agreements. Therefore, Alpena seeks waiver of the prior notice requirement to allow an effective date of January 28, 1999 for its market-based rate tariff,

²⁰ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 (2005) (Order No. 652).

²¹ *Citing Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,980 (*Prior Notice*), *order on reh'g*, 65 FERC ¶ 61,081 (1993).

and to allow separate effective dates for its three PSAs. Alpena seeks waiver of any refund requirement.

36. Section 205 of the FPA requires that rates be timely filed with the Commission.²² 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."²³ Thus, a regulated entity must timely file its rates to allow the Commission to fulfill its statutory mandate, namely, determining whether the rates being charged are just and reasonable. The Commission has further stated that it "does not allow market-based rates to go into effect before a filing has been tendered with the Commission."²⁴ In *Central Maine Power Co.*²⁵ and *Prior Notice*,²⁶ the Commission explained that it would grant waiver of prior notice for proposals to charge market-based rates only in extreme or extraordinary circumstances.

37. Based on the information presented by Alpena, the Commission finds that Alpena has not demonstrated the presence of extraordinary circumstances that would warrant a waiver of the Commission's prior notice requirement.²⁷ Accordingly, the Commission denies Alpena's request for waiver of the 60-day prior notice requirement with regard to the three PSAs and the market-based rate tariff. The Commission accepts the proposed tariff for filing to be effective September 8, 2004, following 60 days notice from the date of the filing. With regard to the three PSAs, as discussed above, Alpena must file electronically with the Commission an Electric Quarterly Report 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 greater) market-based power sales (including the three PSAs at issue here) during the most recent calendar quarter.

38. The Commission has noted that if a utility files a market-based rate less than 60 days prior to the proposed effective date of new service, and waiver is denied, the

²² See *El Paso Electric Co.*, 105 FERC ¶ 61,131 at P 9-11 (2003) (*El Paso*).

²³ *Id.* at P 14.

²⁴ *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).

²⁵ 56 FERC ¶ 61,200, *order on reh'g*, 57 FERC ¶ 61,083 (1991).

²⁶ 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081.

²⁷ See *Idaho Power Company*, 95 FERC ¶ 61,482 at 62,718 & n.16.

Commission will require the utility to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission's regulations²⁸ for the entire period that the rate was collected without Commission authorization.²⁹ In addition to returning the time value of the revenues collected for the period the rate was charged without Commission authorization, the Commission has established the remedy for failure to file:

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.³⁰

39. Whether or not a party actually suffered any harm is irrelevant to our inquiry here. The injury being remedied by refunds for late filing is not merely redress for the 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."³¹

40. Normally, Alpena would be required to refund its customers the time value of the revenues for the entire period that the rate was collected without Commission authorization, as well as the difference between the market-based and cost-justified rates. Alpena states that the revenues collected under the three PSAs have not been sufficient to cover all of Alpena's costs. The Commission limits the application of the time value formula to an amount that permits the public utility to recover its variable costs.³² In the instant case, Alpena has demonstrated that the revenues collected under the three PSAs

²⁸ 18 C.F.R. § 35.19a (2004).

²⁹ *Prior Notice*, 64 FERC at 61,980.

³⁰ *Id.*; see 16 U.S.C. § 825h (2000). See *Southern California Water Co.*, 106 FERC ¶ 61,305 at P 15-16, *reh'g denied*, 108 FERC ¶ 61,168 (2004).

³¹ *El Paso*, 105 FERC ¶ 61,131 at P 21 (footnote omitted) (*citing Carolina Power & Light Co.*, 87 FERC 61,083 at 61,356 (1999) (*Carolina Power*)).

³² See *Carolina Power*, 87 FERC at 61,357.

have not been sufficient to cover its costs by providing cost support for the entire period that the rate was collected without Commission authorization. On this basis, we find that Alpena is not required to make refunds.

By direction of the Commission.

Linda Mitry,
Deputy Secretary.