

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Lumberton Power, LLC
Elizabethtown Power, LLC

Docket Nos. ER06-1375-000
ER06-1376-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION

(Issued October 16, 2006)

1. On August 17, 2006, Lumberton Power, LLC (Lumberton) and Elizabethtown Power, LLC (Elizabethtown) filed applications for market-based rate authority, with accompanying tariffs. The proposed market-based rate tariffs provide for the sale of energy, capacity, and ancillary services at market-based rates, the reassignment of transmission capacity, and the resale of firm transmission rights (FTRs).¹ Lumberton's and Elizabethtown's market-based rate tariffs also include the Commission's change in status reporting requirement pursuant to Order No. 652.² In addition, Elizabethtown requests cancellation of its existing market-based rate tariff. In this order, the Commission accepts Lumberton's and Elizabethtown's market-based rate tariffs for filing, effective August 18, 2006, as requested and accepts Elizabethtown's notice of cancellation of its existing market-based rate tariff.³

¹ Lumberton and Elizabethtown plan 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 Inc. (ISO-NE), and California Independent System Operator Corporation (CAISO).

² *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

³ Lumberton Power, LLC, FERC Electric Tariff, Original Volume No. 2, Original Sheet Nos. 1-3; Elizabethtown Power, LLC, FERC Electric Tariff, Original Volume No. 2, Original Sheet Nos. 1-3. In its application, Elizabethtown asks the Commission to terminate its existing market-based rate tariff. The Commission will treat Elizabethtown's request as a notice of cancellation under section 35.15 of the Commission's regulations, 18 C.F.R. § 35.15 (2006).

Background

2. Both Lumberton and Elizabethtown state that they are Delaware limited liability companies that each own and operate a 32 MW cogeneration facility in North Carolina. The Lumberton facility is located in Robeson County and the Elizabethtown facility is located in Bladen County. Lumberton and Elizabethtown are 100 percent owned by North Carolina Power Holdings, LLC which in turn is 100 percent owned by Vulcan Power Group, L.L.C.⁴ The Lumberton and Elizabethtown facilities are located in the Carolina Power & Light Company (CP&L) control area.⁵
3. Lumberton and Elizabethtown, both of which are qualifying facilities (QFs), currently sell all of their respective facility's output to CP&L pursuant to existing power purchase agreements (PPAs).
4. Lumberton and Elizabethtown seek authority to sell capacity, energy and ancillary services at market-based rates. They explain that but for recent revisions to section 292.601(c) of the Commission's regulations resulting from Order No. 671,⁶ prior Commission approval to make such sales would not be needed. As a result of these recent regulatory changes however, the facilities are no longer exempt from section 205 of the Federal Power Act (FPA) for sales made pursuant to a contract executed after March 17, 2006 or for sales that are not made pursuant to a state regulatory authority's implementation of the Public Utility Regulatory Policies Act of 1978 (PURPA).⁷
5. Lumberton states that it previously had a market-based rate tariff on file with the Commission, but due to its failure to submit an updated market power analysis, its market-based rate tariff was terminated.⁸

⁴ Vulcan's common interest is owned by Vulcan Capital, L.L.C. (50 percent) and TDF & Coal, Inc. (50 percent).

⁵ CP&L is d/b/a Progress Energy Carolinas.

⁶ *See Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 (2006); *order on clarification*, 114 FERC ¶ 61,128 (2006).

⁷ 16 U.S.C. § 824a-3 (2000). PURPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

⁸ *See 3E Technologies, Inc*, 113 FERC ¶ 61,124 (2005).

6. Elizabethtown requests that the Commission cancel its existing market-based rate tariff,⁹ which was filed by the facility's previous owner, and submits the proposed market-based rate tariff, which reflects its current ownership and market position.

7. Both Lumberton and Elizabethtown request waiver of the Commission's 60-day prior notice requirement to allow their respective tariffs to become effective August 18, 2006.

Notice of Filing and Responsive Pleadings

8. Notice of Lumberton's and Elizabethtown's August 17, 2006 filings were published in the *Federal Register*, 71 Fed. Reg. 51,601 (2006), with interventions and protests due on or before September 7, 2006. On September 14, 2006, CP&L filed motions to intervene out-of-time and protests. On September 15, 2006, Lumberton and Elizabethtown filed answers to CP&L's protests.

9. With respect to both Lumberton's and Elizabethtown's filings,¹⁰ CP&L argues that the Commission should deny the requests for waiver of the 60-day prior notice requirement and instead make the tariffs effective on January 1, 2007, the day after Lumberton's and Elizabethtown's PPAs with CP&L terminate. CP&L argues that Lumberton and Elizabethtown are parties to two legally binding PPAs¹¹ whereby Lumberton and Elizabethtown are obligated to sell the entire output from each facility to CP&L through December 31, 2006, the date the PPAs expire. It is CP&L's contention that granting Lumberton's and Elizabethtown's applications for market-based rate authority with the requested effective date would enable Lumberton and Elizabethtown to sell the output of their respective facilities to third parties in violation of the terms of the PPAs.

10. CP&L submits that it is conducting preliminary negotiations with Lumberton and Elizabethtown to terminate the PPAs. CP&L states that if it can reach an agreement on the early termination of the PPAs with Lumberton and Elizabethtown, then it would not oppose Lumberton's and Elizabethtown's request for waiver of the 60-day prior notice requirement to allow the proposed tariffs to become effective on August 18, 2006.

⁹ Elizabethtown FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-3.

¹⁰ CP&L makes similar arguments in its protests of both Lumberton's and Elizabethtown's filings.

¹¹ Lumberton and Elizabethtown state in their submittals that they currently sell each facility's output to CP&L pursuant to existing PURP A avoided cost arrangements for qualifying cogenerators and small power producers.

Discussion

Procedural Matters

11. Notwithstanding Lumberton's and Elizabethtown's opposition, we will grant CP&L's motions to intervene out-of-time, given its interest in these proceedings, the early stage of these proceedings and the absence of any undue delay or prejudice. 18 C.F.R. § 385.214 (2006).

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by Lumberton and Elizabethtown because they have provided information that assisted us in our decision-making process.

Market-Based Rate Authorization

13. 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.¹²

14. As discussed below, the Commission concludes that both Lumberton and Elizabethtown satisfy the Commission's standards for market-based rate authority.

Generation Market Power

15. In the Commission's 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. Lumberton and Elizabethtown rely on Duke Power Company's recently accepted generation market power analysis to demonstrate that Lumberton and Elizabethtown pass both the pivotal supplier and wholesale market share screens for the CP&L control area.¹³ The analysis indicates that neither Lumberton nor Elizabethtown are pivotal suppliers and Lumberton's and Elizabethtown's market shares are no greater than 0.8 percent, respectively. Accordingly, the Commission finds that Lumberton and Elizabethtown satisfy the Commission's generation market power standard for the grant of market-based rate authority.

¹² 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).

¹³ *Duke Power Co.*, 109 FERC ¶ 61,270 (2004).

Transmission Market Power

16. Lumberton and Elizabethtown state that neither they nor any of their affiliates own or control any transmission facilities other than those necessary to interconnect their generation facilities to the grid. Further, no intervenor has raised transmission market power concerns. Based on Lumberton's and Elizabethtown's representations, the Commission finds that Lumberton and Elizabethtown satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

Barriers to Entry

17. Lumberton and Elizabethtown submit that neither they nor any of their affiliates own or control any sites for the construction of new generation capacity, or other essential resources or inputs that could be used to restrict market entry by competing suppliers. Based on Lumberton's and Elizabethtown's representations, the Commission is satisfied that Lumberton and Elizabethtown cannot erect barriers to entry.

Affiliate Abuse

18. Lumberton and Elizabethtown submit that neither they nor any of their affiliates own a franchised service territory, and therefore that no affiliate abuse concerns exist. Based on these representations, the Commission finds Lumberton and Elizabethtown satisfy the Commission's concerns with regard to affiliate abuse.

Ancillary Services and Other Requests

19. Lumberton and Elizabethtown request authority to engage in the sale of certain ancillary services (listed in the proposed tariff) at market-based rates into the markets administered by PJM, NYISO, ISO-NE, and CAISO. Consistent with Commission precedent granting authority to sellers to engage in such transactions in those markets, the Commission will grant Lumberton's and Elizabethtown's requests.¹⁴

20. In addition, Lumberton and Elizabethtown propose to sell additional ancillary services in these markets and in additional geographic markets as the Commission may specify and authorize from time-to-time in orders that extend such authority to all sellers previously authorized to sell energy and/or capacity at market-based rates. Lumberton's

¹⁴ See, e.g., *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001); *Atlantic City Electric Co.*, 86 FERC ¶ 61,248, *clarified*, 86 FERC ¶ 61,310 (1999); *Central Hudson Gas & Electric Corp.*, 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).

and Elizabethtown's requests are granted in this regard; however, this grant does not relieve Lumberton and Elizabethtown of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2006).¹⁵

21. Lumberton and Elizabethtown also request authority to reassign transmission capacity and to resell FTRs or their equivalent. The Commission finds that these provisions are consistent with the Commission's requirements.¹⁶ Accordingly, the Commission will grant this request.

Waivers, Authorizations, and Reporting Requirements

22. Lumberton and Elizabethtown request 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; and (3) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

23. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.¹⁷ Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Lumberton and Elizabethtown to keep their accounting records in accordance with generally accepted accounting principles.

24. The Commission will also grant Lumberton's and Elizabethtown's requests for waiver of the prior notice requirement to allow the respective market-based rate tariffs to become effective on August 18, 2006. In Order No. 671, the Commission clarified that it would waive the 60-day prior notice requirement of section 205 of the FPA for electric energy sales that, pursuant to Order No. 671's elimination of certain regulatory exemptions, will now be subject to section 205 filings, provided that such section 205

¹⁵ *Calhoun Power Company*, 96 FERC ¶ 61,056 (2001).

¹⁶ *See Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997); *Calif. Indep. Sys. Operator Corp.*, 89 FERC ¶ 61,153 (1999).

¹⁷ 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 liabilities (18 C.F.R. Part 34). *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Notice of Proposed Rulemaking*, 71 Fed. Reg. 33,102 (June 7, 2006), FERC Stats. & Regs. ¶ 32,602 at P 169 (2006).

filings are made prior to Order No. 671's effective date of March 17, 2006. The Commission stated that it would address the issue of whether to waive the 60-day prior notice requirement for section 205 filings made on or after the effective date of Order No. 671 on a case-by-case basis.¹⁸ Here, Lumberton and Elizabethtown submit that both are small QFs and that waiver will allow them to sell power in distant wholesale markets during the peak summer season, thus increasing competition in those markets. We find it appropriate to waive the 60-day prior notice requirement in this case. We note that nothing in our grant of market-based rate authority adversely effects the previously negotiated contractual obligations under the existing PPAs.

25. In regard to Elizabethtown's request for cancellation of its existing market-based rate tariff, Elizabethtown explains that its existing market-based rate tariff is out of date and does not reflect its current upstream ownership and market position.¹⁹ In addition, Elizabethtown offers that no power sales were made pursuant to the existing market-based rate tariff. Therefore, the Commission will accept Elizabethtown's notice of cancellation.

26. Lumberton and Elizabethtown are required to file Electric Quarterly Reports (EQRs) in compliance with Order No. 2001.²⁰ If the effective date of Lumberton's and Elizabethtown's market-based rate tariffs falls within a quarter of the year that has already expired, Lumberton's and Elizabethtown's EQRs for the expired quarter(s) are due within 30 days of the date of this order.

27. Lumberton and Elizabethtown are both directed to file an updated market power analysis within three years of the date of this order. The Commission also reserves the right to require such an analysis at any intervening time.

¹⁸ See *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 (2006); *order on clarification*, 114 FERC ¶ 61,128 at P 1 and note 7 (2006).

¹⁹ The Commission granted Elizabethtown market-based rate authority in *Elizabethtown Power, LLC*, Docket No. ER01-1509-000 (May 10, 2001) (unpublished letter order).

²⁰ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). See 18 C.F.R. § 35.10b (2005). 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.

The Commission orders:

(A) Lumberton's and Elizabethtown's market-based rate tariffs are hereby accepted for filing, effective August 18, 2006, as discussed in the body of this order.

(B) Elizabethtown's notice of cancellation of its previous market-based rate tariff is accepted, effective August 18, 2006, 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 Parts 41, 101, and 141 of the Commission's regulations is hereby granted, with the exception of 18 C.F.R. §§ 141.14, 141.15 (2006).

(E) 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 Lumberton and Elizabethtown should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., 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 (2006).

(F) Absent a request to be heard within the period set forth above, Lumberton and Elizabethtown 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 Lumberton and Elizabethtown, 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 continued Commission approval of Lumberton's and Elizabethtown's issuances of securities or assumptions of liabilities.

(H) Lumberton and Elizabethtown are required to file Electric Quarterly Reports (EQRs) in compliance with Order No. 2001. If the effective date of Lumberton's and Elizabethtown's market-based rate tariffs falls within a quarter of the year that has already expired, Lumberton's and Elizabethtown's EQRs for the expired quarter(s) are due within 30 days of the date of this order.

(I) Lumberton and Elizabethtown are both hereby directed to file an updated market power analysis within three years of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.