

127 FERC ¶ 61,114
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

WC Landfill Energy, LLC

Docket No. ER09-505-000

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

(Issued May 1, 2009)

1. In this order, the Commission grants market-based rate authorization to WC Landfill Energy, LLC (WC Landfill), effective March 9, 2009.¹ WC Landfill must revise its tariff sheets to include this effective date.
2. Additionally, we find that WC Landfill meets the criteria for a Category 1 seller and is so designated.

Background

3. On January 7, 2009, WC Landfill filed an initial application for market-based rate authority with an accompanying rate schedule. The proposed market-based rate schedule provides for the sale of energy, capacity, and ancillary services at market-based rates. WC Landfill requests waivers commonly granted to similar market-based rate applicants and waiver of the prior notice requirement to make such authorization effective as of January 8, 2009. On March 5, 2009, WC Landfill supplemented its initial application with additional information concerning the ownership structure and energy assets of one of its owners, DCO Energy, LLC (DCO Energy). WC Landfill provided additional information regarding DCO Energy's energy assets on March 18, 2009.
4. WC Landfill states that it is a joint venture between Marina Energy, LLC (Marina Energy),² and DCO Energy. WC Landfill owns and operates an approximately 3.8 MW

¹ FERC Electric Tariff Original Vol. 1, Original Sheet Nos. 1-3.

methane-to-electric generation system (the Facility) located in the PJM Interconnection, LLC (PJM) footprint. WC Landfill sells the output of the Facility to Marina Energy, which then resells the energy. WC Landfill states that it began generating and selling energy in December 2005.

5. Marina Energy is wholly owned by South Jersey Energy Solutions, LLC (SJ Energy), which in turn is owned by South Jersey Industries, Inc. (SJ Industries). SJ Energy is a holding company for all of SJ Industries' non-regulated utility businesses. SJ Industries is a diversified publicly-traded holding company whose investments include natural gas distribution and marketing.³

6. WC Landfill states that Marina Energy owns or controls the following amounts of generation, all of which are located in the PJM footprint: an 8 MW Marina Thermal Energy generating facility, which primarily serves the electrical and thermal needs of the Atlantic City, New Jersey casino at which the facility is located; and the Mannington Mills Cogeneration Facility, which is a 4 MW cogeneration facility.

7. DCO Energy is an energy development company specializing in the development, engineering, construction, start up, commissioning, operation, maintenance, management, and ownership of central energy centers, renewable energy projects, and combined heat, chilling and power production facilities.

8. WC Landfill states that DCO Energy currently operates (directly or through its wholly-owned subsidiary DCO Essex Energy, LLC) the following electric generating facilities which are located in the PJM footprint and which provide on-site electric energy to the associated host facilities: the Bergen County Correctional Facility, a

² Marina Energy was granted market-based rate authority in *Marina Energy, LLC*, Docket No. ER03-715-000 (June 17, 2003) (unpublished letter order).

³ SJ Industries owns the following subsidiaries, none of which owns or controls any generation or transmission facilities: South Jersey Energy Company, which acquires and markets natural gas and electricity to retail end users and provides energy management services to commercial and industrial customers; South Jersey Gas Company, which is a regulated natural gas utility that distributes natural gas at retail in southern New Jersey; and SJI Services, LLC, which is a non-regulated service company providing services to SJ Industries and its other subsidiaries.

1.3 MW combined heat and power cogeneration facility; and the Essex County Correctional Facility, a 6.0 MW combined heat and power cogeneration facility.⁴

9. WC Landfill states that it is affiliated through common upstream ownership with the following entities that own or control other methane-to-electricity generating facilities at municipal landfill operations located within the PJM footprint: AC Landfill Energy, LLC (AC Landfill), which has a maximum plant capacity of 5.4 MW; BC Landfill Energy, LLC (BC Landfill), which has a maximum plant capacity of 7.1 MW; and SC Landfill Energy, LLC (SC Landfill), which has a maximum plant capacity of 1.9 MW.⁵

10. WC Landfill states that the Facility is WC Landfill's only electric generation facility in North America, and through its ownership interests with the affiliates described above, WC Landfill is affiliated with 30.8 MW of generation, for a total of 34.6 MW of generation in the PJM footprint. Additionally, WC Landfill states that there are no contractual or other arrangements that result in the transfer or control of any electric generation assets owned by third parties to WC Landfill or its affiliates, or the transfer of any electric generation assets owned by WC Landfill or its affiliates to third parties.

11. WC Landfill states that it seeks the same pre-approvals and waivers previously granted to other sellers permitted to sell at market-based rates. WC Landfill requests waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except for sections 35.12(a), 35.13(b), 35.15 and 35.16. WC Landfill also requests blanket authorization under Part 34 for all future issuances of securities and assumption of liability; and waiver of all regulations that the Commission previously has waived at the request of other entities authorized to sell energy at market-based rates.

⁴ DCO Energy also owns the following subsidiaries, neither of which owns or controls any electric generation or transmission facilities: Goldstar Energy Group, Inc., which is wholly owned by DCO Energy and provides consulting services for energy projects; and Energenic, LLC, a joint venture between DCO Energy and Marina Energy, which provides energy engineering, project financing, as well as project and asset management services.

⁵ SC Landfill was granted market-based rate authority on January 26, 2009 in *SC Landfill*, Docket No. ER09-343-000 (unpublished letter order).

12. WC Landfill also requests waiver of the Commission's prior notice requirement. WC Landfill states that it began to generate energy at the Facility in December 2005, but was not aware that separate market-based rate authorization was required because its upstream parent company, Marina Energy, controls and markets the electrical output of the Facility.⁶

13. WC Landfill recognizes that the Commission's normal policy is to require the refund to customers of the time value of revenues collected by a public utility pursuant to rates not previously authorized by the Commission. WC Landfill requests a waiver of this policy.

Notice of Filing and Responsive Pleadings

14. Notice of WC Landfill's request for market-based rate authority was published in the *Federal Register*, 74 Fed. Reg. 4423 (2009), with interventions or protests due on or before January 28, 2009. None was filed.

15. Notice of WC Landfill's request for blanket authorization under Part 34 was separately published in the *Federal Register*, 74 Fed. Reg. 4179 (2009), with interventions or protests due on or before February 3, 2009. None was filed.

16. Notice of WC Landfill's March 5 supplemental filing was published in the *Federal Register*, 74 Fed. Reg. 10,908 (2009), with interventions or protests due on or before March 16, 2009. None was filed.

Discussion

A. Market-Based Rate Authorization

17. 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

⁶ WC Landfill notes that its affiliates AC Landfill and BC Landfill are also seeking market-based rate authorization from the Commission. These affiliates previously engaged in wholesale sales of electric power without having sought Commission authorization.

power.⁷ As discussed below, we find that WC Landfill satisfies the Commission's standards for market-based rate authority.

1. Horizontal Market Power

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

19. WC Landfill prepared the pivotal supplier and wholesale market share screens for the PJM market.⁸ WC Landfill states that 34.6 MW of electric generation is attributable to it for purposes of the market power screens. WC Landfill represents that it is not pivotal and states that its market share in all seasons in the PJM market is significantly less than 1 percent.

20. The Commission has reviewed WC Landfill's pivotal supplier screen and wholesale market share screen. We find that WC Landfill passes both screens in the PJM market. Accordingly, we find that WC Landfill satisfies the Commission's requirements for market-based rates regarding horizontal market power.⁹

⁷ *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 P 62, 399, 408, 440, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008), *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008).

⁸ WC Landfill states that because the only generating facilities owned or controlled by it and its affiliates are located in the PJM market, it prepared a market power analysis only with respect to that market. WC Landfill relies on the market power analysis accepted in *FirstEnergy Operating Cos.*, 125 FERC ¶ 61,074 (2008), as its source for the PJM market data.

⁹ WC Landfill's co-owner, DCO Energy, operates 7.3 MW of on-site combined heat and power generation facilities. We read WC Landfill's application to mean that this 7.3 MW of generation is used for on-site purposes and is not used to engage in a wholesale transaction. Therefore, this 7.3 MW need not be included in WC Landfill's market power analysis. However, we remind WC Landfill that, if the facts presented in its application change, WC Landfill must submit a change in status filing. 18 C.F.R. § 35.42 (2008).

2. Vertical Market Power

21. 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 on file before granting a seller market-based rate authorization.¹⁰

22. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹¹ 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 sources of coal supplies and equipment for the transportation of coal supplies, such as barges and rail cars (collectively, inputs to electric power production).¹² 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.¹³

23. WC Landfill states that neither it nor its affiliates own or control any transmission facilities other than incidental interconnection facilities for its plants to interconnect to the grid.

24. With regard to other barriers to entry, WC Landfill states that neither it nor any of its affiliates own or control intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; own or control any unique sites for new generation capacity development; own or control any physical coal supply sources; or have ownership or control over who may access transportation of coal supplies.

¹⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

¹¹ *Id.* P 440.

¹² *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include "physical coal supply sources and ownership of or control over who may access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

25. Consistent with Order No. 697, WC Landfill affirmatively states that it has not erected any barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

26. Based on WC Landfill's representations, we find that WC Landfill satisfies the Commission's requirements for market-based rates regarding vertical market power.

B. Affiliate Restrictions

27. WC Landfill states that neither it nor any of its affiliates have a franchised service area for the sale of electricity. Additionally, WC Landfill states that it will abide by the Commission's restrictions on transactions between a market-based rate seller and its affiliates that are franchised public utilities, to the extent that they apply to WC Landfill.

28. Thus, pursuant to the "Compliance with Commission Regulations" provision in its tariff, WC Landfill is required to comply with the affiliate restrictions in section 35.39 of the Commission's regulations.

C. Waiver Requests

29. WC Landfill 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; and (3) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

30. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.¹⁴ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects WC Landfill to keep its accounting records in accordance with generally accepted accounting principles.

¹⁴ It should be noted that the Commission has recently examined and approved the continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141), as well as the continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities (18 C.F.R. Part 34). See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 984-85 (regarding waiver of Parts 41, 101, and 141), 999-1000 (regarding blanket approval under Part 34).

D. Reporting Requirements

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 (EQR) containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.¹⁵ Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.¹⁶

32. Additionally, WC Landfill 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.

33. In Order No. 697, the Commission created two categories of sellers.¹⁷ 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

¹⁵ *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 (2003). 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>.

¹⁶ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). 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.

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.¹⁸ Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.¹⁹

34. Based on WC Landfill's representations, we find that it meets the criteria for a Category 1 seller and is so designated. The Commission reserves the right to require an updated market power analysis from any market-based rate seller at any time, including for those sellers that fall within Category 1.²⁰

E. Waiver of the Prior Notice Requirement

35. WC Landfill requests waiver of the Commission's 60-day prior notice requirement and requests an effective date of January 8, 2009. WC Landfill began generating and selling energy in December, 2005, but states that it was not aware that separate market-based rate authorization was required because its upstream parent company, Marina Energy, controls and markets the electrical output of the Facility.

36. Section 205 of the FPA explicitly requires that rates be timely filed with the Commission.²¹ 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."²² Thus, a regulated entity must timely file its rates to allow the Commission to fulfill its statutory mandate, namely, timely determining whether the rates being charged are just and reasonable. The Commission has further made clear that, for market-based rates in particular, it "does not allow market-based rates to go into effect

¹⁸ 18 C.F.R. § 35.36(a)(2) (2008).

¹⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

²⁰ *Id.* P 853.

²¹ *See El Paso Elec. Co.*, 105 FERC ¶ 61,131, at P 9-11 (2003) (*El Paso*).

²² *Id.* P 14.

before a filing has been tendered with the Commission.”²³ In *Central Maine Power Co.*,²⁴ *Central Hudson*,²⁵ and *Prior Notice and Filing Requirements under Part II of the Federal Power Act*,²⁶ the Commission explained that it would grant waiver of the 60-day prior notice requirement for proposals to charge market-based rates only in extreme or extraordinary circumstances.

37. Based on the information presented by WC Landfill, WC Landfill has failed to demonstrate extraordinary circumstances warranting waiver of the 60-day prior notice requirement. The Commission has previously stated that an applicant’s lack of awareness does not constitute extraordinary circumstances.²⁷ Accordingly, we deny WC Landfill’s request for waiver of the 60-day prior notice requirement and an effective date of January 8, 2009. We grant WC Landfill’s request for market-based rate authority to be effective March 9, 2009, 61 days after filing.

F. Time Value Refunds

38. The Commission has noted that if a utility files a market-based rate tariff less than 60 days prior to the proposed effective date of new service, and waiver is denied, the Commission will require the utility to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission’s

²³ *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).

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

²⁵ *Central Hudson Gas and Electric Co.*, 60 FERC ¶ 61,106, *reh’g denied*, 61 FERC ¶ 61,089 (1992).

²⁶ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,984 (*Prior Notice*), *clarified*, 65 FERC ¶ 61,081 (1993); 18 C.F.R. § 35.19a (2008).

²⁷ *Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044 (2007).

regulations,²⁸ for the entire period that the rate was collected without Commission authorization.²⁹ The Commission also has stated that:

[T]he utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and a cost-justified rate . . . In other words, the late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized late filing of cost-based rates, until the date of Commission authorization.³⁰

39. WC Landfill acknowledges the Commission's policy of requiring the refund to customers of the time value of revenues collected. However, WC Landfill requests a waiver of this policy. WC Landfill argues that because its customer is Marina Energy, one of its owners, any refund liability will be substantially borne by its owner/customer, Marina Energy. WC Landfill argues that no public interest would be served in requiring it to go through the exercise of refunding to Marina Energy the time value of the revenues that it collected from Marina Energy. WC Landfill argues that in this circumstance, a waiver of the refund policy is appropriate.

40. Imposition of time value refunds is the Commission's method of encouraging compliance by public utilities with the requirements of section 205, and compensating customers that have been deprived of the use of their monies for the period that the rates had not been filed.³¹ The time value refund is paid, not to the Commission, but to the ratepayers who paid the rates that had not been filed.³² In the instance where the customer is the same entity as the owner, the objective of requiring the time value of refunds would not be served. Therefore, we will not order refunds in this case where the customer, Marina Energy, is the same entity as the owner. This result is consistent with

²⁸ 18 C.F.R. § 35.19a (2008).

²⁹ *Prior Notice*, 64 FERC at 61,980.

³⁰ *Id.*; see 16 U.S.C. § 825h (2006). See *Southern California Water Co.*, 106 FERC ¶ 61,305, at P 15-16, *reh'g denied*, 108 FERC ¶ 61,168 (2004). See also *Public Service Co. of Colorado*, 85 FERC ¶ 61,146, at 61,588 (1998); *Carolina Power & Light Co.*, 84 FERC ¶ 61,103 (1998), *clarified*, 87 FERC ¶ 61,083, at 61,356 (1999).

³¹ *El Paso*, 105 FERC ¶ 61,131 at P 40.

³² *Id.* n.26.

previous Commission orders in which we did not order time value refunds between affiliates.³³

41. WC Landfill is expected to make its next filing on a timely basis, or face possible sanctions by the Commission.

42. Because the request for waiver of notice requirements has been denied, WC Landfill must refile its tariff sheets to incorporate the accepted effective date in accordance with Order No. 614³⁴ and with the identification and numbering of tariffs as required under section 35.9 of the Commission's regulations³⁵ within 30 days of the date of this order.

The Commission orders:

(A) WC Landfill's market-based rate tariff is hereby accepted for filing, effective March 9, 2009, as discussed in the body of this order.

(B) Waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, with the exception of sections 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted.

(C) Waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted.

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

(E) The Commission reserves the right to modify this order to require a further

³³ See, e.g., *TransCanada Power LLC*, 111 FERC ¶ 61,264 (2005).

³⁴ *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

³⁵ 18 C.F.R. § 35.9 (2008).

showing that neither the public nor private interests will be adversely affected by continued Commission approval of WC Landfill's issuances of securities or assumptions of liabilities.

(F) WC Landfill is required to file EQRs in compliance with Order No. 2001. If the effective date of WC Landfill's market-based rate tariff falls within a quarter of the year that has already expired, WC Landfill's EQRs for the expired quarter are due within 30 days of the date of this order.

(G) WC Landfill's request for waiver of the prior notice requirement is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.