

129 FERC ¶ 61,107
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Stony Creek Wind Farm, LLC

Docket Nos. ER09-1505-000
ER09-1505-001

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND
GRANTING REQUESTS FOR WAIVERS

(Issued November 5, 2009)

1. In this order, the Commission grants Stony Creek Wind Farm, LLC (Stony Creek) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates effective October 1, 2009, as requested. As discussed below, we also grant Stony Creek's requests for waiver of certain requirements of Order Nos. 888,¹ 889,² and 890,³ as well as other waivers commonly granted to market-based rate sellers.

¹ *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).

² *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

2. Additionally, we find that Stony Creek meets the criteria for a Category 1 seller in all regions except the Southeast Region and is so designated.⁴ We also find that Stony Creek meets the criteria for a Category 2 seller in the Southeast Region and is so designated. Stony Creek must file an updated market power analysis in the Southeast Region in compliance with the regional reporting schedule adopted in order No. 697.⁵

I. Background

3. On July 31, 2009, as supplemented on September 10, 2009, pursuant to section 205 of the Federal Power Act (FPA),⁶ Stony Creek filed an initial application for market-based rate authority with an accompanying market-based rate tariff providing for the sale of electric energy, capacity, and ancillary services at market-based rates. Stony Creek requests waiver of certain requirements under Order Nos. 888, 889, and 890. Stony Creek also requests waivers commonly granted to similar market-based rate applicants.

4. Stony Creek states it is an indirect subsidiary of E.ON Climate & Renewables North America Inc. (E.ON Climate & Renewables) an exempt holding company in the business of developing or acquiring electric generating facilities. According to Stony Creek, E.ON Climate & Renewables is a wholly-owned subsidiary of E.ON US Holding GmbH, which itself is a wholly-owned subsidiary of E.ON AG.

5. Stony Creek states that E.ON AG wholly owns E.ON U.S. LLC, a Kentucky limited liability company. E.ON U.S. LLC owns Louisville Gas & Electric Company (Louisville Gas & Electric), a public utility that owns and operates electric generation, transmission, and distribution facilities as well as natural gas distribution and storage facilities in Kentucky. According to Stony Creek, E.ON U.S. LLC also owns Kentucky Utilities Company (Kentucky Utilities) a public utility that owns and operates electric generation, transmission, and distribution facilities in Kentucky with operations in

⁴ *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 848-50, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008), *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).

⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-93, app. D; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at apps, D, D-1, D-2.

⁶ 16 U.S.C. § 825d (2006).

Tennessee and Virginia.⁷ Stony Creek states that Louisville Gas & Electric and Kentucky Utilities directly own or control 7,507 MW (summer rating) of generating capacity and, in addition, hold minority interests in certain entities that own generation. Stony Creek further states that Louisville Gas & Electric and Kentucky Utilities operate a joint electric balancing authority area and own approximately 4,925 circuit miles of electric transmission lines. Stony Creek states that Louisville Gas & Electric and Kentucky Utilities are authorized by the Commission to engage in wholesale sales of capacity and energy at market-based rates, except in the Big Rivers Electric Corporation balancing authority area and the Louisville Gas & Electric/Kentucky Utilities joint balancing authority area.⁸

6. Stony Creek states that it owns a 52.5 MW wind-powered electric generation facility located in Somerset County, Pennsylvania in the Northeast Region. Stony Creek adds that the wind facility is currently under construction and is expected to begin operational testing on October 1, 2009, with commercial operation beginning on November 1, 2009. Stony Creek states that the wind facility will interconnect with the transmission system owned by Pennsylvania Electric Company, which is operated by PJM Interconnection, LLC, over a 75 foot 115 kV 3-phase generator lead line. Stony Creek asserts that it plans to sell electric energy, capacity, and ancillary services produced by the wind facility exclusively at wholesale.

II. Notice of Filing

7. Notice of Stony Creek's July 31, 2009 filing was published in the *Federal Register*, 74 FR 40176 (2009), with interventions and comments due on or before August 21, 2009. None was filed.

8. Notice of Stony Creek's September 10, 2009 filing was published in the *Federal Register*, 74 FR 48252 (2009), with interventions and comments due on or before October 1, 2009. None was filed.

⁷ Kentucky Utilities owns a 20 percent interest in Electric Energy Inc. (Electric Energy), which owns and operates a 1,002 MW generating facility in Joppa, Illinois. Electric Energy wholly owns Midwest Electric Power, Inc., which has 74 MW of generation in Joppa, Illinois. Ameren Corporation, which owns 80 percent of Electric Energy, operates and controls the output from the Joppa facilities.

⁸ *LG&E Energy Marketing Inc.*, 122 FERC ¶ 61,175 (2008).

III. Discussion

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.⁹ As discussed below, we find that Stony Creek satisfies the Commission's standards for market-based rate authority.

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.¹⁰ Stony Creek prepared the pivotal supplier and wholesale market share screens for the PJM market, consistent with the requirements of Order No. 697.¹¹ Stony Creek relies on the data from Louisville Gas & Electric's recently accepted market power analysis¹² to demonstrate that Stony Creek passes both the pivotal supplier and the wholesale market share screens for the PJM market.

11. The market share screen analysis included in Stony Creek's application indicates that its market share in all seasons in the PJM market is less than one percent. Similarly, Stony Creek's pivotal supplier screen analysis indicates that the net uncommitted supply in the PJM market far exceeds Stony Creek's uncommitted capacity.

12. The Commission has reviewed Stony Creek's pivotal supplier and wholesale market share screens and has determined that Stony Creek passes both screens in the PJM market. Accordingly, we find that Stony Creek satisfies the Commission's requirements for market-based rates regarding horizontal market power.

2. Vertical Market Power

13. 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

⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

¹⁰ *Id.* P 408, 440.

¹¹ *Id.* P 62.

¹² *LG&E Energy Marketing Inc.*, 128 FERC ¶ 61,041 (2009).

Open Access Transmission Tariff (OATT) on file or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.¹³

14. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁴ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).¹⁵ 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.¹⁶

15. In this case, the Commission grants Stony Creek waiver of the OATT requirement, as discussed below. Also, while Stony Creek's affiliates, Louisville Gas & Electric, Kentucky Utilities, and Electric Energy own or control transmission assets, each affiliate has an OATT on file with the Commission.¹⁷

16. Regarding other barriers to entry, Stony Creek represents that, other than Louisville Gas & Electric and Kentucky Utilities, neither it nor any of its other affiliates own, control, or operate intrastate natural gas transportation, intrastate natural gas storage or distribution facilities. Although Stony Creek acknowledges that Louisville Gas & Electric and Kentucky Utilities own and operate intrastate natural gas transportation, storage, or distribution facilities, Stony Creek asserts that these facilities are limited in nature and do not provide a basis for disputing the Commission's rebuttable presumption that such ownership does not allow Stony Creek and its affiliates to raise barriers to

¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

¹⁴ *Id.* P 440.

¹⁵ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

¹⁷ See *E.ON U.S., LLC*, Docket No. ER06-20-006 (November 8, 2006) (unpublished letter order); *E.ON U.S. LLC*, 123 FERC ¶ 61,301 (2008). See also *Baltimore Gas and Electric Company*, Docket No. OA96-156-001 (February 24, 1999) (unpublished letter order); *Electric Energy, Inc.*, 125 FERC ¶ 61,365 (2008).

entry.¹⁸ Similarly, Stony Creek states that neither it nor its affiliates own any sites for generation capacity development except for limited sites for distributed generation. Stony Creek also acknowledges that several of its affiliates have leasehold interests in various sites around the U.S. for the development of wind generation, but asserts that none of these sites are located in areas that have a scarcity of similar alternative sites for possible market entrants. In addition, Stony Creek states that while its affiliates Louisville Gas & Electric, Kentucky Utilities, and Electric Energy own or control coal purchase contracts and coal transportation infrastructure, these resources are used exclusively to supply coal to power plants owned and operated by Stony Creek's affiliates.

17. Consistent with Order No. 697, Stony Creek affirmatively states that neither it nor any of its affiliates have erected barriers to entry in the relevant market, and will not erect barriers to entry into the relevant market.

18. Based on Stony Creek's representations, we find that Stony Creek satisfies the Commission's requirements for market-based rates regarding vertical market power.

B. Reporting Requirements

19. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rate authorization must electronically file an Electric Quarterly Report (EQR) with the Commission containing: (1) a summary of the contractual terms 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.¹⁹

¹⁸ The Commission has adopted a rebuttable presumption that sellers cannot erect barriers to entry with regard to the ownership, control, or affiliation with any entity that owns or controls these types of inputs to electric power production. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

¹⁹ *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>.

Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.²⁰

20. Additionally, Stony Creek 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.²¹

21. In Order No. 697, the Commission created two categories of sellers.²² 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 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.²³ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file an updated market power analysis.²⁴

22. Stony Creek states that it is a Category 1 Seller in all regions except the Southeast Region because, in all regions except the Southeast Region, it: (1) owns or controls or is affiliated with 500 MW or less of generation in aggregate per region; (2) does not own, operate or control transmission facilities other than the limited equipment necessary to connect individual generating facilities to the transmission grid; and (3) is not affiliated

²⁰ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2009). 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.

²¹ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42(a) (2009).

²² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

²³ 18 C.F.R. § 35.36(a) (2009).

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

with any entity that owns, operates, or controls transmission facilities that the Commission considers relevant in the market power analysis.²⁵ Stony Creek also states that the only franchised public utilities it is affiliated with are located in the Southeast Region, and that its application for market-based rate authority does not raise any vertical market power issues.

23. Based on Stony Creek's representations and the Commission's decision herein to grant Stony Creek waiver of the OATT requirement, we find that Stony Creek meets the criteria for a Category 1 seller in all regions except the Southeast Region and is so designated. The Commission also reserves the right to require an updated market power analysis at any time.²⁶ In addition, Stony Creek meets the criteria for a Category 2 seller in the Southeast Region. Accordingly, Stony Creek must file an updated market power analysis in the Southeast Region in compliance with the regional reporting schedule adopted in Order No. 697.²⁷

C. Waiver Requests

1. Waiver of Order Nos. 888, 889, and 890

24. Stony Creek seeks waiver of certain requirements under Order Nos. 888, 889, and 890. In support of its request for waiver of Order Nos. 888, 889, and 890, Stony Creek states that it does not own, operate, or control any transmission-related equipment other than the discrete facilities interconnecting the wind facility to the transmission grid. Specifically, Stony Creek states that the wind facility connects to the transmission grid over a 75 foot, 3-phase lead line that is rated at 115 kV and serves only to connect the wind facility to the transmission grid.

25. Order Nos. 888 and 890 require public utilities that own, control, or operate facilities used for the transmission of electric energy in interstate commerce to file an OATT. Order No. 889 requires public utilities to establish an Open Access Same-Time Information System (OASIS). In prior orders, the Commission has enunciated the standards for exemption from some or all of the requirements of Order Nos. 888 and

²⁵ We interpret this to mean that those of Stony Creek's affiliates that own transmission facilities own only limited equipment necessary to connect individual generating facilities to the transmission grid or have been granted waiver of the requirements of Order No. 888.

²⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 853.

²⁷ *Id.* P 882.

889.²⁸ The Commission has stated that the criteria for waiver of the requirements of Order No. 890 are unchanged from those used to evaluate requests for waiver under Order Nos. 888 and 889.²⁹

26. The Commission may grant requests for waiver of Order Nos. 888 and 890 to public utilities that can show that they own, operate, or control only limited and discrete transmission facilities (facilities that do not form an integrated transmission grid), until such time as the public utility receives a request for transmission service. Should the public utility receive such a request, the Commission has determined that the public utility must file with the Commission a *pro forma* tariff within 60 days of the date of the request, and must comply with any additional requirements that are effective on the date of the request.³⁰

27. The Commission has also determined that waiver of Order No. 889 would be appropriate for a public utility if the applicant: (1) owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) is a small public utility that owns, operates, or controls an integrated transmission grid, unless it is a member of a tight power pool, or other circumstances are present that indicate that a waiver would not be justified.³¹ Moreover, the Commission has held that a waiver of Order No. 889 will remain in effect until the Commission takes action in response to a complaint to the Commission that an entity evaluating its transmission needs could not get the information necessary to complete its evaluation.³²

28. Based on the statements in Stony Creek's application as supplemented on September 10, 2009, we find that Stony Creek's facilities are limited and discrete. The facilities will be used solely by Stony Creek to interconnect its wind project to the

²⁸ See, e.g., *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996) (*Black Creek*); *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228, at P 22 (2005) (*Entergy*).

²⁹ See *Alcoa Power Generating Inc.*, 120 FERC ¶ 61,035, at P 3 (2007); *Alcoa Power Generating Inc.*, 108 FERC ¶ 61,243, at P 27 (2004).

³⁰ *Black Creek*, 77 FERC at 61,941.

³¹ *Id.*

³² *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997)); *Easton Utilities Commission*, 83 FERC ¶ 61,334, at 62,343 (1998).

transmission grid. Accordingly, we will grant Stony Creek waiver of the requirements in Order Nos. 888 and 890 to have an OATT on file.³³ Similarly, the Commission grants Stony Creek waiver from the OASIS requirements of Order No. 889.³⁴

2. Other Waivers, Approvals and Authorizations

29. Stony Creek requests a number of waivers and authorizations typically granted by the Commission to market-based rate sellers. In particular, Stony Creek requests the following waivers and authorizations under the Commission's regulations: (1) waiver of the filing requirements of subparts B and C of Part 35, except sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101, and 141, except sections 141.14 and 141.15; and (3) blanket authorization under Part 34 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.³⁵ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects Stony Creek to keep its accounting records in accordance with generally accepted accounting principles.

³³ Consistent with *Black Creek*, Stony Creek must file a *pro forma* OATT in compliance with Order Nos. 888 and 890 within 60 days of receiving a request for transmission service.

³⁴ A waiver of the requirement to establish and maintain an information system remains effective until the Commission takes action in response to a complaint by any entity alleging that, in evaluating its transmission needs, the entity could not obtain from Stony Creek information necessary to complete its evaluation. In addition, as the Commission recently explained, Stony Creek must notify the Commission if there is a material change in facts that affect its waiver, within 30 days of the date of such change. *Material Changes in Facts Underlying Waiver of Order No. 889 and Part 358 of the Commission's Regulations*, 127 FERC ¶ 61,141, at P 5 (2009).

³⁵ It should be noted that the Commission has recently 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. 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).

The Commission orders:

(A) Stony Creek's market-based rate tariff is hereby accepted for filing, effective October 1, 2009, as discussed in the body of this order.

(B) 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.

(C) Waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted, with the exception of sections 141.14 and 141.15.

(D) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is granted. Stony Creek 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 Stony Creek, 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 showing that neither the public nor private interests will be adversely affected by continued Commission approval of Stony Creek's issuance of securities or assumptions of liability.

(F) Stony Creek's request for waiver of the requirements of Order Nos. 888, 889, and 890 is hereby granted, as discussed in the body of this order.

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