

129 FERC ¶ 61,296  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Avista Turbine Power, Inc.

Docket No. ER10-390-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued December 30, 2009)

1. In this order, we grant Avista Turbine Power, Inc.'s (Avista Turbine) application under section 205 of the Federal Power Act (FPA)<sup>1</sup> for Commission authorization for Avista Turbine to make market-based rate sales of energy and capacity pursuant to a long-term power purchase agreement (Avista PPA) between Avista Turbine and its affiliate, Avista Corporation (Avista). By this order, we find that the proposed affiliate sale satisfies the Commission's concerns regarding affiliate abuse. Accordingly, we authorize this affiliate sale, effective January 1, 2010, as requested.

**I. Background**

2. On December 7, 2009, Avista Turbine submitted an application seeking Commission authorization for affiliate sales of energy and capacity at market-based rates pursuant to the Avista PPA between Avista Turbine, a market-regulated power sales entity, and Avista, its franchised public utility affiliate.

3. Avista Turbine states that it is a wholly-owned, market-regulated power sales subsidiary of Avista, a franchised public utility with captive customers with its principal office in Spokane, Washington. Both Avista Turbine and Avista have been granted market-based rate authorization by the Commission.<sup>2</sup>

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> *Washington Water Power*, 77 FERC ¶ 61,233 (1996) and *Reliant Energy, Inc.*, 91 FERC ¶ 61,073 (2000). See also *Avista Corporation*, 110 FERC ¶ 61,216 (2005) for Avista and Avista Turbine's most recently accepted updated market

(continued...)

4. Avista Turbine explains that it has the right to purchase all of the energy and capacity produced by the Lancaster generating facility, a natural gas-fired combined cycle generating unit located in Rathdrum, Idaho (Lancaster facility), pursuant to a power purchase agreement entered into on December 10, 1998 (Rathdrum PPA) with Rathdrum Power, LLC (Rathdrum), an unaffiliated third party.<sup>3</sup> The Lancaster facility is owned by Rathdrum.

5. Avista Turbine further notes that in 2007, it entered into a contract with Coral Power, LLC (Coral), an unaffiliated third party, pursuant to which Avista Turbine sold its rights to the energy and capacity from the Lancaster facility to Coral at the same terms applicable to Avista Turbine under the Rathdrum PPA (Coral Contract). According to Avista Turbine, the Coral Contract will expire by its terms on December 31, 2009.

## **II. Avista Turbine's Filing**

6. In the instant filing, Avista Turbine proposes to transfer the rights to energy and capacity from the Lancaster facility to Avista, pursuant to the Avista PPA, effective January 1, 2010, at the same terms as the Rathdrum PPA and the Coral Contract. Avista Turbine explains that this will allow Avista to use the Lancaster facility to serve its load for the remaining term (almost 17 years) of the Rathdrum PPA.

7. Avista Turbine further represents that it will sell the energy and capacity to Avista at its cost.<sup>4</sup> Avista Turbine adds that although it takes title to the energy and capacity under the Rathdrum PPA, and will sell it to Avista under the Avista PPA, Avista Turbine has no employees and will only act as a financial pass-through. Accordingly, Avista will schedule the power from the Lancaster facility.

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power analysis.

<sup>3</sup> The Rathdrum PPA was originally accepted for filing by the Commission in *Rathdrum Power, LLC*, Docket No. ER01-2862-000 (Oct. 5, 2001) (unpublished letter order). The Commission accepted the amended Rathdrum PPA in *Allegheny Energy Supply Company, L.L.C., et al.*, Docket Nos. ER02-761-000, *et al.* (Feb. 14, 2002) (unpublished letter order).

<sup>4</sup> Avista Turbine specifies that, as was true for Coral, Avista will pay Avista Turbine at a rate equal to Avista Turbine's cost under the Rathdrum PPA. Avista Turbine December 7, 2009 Filing at 6.

8. In addition, Avista Turbine emphasizes that the Avista PPA will not become effective unless Avista first receives satisfactory regulatory treatment from the relevant state regulatory agencies.<sup>5</sup>

9. Avista Turbine asserts that the Avista PPA does not raise any concerns regarding potential affiliate abuse because its terms are the same as those of the non-affiliate, arms-length transaction between Avista Turbine and Rathdrum under the Rathdrum PPA, as well as those of the non-affiliate, arms-length transaction between Avista Turbine and Coral under the Coral Contract.

10. Avista Turbine notes that in Order No. 697,<sup>6</sup> the Commission reaffirmed its policy to rely on the standards set forth in *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*) to review affiliate transactions

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<sup>5</sup> Avista Turbine states that it has received approval from the Idaho Public Utilities Commission (Idaho Commission) for Avista's proposed purchase under the Avista PPA, and that a similar request is pending before the Washington Utilities and Transportation Commission (Washington Commission), with expected action by December 23, 2009. Avista Turbine December 7, 2009 Filing at 2 and 7. On December 22, 2009, the Washington Commission issued its order regarding the proposed purchase under the Avista PPA. In particular, the Washington Commission "authorizes Avista to defer its costs associated with the [Avista PPA] for possible later recovery, determining that Avista failed to make various factual and other showings that are prerequisite to immediate inclusion of such power costs in rates. These include failure to make the requisite showing of a binding agreement to purchase the power from the Lancaster [facility], failure to make the required affiliated interest filing in compliance with RCW 80.16, and failure to demonstrate that this new power purchase agreement complies with the greenhouse gas emissions limits in RCW 80.80. Accordingly, the [Washington] Commission will consider the recovery of the Lancaster [facility] costs in a later proceeding once those prerequisite showings have been made." See *Washington Utilities and Transportation Commission v. Avista Corp.*, Docket No. UE-090134 *et al.*, at 79-93 (Washington Utilities and Transportation December 22, 2009).

<sup>6</sup> *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 540, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *order on reh'g*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009).

with a franchised public utility with captive customers.<sup>7</sup> Avista Turbine contends that the proposed sale under the Avista PPA fully satisfies the requirements established in *Edgar* to make affiliate sales for the following reasons. First, Avista Turbine argues that since the Rathdrum PPA was negotiated on an arms-length basis between non-affiliates and since the Avista PPA reflects the same terms as the Rathdrum PPA, the terms of the Avista PPA do not include any affiliate preference.

11. Second, Avista Turbine contends that the Coral Contract is “evidence of the prices that non-affiliated buyers were willing to pay for similar services.”<sup>8</sup> Under the Coral Contract, Coral purchases the rights to energy and capacity from the Lancaster facility under the same terms that will apply to Avista under the Avista PPA. Accordingly, Avista Turbine asserts that the Coral Contract is evidence that Coral, a non-affiliated buyer, was willing to pay the same price that Avista will pay under the Avista PPA for the rights to energy and capacity from the Lancaster facility. Additionally, Avista Turbine states that, consistent with *Black Hills Wyoming, LLC and Cheyenne Light, Fuel, and Power Company*,<sup>9</sup> which accepted for filing a power purchase agreement between affiliates under similar circumstances, Coral is a power marketer that operates in the same market as Avista. Avista Turbine further states that Avista and its affiliates, including Avista Turbine, lack market power. Thus, Avista Turbine asserts that the *Edgar* standard has been satisfied.

12. Third, Avista Turbine states that Avista has evaluated the purchase of energy and capacity from Avista Turbine in the same manner that it would evaluate such a purchase from any other seller. Specifically, Avista's Resource Planning staff performed an initial analysis based on Avista's identified need in its 2007 Integrated Resource Plan for 350 megawatts (MWs) of base load natural gas-fired resources and concluded that the Avista PPA, which is based on the energy and capacity from the Lancaster facility, was a cost-effective resource for Avista and its customers. Further, Avista contracted for an independent assessment of the Rathdrum PPA, which is also based on the energy and capacity from the Lancaster facility, to compare the Lancaster facility with other utility gas-fired operations. That assessment concluded that the Rathdrum PPA was cost-effective and

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<sup>7</sup> Avista Turbine December 7, 2009 Filing at 4.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> 128 FERC ¶ 61,285 (2009).

financially favorable relative to other natural gas-fired options available to utilities in the Pacific Northwest.

13. Finally, Avista Turbine states that the Idaho Commission has found Avista's proposed purchase under the Avista PPA to be reasonable.<sup>10</sup>

14. Avista Turbine requests that the Commission grant the authorization to make affiliate sales effective on January 1, 2010. It asserts that this is the date under the Avista PPA that sales are scheduled to begin. Avista Turbine requests waiver of the Commission's 60-day prior notice requirement to allow sales under the Avista PPA to begin on the requested date.

### **III. Notices and Interventions**

15. Notice of Avista Turbine's filing was published in the *Federal Register*, 74 Fed. Reg. 66631 (2009), with interventions and protests due on or before December 17, 2009. None was filed.

### **IV. Discussion**

16. Under the Commission's regulations, no wholesale sale of electric energy may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the FPA.<sup>11</sup> The Commission traditionally places limits on wholesale power sales by wholesale generators and marketers to affiliated franchised public utilities with captive customers out of concern for affiliate abuse.<sup>12</sup> In cases where affiliates are entering into sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.<sup>13</sup>

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<sup>10</sup> As noted above, the Washington Commission will consider the recovery of the Lancaster facility costs in a later proceeding.

<sup>11</sup> 18 C.F.R. § 35.39(b) (2009). See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 467.

<sup>12</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 492; Cross-Subsidization Restrictions on Affiliate Transactions, Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 4-7 (2008).

<sup>13</sup> *Edgar*, 55 FERC at 62,167.

17. In *Edgar*, the Commission explained that there are three examples of approaches to demonstrate that a franchised public utility has chosen the lowest cost supplier and thus that it has not unduly preferred an affiliate.<sup>14</sup> First, the utility may submit evidence of direct head-to-head competition between affiliated and non-affiliated suppliers either in a formal solicitation or in an informal negotiation process.<sup>15</sup>

18. Second, the utility may present evidence of the prices that non-affiliated buyers were willing to pay for similar services from that project. The Commission states that this second type of evidence is credible only to the extent that the nonaffiliated buyers are in the relevant market as the franchised public utility and are not subject to market power by the seller or its affiliates.<sup>16</sup>

19. Finally, the utility may provide “benchmark” evidence of the prices, terms and conditions of sales by non-affiliated sellers. This can include purchases made by the utility itself or by other buyers in the relevant market. The Commission states that two major considerations with respect to the credibility of benchmark evidence is whether the benchmark sales are contemporaneous and whether they are for similar services when compared to the original transaction.<sup>17</sup>

20. The Commission finds that the Coral Contract satisfies the second showing under *Edgar*. Specifically, the Coral Contract presents evidence of the prices that a non-affiliated buyer (i.e., Coral) was willing to pay for similar services from Avista Turbine. The affiliate sale under the Avista PPA has the same rates, terms, and conditions as the Coral Contract, for the exact same plant and service.<sup>18</sup> In particular, Avista Turbine states that it will sell energy and capacity under its market-based rate authority to Avista at a rate equal to Avista Turbine’s cost under

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<sup>14</sup> In Order No. 697, the Commission states that it will continue its approach for determining the types of affiliate transactions that are permissible and the criteria that should be used to make those decisions, including evaluation of the *Edgar* criteria. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540.

<sup>15</sup> *Edgar*, 55 FERC at 62,168.

<sup>16</sup> *Id.* at 62,168-69.

<sup>17</sup> *Id.* at 62,169.

<sup>18</sup> Avista Turbine December 7, 2009 Filing at n.18.

the Rathdrum PPA.<sup>19</sup> In short, the Avista PPA will allow Avista Turbine to transfer the rights to the energy and capacity under the Rathdrum PPA, which still has a remaining term of almost 17 years, to Avista.

21. Additionally, Avista Turbine notes that Coral operates in the same relevant market as Avista, and that the Commission has determined that Avista and its affiliates (including Avista Turbine's energy and capacity from the 207 MW Lancaster facility) lack market power.<sup>20</sup>

22. The Commission finds that the submitted evidence and representations of Avista Turbine are sufficient to provide reasonable assurance that no abuse of the affiliate relationship is involved in the Avista PPA. Thus, we authorize the sale of energy and capacity between Avista Turbine and Avista pursuant to the Avista PPA, effective January 1, 2010, as requested.<sup>21</sup>

23. This order satisfies the requirement that Avista Turbine first receive Commission authorization, pursuant to section 205 of the FPA, before engaging in sales at market-based rates with a franchised public utility affiliate with captive customers. We note that Avista Turbine must receive prior approval from the Commission under section 205 of the FPA for any other sales to affiliates with a franchised electric service territory and captive customers.

24. Finally, we note that Avista Turbine has separately submitted a filing to comply with Order No. 697.<sup>22</sup> That filing includes a revision to the limitations

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<sup>19</sup> Avista Turbine December 7, 2009 Filing at 4. We note, as stated above, that these rates at Avista Turbine's costs were negotiated with Rathdrum, an unaffiliated third party.

<sup>20</sup> See *Avista Corporation*, 110 FERC ¶ 61,216 (2005) accepting Avista and its affiliates' updated market power analysis. We note that under their market-based rate authority, Avista and its affiliates must file an updated market power analysis in compliance with the regional reporting schedule adopted in Order No. 697. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-896.

<sup>21</sup> We will grant Avista Turbine's request for waiver of the Commission's prior notice requirement and permit an effective date of January 1, 2010. See *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106 (1992), *reh'g denied*, 61 FERC ¶ 61,089 (1992).

<sup>22</sup> See *Avista Turbine Power, Inc.'s* December 8, 2009 Filing, Docket No. ER00-1814-008.

and exemptions section of Avista Turbine's market-based rate tariff to list the affiliate sale waiver granted herein.<sup>23</sup> The Commission will act on that filing separately.

The Commission orders:

The application for authorization of Avista Turbine to make sales of electric energy and capacity to its affiliate, Avista, pursuant to the Avista PPA, is granted, effective January 1, 2010, as requested, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>23</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 385 n.517; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C.