

131 FERC ¶ 61,097
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NSTAR Electric Company
Medical Area Total Energy Plant, Inc.
MATEP LLC

Docket Nos. ER98-1992-006
ER06-1143-004
ER08-444-004

ORDER ON AFFILIATE RESTRICTIONS

(Issued May 4, 2010)

1. In this order, we grant NSTAR Electric Company's (NSTAR Electric), Medical Area Total Energy Plant, Inc.'s (Medical Area Plant) and MATEP LLC's (MATEP) (collectively, NSTAR Affiliates) request for waiver of the Commission's affiliate restrictions.¹

Background

2. On August 28, 2009, the NSTAR Affiliates filed a request for waiver of the code of conduct requirements for market-based rate authority as set forth in the affiliate restrictions in section 35.39 of the Commission's regulations.²

¹ 18 C.F.R. § 35.39 (2009).

² In Order No. 697, the Commission codified affiliate restrictions in section 35.39 of its regulations. *See 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 467 and 544-51 (Order No. 697), *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, 74 Fed. Reg. 30924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009).

3. The NSTAR Affiliates state they are subsidiaries of NSTAR, a public utility holding company located in Massachusetts, and that they each have been granted market-based rate authorization by the Commission.³ They explain that, while NSTAR Electric owns transmission and distribution facilities located in Massachusetts, transmission service over NSTAR Electric's facilities is provided through the ISO New England Inc. (ISO New England) open access transmission tariff. In addition, NSTAR Electric owns a 3.4 percent equity ownership share of New England Hydro-Transmission Electric Company and New England Hydro Transmission Corporation.

4. The NSTAR Affiliates explain that NSTAR Electric does not own any generation assets. However, NSTAR Electric does have contractual entitlements to generation capacity which it sells into the ISO New England wholesale market. The NSTAR Affiliates further explain that, pursuant to Massachusetts state law, 100 percent of the revenues collected from these sales are credited to NSTAR Electric's distribution customers. They state that, aside from those sales into the ISO New England wholesale market, NSTAR Electric does not engage in wholesale sales and has no wholesale power customers. They further state that NSTAR Electric has no captive wholesale customers served at cost-based rates.

5. The NSTAR Affiliates state that Medical Area Plant owns an 88.6 megawatt (MW) generation facility located in Boston, Massachusetts and that the output from this facility is sold to its affiliate MATEP through a wholesale power sales contract, and that MATEP uses the power to supply retail customers such as hospitals and medical institutions in Boston. The NSTAR Affiliates state that MATEP may sell any excess capacity that is not needed to serve those customers in the ISO New England market. Aside from this 88.6 MW facility, Medical Area Plant and MATEP do not own or control any other generation.

6. The NSTAR Affiliates also state that NSTAR Electric does not have captive retail customers. The NSTAR Affiliates explain that Massachusetts is a retail choice state and that all of the consumers within Massachusetts have the right to purchase power from other suppliers. The NSTAR Affiliates acknowledge that NSTAR Electric does have provider-of-last-resort service responsibilities that it fulfills by assigning the rights to serve those customers to other suppliers.⁴ However, they argue that these provider-of-last-resort customers are not captive.

³ *Advanced Energy Systems, Inc.*, 83 FERC ¶ 61,044 (1998); *NSTAR Cos.*, 97 FERC ¶ 61,288 (2001); *MATEP LLC*, Docket No. ER06-1143-000 (Aug. 11, 2006) (unpublished letter order).

⁴ The NSTAR Affiliates note that NSTAR Electric does not directly serve the provider-of-last-resort customers. Instead, NSTAR Electric negotiates with suppliers and
(continued...)

7. The NSTAR Affiliates state that the other NSTAR Affiliates, Medical Area Plant and MATEP, are not franchised public utilities and do not have captive customers. Instead, Medical Area Plant and MATEP are market-regulated power sales affiliates as that term is defined under the Commission's regulations.

8. The NSTAR Affiliates submit that because NSTAR Electric does not have captive wholesale or retail customers, the Commission should grant their request for waiver of the code of conduct requirements in section 35.39 of the Commission's regulations.

9. Notice of the NSTAR Affiliates' filing was published in the *Federal Register*⁵ with interventions and protests due on or before September 18, 2009. None was filed.

Commission Determination

10. In Order No. 697, the Commission codified in its regulations affiliate restrictions to protect captive customers from the potential for a franchised public utility to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliate and its stockholders to the detriment of the captive customers.⁶ Captive customers are defined as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."⁷

11. In Order No. 697, the Commission stated that, "where a seller demonstrates and the Commission agrees that it has no captive customers, the affiliate restrictions will not apply."⁸ The Commission explained that the definition of "captive customers" does not include those customers who have retail choice, i.e., the ability to select a retail supplier based on the rates, terms, and conditions of service offered. The Commission stated that retail customers who choose to be served under cost-based rates but have the ability, by virtue of state law, to choose one retail supplier over another, are not considered to be

assigns the right to serve the provider-of-last-resort customers to those suppliers. Hence, NSTAR Electric's sole responsibility is to deliver the power of third-party suppliers to serve retail and wholesale customers located on NSTAR Electric's transmission and distribution facilities.

⁵ 74 FR 46190 (2009).

⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 513, 544, 549.

⁷ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 202 and 18 C.F.R. 35.36(a)(6) (2009).

⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 552.

under “cost-based regulation” and therefore are not “captive.”⁹ The Commission went on to state that “retail customers in retail choice states who choose to buy power from their local utility at cost-based rates as part of that utility’s provider-of-last-resort obligation are not considered captive customers because, although they may choose not to do so, they have the ability to take service from a different supplier whose rates are set by the marketplace.”¹⁰

12. In Order No. 697-A the Commission explained that, if a seller has wholesale customers, the seller should explain why those customers are adequately protected against affiliate abuse.¹¹

13. Based on the NSTAR Affiliates’ representations, and consistent with Order Nos. 697 and 697-A, we find that NSTAR Electric does not have retail captive customers and does not have wholesale customers served at cost-based rates. Accordingly, we will grant the NSTAR Affiliates’ request for waiver of the affiliate restrictions. We will direct the NSTAR Affiliates to submit a compliance filing within 30 days of the date of this order, revising the limitations and exemptions sections of their market-based rate tariffs to list the waiver granted herein and to include a citation to this order.¹²

The Commission orders:

(A) The NSTAR Affiliates are hereby directed to make a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

(B) The NSTAR Affiliates’ request for waiver is hereby granted, as discussed in the body of this order.

By the Commission.

Kimberly D. Bose,
Secretary.

⁹ *Id.* P 479.

¹⁰ *Id.* P 480.

¹¹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 201.

¹² *Id.* P 385 n.517; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C.