

137 FERC ¶ 61,246
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Northampton Generating Company, L.P.

Docket No. ER12-281-000

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

(Issued December 30, 2011)

1. In this order, the Commission conditionally grants Northampton Generating Company, L.P. (Northampton) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective December 30, 2011, as requested. We also grant Northampton's request for waivers commonly granted to market-based rate sellers.
2. Additionally, we find that Northampton meets the criteria for a Category 2 seller in the Northeast region, and a Category 1 seller in all other regions, and is so designated.¹

I. Background

3. On October 31, 2011, pursuant to section 205 of the Federal Power Act (FPA),² Northampton filed an application for market-based rate authority with an accompanying

¹ *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, *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), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

² 16 U.S.C. § 824d (2006).

tariff. The proposed market-based rate tariff provides for the sale of energy, capacity, and ancillary services at market-based rates.³

4. Northampton states that it owns and operates a 134 megawatt (MW) small power production facility that is a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978, as amended (PURPA), located in Northampton, Pennsylvania and interconnected with the transmission system owned by PPL Electric Utilities, which is operated by PJM. Northampton represents that the output of the facility is fully committed to Metropolitan Edison Company (MetEd) under a long-term Power Purchase Agreement (MetEd PPA), which was approved by the Pennsylvania Public Utility Commission (Pennsylvania Commission) pursuant to PURPA. Northampton represents that the sales made pursuant to the MetEd PPA are exempt from section 205 of the FPA because the MetEd PPA is a long-term power purchase agreement that was in effect as of March 17, 2006.⁴ Northampton states that it is seeking market-based rate authorization in order to engage in power sales not covered by the MetEd PPA.

5. Northampton states that it is an indirect subsidiary of EIF Calypso, LLC (EIF Calypso), which holds 77.5 percent of ownership interests, and Cogentrix Energy, LLC (Cogentrix), which holds the remaining 22.5 percent of ownership interests. Northampton further states that Cogentrix is Northampton's sole voting board member. Northampton represents that Cogentrix is a wholly-owned subsidiary of The Goldman Sachs Group, Inc., an investment banking, securities, and investment management firm with affiliates in the energy industry. The Goldman Sachs Group is affiliated with a total of 503 MW of generation in the Northeast region, including the Northampton facility. According to Northampton, EIF Calypso is a wholly-owned subsidiary of United States Power Fund III, L.P. (US Power Fund III) or one or more of US Power Fund III's affiliates under common management and control with US Power Fund III (collectively, USP Funds). Northampton states that EIF Management, LLC has the exclusive management interest in several private equity investment funds, including USP Funds, which invest in power projects in the United States. Northampton represents that it and its affiliates own or control approximately 2,101 MWs of generation capacity in the PJM market.

³ Northampton requests authorization to sell ancillary services in the markets administered by PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc., ISO New England Inc., California Independent System Operator Corp., and Midwest Independent Transmission System Operator, Inc. Northampton Generating also requests authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁴ 18 C.F.R. § 292.601(c) (2011).

II. Notice of Filing

6. Notice of Northampton's October 31, 2011 filing was published in the *Federal Register*, 76 Fed. Reg. 69,252 (2011), with interventions or protests due on or before November 21, 2011. Timely motions to intervene were filed by the Pennsylvania Office of Consumer Advocate and Metropolitan Edison Industrial Users Group (MetEd Industrial). MetEd filed a timely motion to intervene and comments urging the Commission to adopt certain conditions to the market-based rate authority that may be granted to Northampton. On December 6, 2011, Northampton filed an answer to MetEd's motion to intervene. On December 15, 2011, Met Ed filed a response to Northampton's answer. On December 20, 2011, Northampton filed an answer to MetEd's answer. PPL Electric Utilities Corporation filed a motion to intervene out-of-time.

7. Notice of Northampton's request for blanket authorization under Part 34 was separately published in the *Federal Register*, 76 Fed. Reg. 69,720 (2011) with interventions or protests due on or before November 22, 2011. None was filed.

III. MetEd Intervention

8. In its motion to intervene, MetEd, a retail electric service provider, represents that it is contractually committed by the MetEd PPA to purchase electricity from Northampton under PURPA,⁵ and is concerned that Northampton may breach the MetEd PPA if it sells electricity under the requested market-based rate authority. MetEd states that the price under the MetEd PPA is lower than the PJM market price, and that the unconditional grant of market-based rate authority may create an incentive for Northampton to breach the MetEd PPA in order to make sales at market-based rates.

9. MetEd states that because the MetEd PPA was a front-loaded contract with higher rates in the early years of the contract and lower rates in later years and because the market for capacity and energy has changed in Pennsylvania, Northampton could sell its capacity, energy, and ancillary services into the market for more than it currently receives under the MetEd PPA. MetEd further states that, while it would have remedies for breach of contract if Northampton ceases selling capacity, energy and ancillary services pursuant to the MetEd PPA, Northampton's financial ability to satisfy an award of damages is questionable.

⁵ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, *clarified*, 114 FERC ¶ 61,128, *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006).

10. Therefore, MetEd requests that any market-based rate authority granted to Northampton by the Commission be subject to the following conditions: 1) Northampton's market-based rate sales of capacity, energy, and ancillary services are limited to those not covered by the MetEd PPA; 2) Northampton is required to continue to make sales to MetEd in accordance with the MetEd PPA; and 3) Northampton is required to receive authorization from the Commission before abrogating the MetEd PPA.

11. In its answer, Northampton states that MetEd's motion to intervene improperly expands the scope of the proceeding to the MetEd PPA, which is not at issue in this proceeding. Northampton argues that MetEd's claims regarding both Northampton's financial distress and Northampton's alleged likelihood of breaching the MetEd PPA are irrelevant to a consideration of whether to grant market-based rate authority. Northampton also states that the conditions proposed by MetEd on Northampton's market-based rate authority are unprecedented. Northampton states that the only situation in which the Commission imposes conditions on a seller's market-based rate authority is where the seller possesses or is presumed to possess market power. Northampton states that it and its affiliates do not have market power. Therefore, Northampton requests that the Commission grant it market-based rate authority.

12. In its December 15, 2011 pleading, MetEd states that Northampton sells virtually all of the capacity, energy and ancillary services from its generation facility to MetEd pursuant to the MetEd PPA. MetEd states that it entered into the MetEd PPA in compliance with section 210 of PURPA and the Commission's regulations implementing section 210 of PURPA. MetEd states that Northampton has recently filed a voluntary petition for protection under Chapter 11 of the Bankruptcy Code; MetEd believes that Northampton may seek to reject the MetEd PPA through the bankruptcy process. MetEd argues that if Northampton is granted market-based rate authority without the conditions proposed by MetEd, that Northampton will have an incentive to terminate the MetEd PPA in order to sell capacity, energy and ancillary services at rates higher than those provided in the MetEd PPA. As a result, MetEd urges the Commission to condition the authorization in order to protect its customers.

IV. Determination

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene by the Pennsylvania Office of Consumer Advocate, MetEd Industrial, and MetEd makes them parties to the proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice

and Procedure, 18 C.F.R. § 385.214(d), the Commission will grant PPL Electric Utilities Corporation's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Northampton's December 6, 2011 answer to the protest and MetEd's December 15, 2011 answer to Northampton's answer because they have provided information that assisted us in our decision-making process. However, we are not persuaded to accept Northampton's December 20, 2011 answer because it does not add any information that is not already part of the record in this proceeding.

B. Analysis

1. Market-Bates Rate Authorization

15. 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.⁶ As discussed below, the Commission concludes that Northampton satisfies the Commission's standards for market-based rate authority and we will conditionally accept Northampton's market-based rate tariff effective December 30, 2011, as requested.

2. Horizontal Market Power

16. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.⁷ The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.⁸

17. As stated above, Northampton owns a 134 MW generating facility located in Northampton, Pennsylvania and interconnected with the transmission system owned by PPL Electric Utilities, which is operated by PJM. Northampton further states that the output of the facility is fully committed to MetEd under the MetEd PPA. Nevertheless,

⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

⁷ *Id.* P 62.

⁸ *Id.* P 33, 62-63.

in its horizontal market power analysis, Northampton conservatively assumes that it and its affiliates' generation capacity in the PJM market is uncommitted.

18. Northampton relies on Duquesne Light Company's recent market power analysis⁹ to demonstrate that it passes both the pivotal supplier and the wholesale market share screens for the PJM market. Northampton's market share screen indicates that its market share in the PJM market ranges from 3.6 to 3.8 percent. Northampton's pivotal supplier screen analysis indicates that the net uncommitted supply in the PJM market area exceeds Northampton's uncommitted capacity.

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

3. Vertical Market Power

20. 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 (OATT) on file before granting a seller market-based rate authorization.¹⁰

21. 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 physical coal supply sources and ownership of or control over who may access transportation of coal supplies (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 The Commission adopted a

⁹ See *Duquesne Light Company*, Docket No. ER98-4159-019 (June 15, 2011) (delegated letter order).

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

¹¹ *Id.* P 440.

¹² Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

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

rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.¹⁴

22. Northampton represents that its affiliate, Oncor Electric Delivery Company LLC, owns a 100 MW undivided interest in a transmission facility interconnecting ERCOT and Southwest Power Pool, Inc. (Southwest Power Pool). Northampton represents that this facility is subject to an OATT on file with the Commission.¹⁵ Northampton further represents that neither it nor its affiliates own, operate or control any other electric transmission facilities in interstate commerce other than limited equipment necessary to connect individual generating facilities to the transmission grid.

23. Regarding other barriers to entry, Northampton represents that neither it nor any of its affiliates owns or controls inputs to electric power production in the relevant market, including: intrastate natural gas transportation, storage, or distribution facilities; sources of coal supply and the transportation of coal supplies; or sites for generating capacity development.

24. Additionally, consistent with Order No. 697, Northampton affirmatively states that it and its affiliates have not erected barriers to entry and will not erect barriers to entry into the relevant market.

25. Based on these representations, we find that Northampton satisfies the Commission's requirements for market-based rates regarding vertical market power.

4. Long-term Power Purchase Agreement

26. MetEd requests that any grant of market-based rate authority to Northampton be subject to the following conditions: 1) Northampton's authorization to engage in sales of capacity, energy, and ancillary services at market-based rates is limited to those sales not covered by the MetEd PPA; 2) Northampton is required to continue to make sales to MetEd in accordance with the MetEd PPA; and 3) Northampton is required to receive authorization from the Commission before abrogating the MetEd PPA. We will deny MetEd's request as outside the scope of this proceeding, which concerns Northampton's request for market-based rate authorization for power sales not covered by the MetEd PPA. As noted above, the Commission allows power sales at market-based rate if the seller and its affiliates do not have, or have adequately mitigated horizontal or vertical

¹⁴ *Id.* P 446.

¹⁵ See *Oncor Electric Delivery Company*, 120 FERC ¶ 61,215, at P 3 (2007).

market power. The Commission will, however, condition our grant of market-based rate authority on Northampton submitting a compliance filing with an amended tariff, consistent with the Commission's regulations, as discussed below. To the extent that Northampton acts inconsistently with what MetEd believes are the requirements of the MetEd PPA or PURPA, MetEd may seek relief at the appropriate time and in the appropriate forum or fora.

27. When a QF files a market-based rate application, it is required to inform the Commission of its QF status and explain its request to transact under market-based rates. A QF must explain, *inter alia*, whether any of its sales meet the requirements for the exemption from section 205 contained in section 292.601(c)(1) of the Commission's regulations,¹⁶ and if the QF desires to sell both pursuant to an exemption from section 205 while at the same time selling pursuant to market-based rate authority, it must specifically list its limitations on sales at market-based rates in its market-based rate tariff.¹⁷ Northampton acknowledges in its application that it is a QF and that sales under the MetEd PPA are exempt pursuant to Commission regulation from section 205 of the FPA. Northampton also acknowledges that it must obtain market-based rate authorization prior to engaging in any power sales not covered by the MetEd PPA, and states that it is seeking market-based rate authority for any such non-exempt power sales. However, Northampton does not list the limitation on sales at market-based rates (i.e., sales under the MetEd PPA) in its market-based rate tariff. Accordingly, we will condition the grant of market-based rate authority on Northampton submitting a compliance filing within 30 days of the date of this order to incorporate the required limitation in its tariff.

C. Waivers

28. Northampton states that it seeks the same pre-approvals and waivers previously granted to other sellers permitted to sell at market-based rates. Northampton requests the following waivers and authorizations: (1) waiver of the filing requirements of Subparts B

¹⁶ 18 C.F.R. § 292.601(c)(1) (2011).

¹⁷ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 526 (“[I]f a QF desires to make certain energy sales at market-based rates, while making other sales exempt from section 205, the QF must list its limitations on sales at market-based rates in its market-based rate tariff (i.e., sales under Seller's contract (Contract X), which was executed on March 17, 2006, are exempt from section 205 and sales outside of Contract X would be under market-based rates) and cite to the Commission orders certifying or recertifying its QF status, and/or to the docket numbers in which it self-certified or self-recertified its QF status, as explained in Order No. 697.”).

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 section 204 of the FPA¹⁸ and Part 34 for all future issuances of securities and assumptions of liability.

29. The Commission will grant the requested waivers and approvals consistent with those granted to other entities with market-based rate authorization.¹⁹ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects Northampton to keep its accounting records in accordance with generally accepted accounting principles.

30. We will direct Northampton to submit a compliance filing, within 30 days of the date of this order, containing revisions to the limitations and exemptions sections of its market-based rate tariff to include a citation to this order.²⁰

V. Reporting Requirements

31. 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.²¹ Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.²²

¹⁸ 16 U.S.C. § 824c (2006).

¹⁹ We note that the Commission 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), and P 999-1000 (regarding blanket approval under Part 34).

²⁰ *See* Order No. 697, FERC Stats and Regs. ¶ 31,252 at Appendix C, *order on reh'g*, Order No. 697-A, FERC Stats. and Regs. ¶ 31,268 at P 384.

²¹ *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*,

32. Additionally, Northampton 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.²³

33. In Order No. 697, the Commission created two categories of sellers.²⁴ 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

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, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008). 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>.

²² The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2011). 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.

²³ *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 (2011).

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

issues.²⁵ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.²⁶

34. Northampton states that it is a Category 2 seller in the Northeast region. Northampton states that it meets the criteria for Category 1 seller outside of the Northeast region because it does not own or control generation capacity outside of the Northeast region. Northampton further states that neither it nor any of its affiliates owns, operates or controls transmission facilities other than those limited and discrete facilities that are necessary to interconnect their generation facilities to the grid in the same region as Northampton's generation assets. Additionally, Northampton states that it is not affiliated with any franchised public utility and does not raise any vertical market power concerns. Based on Northampton's representations, we designate Northampton as a Category 2 seller in the Northeast region; thus, Northampton must file updated market power analyses for the Northeast region in compliance with the reporting schedule adopted in Order No. 697.²⁷ We designate Northampton as a Category 1 seller in the Northwest, Southeast, Southwest, Southwest Power Pool, and Central regions; however, the Commission reserves the right to require an updated market power analysis at any time for these regions.²⁸

The Commission orders:

(A) Northampton's market-based rate tariff is hereby conditionally accepted for filing, effective December 30, 2011, as requested, as discussed, in the body of this order.

(B) Northampton is hereby directed to make a compliance filing revising its market-based rate tariff, within 30 days of the date of this order, 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.

²⁵ 18 C.F.R. § 35.36(a) (2011).

²⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

²⁷ *Id.*

²⁸ *See id.* P 853.

(D) 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.

(E) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted. Northampton is hereby authorized to issue securities and assume obligations or liabilities as guarantor, endorser, 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 Northampton, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) 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 Northampton's issuance of securities or assumptions of liability.

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

(H) Northampton is hereby directed to file an updated market analysis for the Northeast region according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.