

140 FERC ¶ 61,002
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Imperial Valley Solar Company (IVSC) I, LLC

Docket Nos. ER12-1170-003

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND REQUEST
FOR WAIVERS

(Issued July 3, 2012)

1. In this order, the Commission grants Imperial Valley Solar Company (IVSC) I, LLC (Imperial Valley) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective June 12, 2012, as requested. Also, as discussed below, we grant Imperial Valley waiver of the obligation to file an Open Access Transmission Tariff (OATT) and to establish and maintain an Open Access Same-Time Information System (OASIS). We also grant Imperial Valley's request for other waivers commonly granted to market-based rate sellers.
2. Additionally, we find that Imperial Valley meets the criteria for a Category 1 seller in all regions and is so designated.¹

¹ 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 PP 848-850, *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), *cert. denied sub nom. Public Citizen, Inc. v. FERC*, 2012 U.S. LEXIS 4820 (U.S. June 25, 2012).

I. Background

3. On February 27, 2012, as amended on March 21, 2012, April 3, 2012, May 15, 2012, and June 7, 2012, pursuant to section 205 of the Federal Power Act (FPA),² Imperial Valley filed an application for market-based rate authority with an accompanying tariff providing for the sale of electric energy, capacity, and ancillary services at market-based rates.³ Imperial Valley states that it will own a 23 megawatt (MW) photovoltaic electric generation facility (Facility) in Niland, California in the Imperial Irrigation District (Imperial Irrigation) balancing authority area.⁴ Imperial Valley states that Imperial Irrigation is contractually entitled to all of the Facility's output under a 30-year power purchase agreement. Imperial Valley additionally states that the Facility will be operated by Imperial Valley's affiliate, Imperial Projects, LLC, and Imperial Valley will maintain decision-making authority over the Facility.

4. Imperial Valley states that the Facility will interconnect to the Imperial Irrigation balancing authority area at Imperial Irrigation's Niland 13.2 kilovolt (kV) distribution substation. Imperial Valley states that it owns an approximately 200-foot 13.2 kV generator tie line that will connect the Facility to the Niland substation. Imperial Valley represents that its generator tie line constitutes limited and discrete transmission facilities

² 16 U.S.C. § 824d (2006).

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

⁴ Imperial Valley states that it anticipates that the Facility will begin commercial operations on or about June 29, 2012.

and requests that the Commission waive the requirements under Order Nos. 888⁵ and 890⁶ to file an OATT and the requirement under Order No. 889⁷ to establish an OASIS.

5. Imperial Valley is wholly owned by IVSC1 Holdings, LLC, which is wholly owned by SunPeak Solar, LLC. SunPeak Solar, LLC is owned by Rennie Capital Corporation and Desert Projects, Inc. Rennie Capital Corporation is wholly owned by an individual, and Desert Projects, Inc. is wholly owned by the JRH Living Trust.

II. Notice of Filing

6. Notice of Imperial Valley's February 27, 2012, March 21, 2012, April 3, 2012, May 15, 2012, and June 7, 2012 filings were published in the *Federal Register*,⁸ with interventions and comments due on or before June 27, 2012. None was filed.

7. Notice of Imperial Valley's request for blanket authorization under Part 34 was separately published in the *Federal Register*,⁹ with interventions or protests due on or before March 21, 2012. None was filed.

⁵ *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).

⁶ *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, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁷ *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).

⁸ 77 Fed. Reg. 13,315 (2012); 77 Fed. Reg. 19,658 (2012); 77 Fed. Reg. 21,552 (2012); 77 Fed. Reg. 30,520 (2012); 77 Fed. Reg. 35,370 (2012).

⁹ 77 Fed. Reg. 13,591 (2012).

III. Determination

8. As discussed below, we will grant Imperial Valley's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and we will accept its market-based rate tariff, effective June 12, 2012, as requested. We will also grant Imperial Valley's request for certain waivers.

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.¹⁰

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.¹¹ 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.¹²

11. Imperial Valley represents that its generation capacity in the Imperial Irrigation balancing authority area is fully committed under a 30-year power purchase agreement, and that its affiliates also do not have uncommitted capacity in the Imperial Irrigation balancing authority area. The Commission has reviewed Imperial Valley's pivotal supplier and wholesale market share screens and has determined that it passes the screens in the Imperial Irrigation balancing authority area. Accordingly, we find that Imperial Valley satisfies the Commission's requirements for market-based rates regarding horizontal market power.

2. Vertical Market Power

12. 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

¹⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

¹¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62.

¹² *Id.* PP 33, 62-63.

OATT on file or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.¹³

13. In this case, as discussed more fully below, the Commission will grant Imperial Valley's request for waiver of the requirement to have an OATT on file for its transmission facilities.¹⁴

14. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁵ 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).¹⁶ 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.¹⁷ The Commission adopted a 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.¹⁸

15. Regarding other barriers to entry, Imperial Valley represents that neither it nor any of its affiliates owns or controls any intrastate natural gas transportation, storage, or distribution facilities. It further represents that neither it nor any of its affiliates owns or

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

¹⁴ A generator tie line is a transmission facility. *See* 16 U.S.C. §§ 796(23), 824(a)-(b) (2006). Imperial Valley is subject to the requirement under Order Nos. 888 and 890 to file an OATT, or seek a waiver of the requirement to file an OATT unless and until it receives a request for transmission service. *See Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149, at P 24 (2009) (noting that the fact that the facilities merely tie a generator to the grid does not render a line exempt from the Commission's regulation of transmission facilities). *See also Evergreen Wind Power III, LLC*, 135 FERC ¶ 61,030, at P 15 n.18 (2011).

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

¹⁶ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

¹⁸ *Id.* P 446.

controls physical coal supply sources or has ownership or control over who may access transportation of coal supplies. Imperial Valley states that it will control the land upon which it is building its generation facility pursuant to a long-term lease. It also states that its affiliate, Niland Lands Company 1, LLC, controls a site for generation capacity development located in California pursuant to a long-term ground lease.

16. Finally, consistent with Order No. 697, Imperial Valley affirmatively states that Imperial Valley and its affiliates have not erected barriers to entry, and will not erect barriers, in the relevant geographic market.

17. Based on Imperial Valley's representations, and our determinations discussed below, we find that Imperial Valley satisfies the Commission's requirements for market-based rates regarding vertical market power.

B. Waiver Requests

1. OATT, OASIS, and Standards of Conduct

18. As explained above, Imperial Valley seeks waiver of the requirements to file an OATT and establish and maintain an OASIS with respect to its generator tie line. In support of its request for waiver, Imperial Valley states that its generator tie line constitutes limited and discrete transmission facilities and is necessary to connect the Facility to the grid.¹⁹

19. Order Nos. 888 and 890 and section 35.28 of the Commission's regulations²⁰ require public utilities that own, operate, or control facilities used for the transmission of electric energy in interstate commerce to file an OATT. Order No. 889 and Part 37 of the Commission's regulations²¹ require public utilities to establish and maintain an OASIS. In prior orders, the Commission has enunciated the standards for exemption from some or all of the requirements of Order Nos. 888 and 889.²² The criteria for waiver of these requirements are unchanged by Order No. 890.

20. The Commission may grant requests for waiver of the obligation to file an OATT to public utilities that can show that they own, operate, or control only limited and

¹⁹ Imperial Valley's February 27, 2012 Filing at 16 n.46.

²⁰ 18 C.F.R. § 35.28 (2011).

²¹ 18 C.F.R. Part 37 (2011).

²² 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*).

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.²³

21. The Commission has also determined that waiver of the requirement to establish an OASIS 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 other circumstances are present that indicate that a waiver would not be justified.²⁴ The Commission has held that 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.²⁵

22. Based on the statements in Imperial Valley's application, we find that its transmission facilities qualify as limited and discrete. Accordingly, we will grant Imperial Valley waiver of the requirements of Order Nos. 888 and 890 and section 35.28 of the Commission's regulations to have an OATT on file. However, if Imperial Valley receives a request for transmission service, it must file with the Commission a *pro forma* OATT 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.

23. The Commission will also grant Imperial Valley waiver of the requirements of Order No. 889 and Part 37 of the Commission's regulations with respect to OASIS. We

²³ *Black Creek*, 77 FERC at 61,941.

²⁴ *Id.* Although the Commission originally precluded waiver of the requirements for OASIS and the Standards of Conduct for a small public utility that is a member of a tight power pool, in *Black Hills Power, Inc.*, 135 FERC ¶ 61,058, at PP 2-3 (2011), the Commission explained that membership in a tight power pool is no longer a factor in the determination for waiver of Standards of Conduct. Additionally, size is not relevant to whether waivers are granted to public utilities that participate in a Commission-approved Independent System Operator or Regional Transmission Organization. See 18 C.F.R. § 358.1(c) (2011).

²⁵ *Entergy*, 112 FERC ¶ 61,228 at P 23 (citing *Central Minnesota Municipal Power Agency*, 79 FERC at 62,127 (1997); *Easton Utilities Commission*, 83 FERC ¶ at 62,343 (1998)).

note that Imperial Valley's waiver of the requirement to establish an OASIS 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.²⁶

24. Order Nos. 889, 2004,²⁷ and 717²⁸ and Part 358 of the Commission's regulations²⁹ require public utilities to abide by certain standards of conduct. Imperial Valley did not request a waiver from the requirement to abide by the standards of conduct. Therefore, we note that to the extent Imperial Valley is subject to the standards of conduct requirements of Part 358, it must comply with them, although this is without prejudice to Imperial Valley submitting a request for such a waiver in the future.

2. Other Waivers, Approvals, and Authorizations

25. Imperial Valley also requests the following waivers and authorizations: (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

²⁶ *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)).

²⁷ *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *see Standards of Conduct for Transmission Providers*, Order No. 690, FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, FERC Stats. & Regs. ¶ 31,243 (2007).

²⁸ *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017 (2011).

²⁹ 18 C.F.R. Part 358 (2011).

section 204 of the FPA³⁰ and Part 34 for all future issuances of securities and assumptions of liability.

26. The Commission will grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.³¹ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects Imperial Valley to keep its accounting records in accordance with generally accepted accounting principles.

C. Reporting Requirements

27. 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.³²

³⁰ 16 U.S.C. § 824c (2006).

³¹ We note that the Commission has 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 PP 984-985 (regarding waiver of Parts 41, 101, and 141) and PP 999-1000 (regarding blanket approval under Part 34).

³² *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, *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>.

Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.³³

28. Additionally, Imperial Valley 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.³⁴

29. In Order No. 697, the Commission created two categories of sellers.³⁵ 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.³⁶ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.³⁷

30. Imperial Valley represents that it and its affiliates own less than 500 MW of generation in all regions. Imperial Valley further states that neither it nor any of its affiliates owns, operates, or controls transmission facilities other than the limited facilities that are necessary to interconnect their generation facilities to the grid. Imperial Valley further states that it is not affiliated with a franchised public utility, and that it does not raise any other vertical market power issues. Based on Imperial Valley's

³³ 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.

³⁴ *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).

³⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

³⁶ 18 C.F.R. § 35.36(a) (2011).

³⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

representations, and the Commission's decision herein to grant waiver of the OATT requirement, we designate Imperial Valley as a Category 1 seller in all regions. The Commission reserves the right to require an updated market power analysis at any time for any region.³⁸

The Commission orders:

(A) Imperial Valley's market-based rate tariff is hereby accepted for filing, effective June 12, 2012, as requested, 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 hereby granted. Imperial Valley 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 Imperial Valley, 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 Imperial Valley's issuance of securities or assumptions of liability.

(F) Imperial Valley is hereby granted waiver of the requirements under Order Nos. 888 and 890 and section 35.28 of the Commission's regulations to file an OATT and the requirements under Order No. 889 and Part 37 of the Commission's regulations to establish and maintain an OASIS, as discussed in the body of this order.

³⁸ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 853.

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