

140 FERC ¶ 61,234
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.

San Gorgonio Farms, Inc.

Docket Nos. ER12-2055-000
ER12-2055-001

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND DENYING
WAIVER OF PRIOR NOTICE REQUIREMENT

(Issued September 21, 2012)

1. In this order, the Commission grants San Gorgonio Farms, Inc. (San Gorgonio) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective August 15, 2012. We deny San Gorgonio's request for waiver of the prior notice requirement. Also, we grant San Gorgonio 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). In addition, we grant San Gorgonio's request for other waivers commonly granted to market-based rate sellers.

2. Additionally, we find that San Gorgonio meets the criteria for a Category 1 seller in all regions and is so designated.¹

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 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 June 15, 2012, as supplemented on July 24, 2012 and August 23, 2012, pursuant to section 205 of the Federal Power Act (FPA),² San Gorgonio filed an initial application for market-based rate authority with an accompanying tariff. The proposed tariff provides for the sale of energy, capacity and ancillary services at market-based rates.³

4. San Gorgonio states that it is a partial owner of a 31 megawatt (MW) wind energy electric generation facility (Facility) in Whitewater, California, in the CAISO market. In addition, San Gorgonio states that it and its affiliates own or control another 12 MW wind energy electric generation facility located in North Palm Springs, California (Karen Avenue Wind Farm), in the CAISO market.⁴

5. San Gorgonio states that the Facility is a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA).⁵ San Gorgonio explains that until March 22, 2012, it sold all of the net energy produced by the Facility to Southern California Edison Company (SoCal Edison) under two power purchase agreements (PURPA Power Purchase Agreements), which were subject to the mandatory purchase obligation under section 210 of PURPA.⁶ However, according to San Gorgonio, in December 2010, the California Public Utilities Commission approved a settlement (California QF/CHP Settlement) providing for the termination of the mandatory purchase obligation for QFs in SoCal Edison's service territory.⁷ As a result, San Gorgonio states that the PURPA Power Purchase Agreements were terminated on March 22, 2012. Consequently, San Gorgonio states that it began delivering power to the City of

² 16 U.S.C. § 824d (2006).

³ San Gorgonio 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 Corporation (CAISO). San Gorgonio also requests authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁴ San Gorgonio June 15 Filing, Docket No. ER12-2055-000 at 3 (June 15 Filing).

⁵ 16 U.S.C. § 824a-3 (2006).

⁶ 16 U.S.C. § 824a-3(h).

⁷ See *Pacific Gas & Electric Co.*, 135 FERC ¶ 61,234, at P 5 (2011) (discussing the California QF/CHP Settlement).

Anaheim, California (City of Anaheim) on March 23, 2012 under a short-term Western Systems Power Pool Agreement (short-term WSPP agreement).

6. San Gorgonio requests waivers commonly granted to similar applicants seeking market-based rate authority as well as waiver of the prior notice requirement to make its market-based rate authority effective as of March 23, 2012.⁸

7. On July 11, 2012, the Division of Electric Power Regulation-West issued a letter directing San Gorgonio to explain whether San Gorgonio or its affiliates own interests in generation capacity outside of the CAISO market and to amend its generation asset appendix. The letter also directed San Gorgonio to describe the short-term WSPP agreement and explain why San Gorgonio felt it was appropriate to transact under such an agreement without market-based rate authority. Further, the letter instructed San Gorgonio to explain why it was appropriate to use historical data from a different calendar year in its horizontal market power analysis and to state whether there would be a significant increase in the market shares during any season if more recent data had been used. Finally, the letter directed San Gorgonio to describe the transmission facilities for which San Gorgonio sought waiver from the requirements of Order Nos. 888,⁹ 889,¹⁰ and 890.¹¹

⁸ June 15 Filing at 20-23.

⁹ *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).

¹⁰ *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).

¹¹ *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), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

8. On July 24, 2012, San Gorgonio filed a response to the July 11, 2012 letter (July 24 Response). According to San Gorgonio, neither San Gorgonio nor its affiliates own interests in generation capacity outside of the CAISO market.¹²

9. San Gorgonio states that it entered into the short-term WSPP agreement with the City of Anaheim as an interim measure until the parties could negotiate a long-term power purchase agreement.¹³ San Gorgonio further states that under the short-term WSPP agreement, the City of Anaheim has agreed to purchase all electric energy produced by the Facility and all green attributes associated with such energy.¹⁴ According to San Gorgonio, the energy required under the short-term WSPP agreement is delivered to SoCal Edison's Devers Substation, where the City of Anaheim immediately resells the energy into CAISO's real-time market as a price taker. In exchange, the City of Anaheim pays San Gorgonio an amount equal to the revenues the City of Anaheim receives when the energy is sold into the CAISO real-time market.

10. San Gorgonio states that its application relies on CAISO market data that was submitted to the Commission by Topaz Solar Farms LLC.¹⁵ San Gorgonio states that it believed such data was sufficiently current to use in performing its horizontal market power analyses. However, San Gorgonio states that its July 24 Response includes updated horizontal market power analyses utilizing more recent CAISO market data.

11. Finally, San Gorgonio asserts that it does not own, operate, or control any transmission-related equipment other than the limited and discrete facilities that interconnect the Facility and the Karen Avenue Wind Farm to SoCal Edison's transmission system.¹⁶ San Gorgonio states that its transmission assets only include the Facility's transformer and the equipment that interconnects the Facility to that

¹² July 24 Response at 1. San Gorgonio also updated its generation asset appendix.

¹³ San Gorgonio states that the short-term WSPP agreement will terminate upon the earlier of the date that the parties execute a long-term power purchase agreement or September 23, 2012. *Id.*

¹⁴ San Gorgonio states that the parties have negotiated a separate price for the green attributes associated with such energy.

¹⁵ See July 24 Response at 3-4 (citing Topaz Solar Farms LLC, Application, Docket No. ER12-1626-000 (filed April 26, 2012)); *Topaz Solar Farms LLC*, Docket No. ER12-1626-000 (June 14, 2012) (delegated letter order).

¹⁶ July 24 Response at 4.

transformer. On August 23, 2012, San Gorgonio supplemented the July 24 Response, clarifying that it requests waiver of the OATT requirements, as they pertain to the Facility, and not on behalf of its affiliates or with respect to the Karen Avenue Wind Farm.

II. Notice of Filings and Responsive Pleadings

12. Notice of the June 15 Filing was published in the *Federal Register*, 77 Fed. Reg. 37,895 (2012), with interventions or protests due on or before July 6, 2012. None was filed.

13. Notice of San Gorgonio's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*, 77 Fed. Reg. 38,048 (2012), with interventions and protests due on or before July 10, 2012. None was filed.

14. Notice of the July 24 Response was published in the *Federal Register*, 77 Fed. Reg. 45,348 (2012), with interventions and protests due August 14, 2012.

15. The City of Anaheim filed a motion to intervene on August 7, 2012.

16. Notice of the August 23 Supplement was published in the *Federal Register*, 77 Fed. Reg. 53,881 (2012), with interventions and protests due on September 4, 2012. None was filed.

III. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the City of Anaheim's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Substantive Matters

18. As discussed below, we will grant San Gorgonio's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, and we will accept San Gorgonio's market-based rate tariff, effective August 15, 2012. We deny San Gorgonio's request for waiver of the Commission's prior notice policy, and grant San Gorgonio's request for certain other waivers.

1. Market-Based Rate Authorization

19. 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.¹⁷

a. Horizontal Market Power

20. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹⁸ 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.¹⁹

21. San Gorgonio states that it and its affiliates own or control 43 MW in the CAISO market. San Gorgonio's market share screen indicates that its market share in the CAISO market is less than one percent.²⁰ San Gorgonio's pivotal supplier screen indicates that the net uncommitted supply in the CAISO market exceeds San Gorgonio's uncommitted capacity.

22. The Commission has reviewed San Gorgonio's wholesale market share and pivotal supplier screens and has determined that San Gorgonio passes both screens in the CAISO market.²¹ Based on San Gorgonio's representations, we find that San Gorgonio

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

¹⁸ *Id.* P 62.

¹⁹ *Id.* PP 33, 62-63.

²⁰ We note that the analysis of the CAISO market relies on data previously submitted to the Commission. *See* July 24 Response at 3-4 (citing Topaz Solar Farms LLC, Application, Docket No. ER12-1626-000 (filed April 26, 2012)); *Topaz Solar Farms LLC*, Docket No. ER12-1626-000 (June 14, 2012) (delegated letter order).

²¹ While San Gorgonio used non-affiliate imports to perform the analysis, using the conservative assumption of no non-affiliate imports (specifically, setting row H in the pivotal supplier screen and row P in the wholesale market share screen to zero), San Gorgonio passes the Commission's indicative screens in the CAISO market. *See, e.g., Carthage Energy, LLC*, 123 FERC ¶ 61,186 at P 19 (2008); *Wolverine Power Supply*, Docket No. ER98-411-015 (March 16, 2009) (delegated letter order); *see also* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 379; *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at P 38 (2004).

satisfies the Commission's requirements for market-based rates regarding horizontal market power.

b. Vertical Market Power

23. 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 OATT on file or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.²²

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

25. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.²³ 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).²⁴ 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.²⁵ 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 barriers to entry but will allow interveners to demonstrate otherwise.²⁶

26. Regarding other barriers to entry, San Gorgonio asserts that neither it nor its affiliates owns or controls sites in the CAISO market or anywhere else in California used for the development of generation capacity other than the properties on which their

²² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

²³ *Id.* P 440.

²⁴ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

²⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

²⁶ *Id.* P 446.

respective generation facilities are currently or will be located.²⁷ San Gorgonio states that it does not own any other inputs to electric power production.²⁸

27. Consistent with Order No. 697, San Gorgonio affirmatively states that San Gorgonio and its affiliates have not erected barriers to entry, and will not erect barriers to entry, in the relevant geographic market.

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

2. Waiver Requests

a. OATT and OASIS

29. As noted above, San Gorgonio seeks waiver of the requirement to file an OATT as well as the requirement to establish and maintain an OASIS. In support of its request for waiver, San Gorgonio states that its facilities constitute limited and discrete transmission facilities necessary to interconnect the Facility to the transmission grid.²⁹

30. Order Nos. 888 and 890 and section 35.28 of the Commission's regulations require that utilities own, operate, or control facilities used for the transmission of energy in interstate commerce to file an OATT.³⁰ Order No. 889 and Part 37 of the Commission's regulations require public utilities to establish and maintain an OASIS.³¹

²⁷ June 15 Filing at 14. 18 C.F.R. § 35.37(e) (2012) requires a seller to demonstrate a lack of vertical market power in wholesale energy markets through the affiliation, ownership or control of inputs to electric power production and specifically to provide information on sites for generation capacity development. We interpret San Gorgonio's statement to include all such sites throughout the country. If San Gorgonio or its affiliates have any additional sites for generation capacity development, it must file a notice of change in status with the Commission within 30 days of the date of this order reporting such sites.

²⁸ June 15 Filing at 14.

²⁹ *Id.* at 18-19; July 24 Filing at 4 ("these limited and discrete facilities only include the Facility's transformer and the equipment that interconnects the Facility to that transformer; they do not include a gen-tie line.").

³⁰ 18 C.F.R. § 35.28 (2012).

³¹ 18 C.F.R. Part 37 (2012).

In prior orders, the Commission has articulated the standards for exemption from some or all of the requirements of Order Nos. 888 and 889.³² The criteria for waiver of these requirements are unchanged by Order No. 890.

31. 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 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.³³

32. 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.³⁴ 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.³⁵

³² See, e.g., *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996); *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228, at P 22 (2005).

³³ *Black Creek Hydro*, 77 FERC ¶ 61,232 at 61,941.

³⁴ *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. § 385.1(c) (2012).

³⁵ *Entergy Mississippi, Inc.*, 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)).

33. Based on San Gorgonio's representations, we find that its transmission facilities qualify as limited and discrete. Accordingly, we will grant San Gorgonio 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 San Gorgonio 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.

34. The Commission will also grant San Gorgonio waiver of the requirements of Order No. 889 and Part 37 of the Commission's regulations with respect to OASIS. We note that San Gorgonio'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.³⁶

35. Order Nos. 889, 2004,³⁷ and 717³⁸ and Part 358 of the Commission's regulations³⁹ require public utilities to abide by certain standards of conduct. San Gorgonio did not request a waiver from the requirement to abide by the standards of conduct. Therefore, we note that, to the extent San Gorgonio is subject to the standards of conduct requirements of Part 358, it must comply with them, although this is without prejudice to San Gorgonio submitting a request for such a waiver in the future.

³⁶ *Id.*; *Easton Utilities Commission*, 83 FERC ¶ 61,334 at 62,343.

³⁷ *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).

³⁸ *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).

³⁹ 18 C.F.R. Part 358 (2012).

b. Other Waivers, Approvals, and Authorizations

36. San Gorgonio also requests the following waivers and authorizations: (1) waiver of the filing requirements of subparts B and C of Part 35 of the Commission's regulations, 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 of the Commission's regulations, except sections 141.14 and 141.15; and (3) blanket authorization under section 204 of the FPA⁴⁰ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

37. The Commission will grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authority.⁴¹ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects San Gorgonio to keep its accounting records in accordance with generally accepted accounting principles.

38. We will direct San Gorgonio to submit a compliance filing containing revisions to the limitations and exemptions sections of its market-based rate tariff to include a citation to this order.⁴²

c. Waiver of the Prior Notice Requirement

39. San Gorgonio argues that extraordinary circumstances justify waiver of the prior notice requirement and requests an effective date of March 23, 2012.⁴³ San Gorgonio asserts that it is essentially a small family-run business that has historically operated as a QF selling power pursuant to the mandatory purchase obligation under section 210 of

⁴⁰ 16 U.S.C. § 824c (2006).

⁴¹ We note that the Commission has examined and approved the continued applicability of the waiver 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 PP 984-985 (regarding waiver of Parts 41, 101, and 141); *id.* PP 999-1000 (regarding blanket approval under Part 34).

⁴² *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 384. These tariff revisions may be filed the next time San Gorgonio makes a market-based rate filing with the Commission.

⁴³ June 15 Filing at 20-23.

PURPA.⁴⁴ San Gorgonio explains that the California QF/CHP Settlement terminated the mandatory purchase obligation under PURPA for QFs in SoCal Edison's service territory. Additionally, San Gorgonio asserts that it was one of only a handful of QFs that was not afforded a process under the California QF/CHP Settlement through which it could transition to a successor agreement. Consequently, San Gorgonio contends that it faced a number of challenges following the California QF/CHP Settlement.

40. Specifically, San Gorgonio states that following the California QF/CHP Settlement, San Gorgonio focused its activities on executing an interconnection agreement with SoCal Edison in order to ensure that it would be able to deliver energy to the transmission grid.⁴⁵ San Gorgonio asserts that it was unaware of its obligation to request market-based rate authority from the Commission following the California QF/CHP Settlement.⁴⁶ San Gorgonio states that if its efforts to negotiate the short-term WSPP agreement had failed and San Gorgonio was unable to secure a new off-taker immediately following the termination of the PURPA Power Purchase Agreements, San Gorgonio would likely have been left bankrupt.⁴⁷ San Gorgonio also argues that the Commission has previously waived the prior notice requirement for "small, unsophisticated QFs like [San Gorgonio] who failed to timely comply with filing obligations."⁴⁸

41. Moreover, San Gorgonio argues that waiver would be reasonable in this case because the short-term WSPP agreement under which San Gorgonio sells its energy to the City of Anaheim "already reflects [San Gorgonio's] 'cost-justified rate.'"⁴⁹ According to San Gorgonio, where a seller has failed to comply with the prior notice requirement, the Commission has ordered the seller to "refund the difference, if any, between the contract price and [the seller's] cost-justified rate."⁵⁰ San Gorgonio states

⁴⁴ *Id.* at 20; July 24 Response at 2.

⁴⁵ July 24 Response at 2-3.

⁴⁶ July 15 Filing at 21; July 24 Response at 3.

⁴⁷ June 15 Filing at 21.

⁴⁸ *Id.* at 23 (citing *WM Renewable Energy, L.L.C.*, 130 FERC ¶ 61,268 (2010); *Ashland Windfarm, LLC*, 124 FERC ¶ 61,068 (2008)).

⁴⁹ *Id.* at 22.

⁵⁰ *Id.* at 22 (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,975 (*Prior Notice*), clarified, 65 FERC ¶ 61,081 (1993)).

that a QF's cost-justified rate is its avoided-cost rate, or, if it has no such avoided-cost rate a reasonable proxy for such a rate.⁵¹ San Gorgonio contends that the rate provided under the short-term WSPP agreement is equal to the real-time price at the Devers Substation, which San Gorgonio asserts is the best proxy for its avoided-cost rate.⁵²

42. Section 205 of the FPA explicitly requires that rates be timely filed with the Commission.⁵³ In this regard, the Commission has explained that it cannot "ignore its statutory duty to determine whether rates are just and reasonable by permitting utilities to submit filings whenever convenient," and that it "must have the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences."⁵⁴ Thus, a regulated entity must timely file its rates to allow the Commission to fulfill its statutory mandate, namely, timely determining whether the rates being charged are just and reasonable. The Commission has further made clear that, for market-based rates in particular, it "does not allow market-based rates to go into effect before a filing has been tendered with the Commission."⁵⁵ In *Central Maine Power Co.*,⁵⁶ *Central Hudson Gas and Electric Co.*,⁵⁷ and *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*,⁵⁸ the Commission explained that it would grant waiver of the prior notice requirement for proposals to charge market-based rates only in extreme or extraordinary circumstances.

⁵¹ *Id.* (citing *Wind Capital Holdings, LLC*, 120 FERC ¶ 61,276, at P 22 (2007)).

⁵² *Id.*

⁵³ *See El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 9-11 (2003).

⁵⁴ *Id.* P 14.

⁵⁵ *El Segundo Power, LLC*, 84 FERC ¶ 61,011, at 61,060, *order on reh'g*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC ¶ 61,208 (1999), *order on reh'g*, 90 FERC ¶ 61,036 (2000); *see also FC Landfill Energy, LLC*, 133 FERC ¶ 61,041 (2010) (citing *El Segundo Power, LLC*, 84 FERC ¶ 61,011); *BC Landfill Energy, LLC*, 127 FERC ¶ 61,113 (2009) (citing *El Segundo Power, LLC*, 84 FERC ¶ 61,011).

⁵⁶ *Central Maine Power Co.*, 56 FERC ¶ 61,200, *order on reh'g*, 57 FERC ¶ 61,083 (1991).

⁵⁷ *Central Hudson Gas and Electric Company*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

⁵⁸ *Prior Notice*, 64 FERC ¶ 61,139 at 61,984.

43. Based on the information presented by San Gorgonio, San Gorgonio has failed to demonstrate extraordinary circumstances warranting waiver of the prior notice requirement. The Commission has previously stated that an applicant's lack of awareness does not constitute extraordinary circumstances.⁵⁹ Accordingly, we deny San Gorgonio's request for waiver of the prior notice requirement and an effective date of March 23, 2012. We grant San Gorgonio's request for market-based rate authority to be effective August 15, 2012, 61 days after San Gorgonio filed its request for market-based rate authority.

3. Refunds

44. The Commission has noted that if a utility files a market-based rate tariff less than 60 days prior to the proposed effective date of new service, and waiver is denied, the Commission will require the utility to refund to its customers the time-value of the gross revenues collected, calculated pursuant to section 35.19a of the Commission's regulations,⁶⁰ for the entire period that the rate was collected without Commission authorization.⁶¹ In addition to returning the time-value of revenues collected for the period the rate was charged without Commission authorization, when dealing with market-based rates that are not timely filed, the Commission has stated that:

[T]he utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and a cost-justified rate. . . . In other words, the late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized late filing of cost-based rates, until the date of Commission authorization.⁶²

45. For a QF like San Gorgonio, the difference between the market-based rate and the cost-justified rate would be the difference between the market-based rate it actually charged and its avoided cost rate (or, if it has no such avoided cost rate, a reasonable

⁵⁹ *Trigen-St. Louis Energy Corporation*, 120 FERC ¶ 61,044 (2007); *see also OREG 1, Inc.*, 135 FERC ¶ 61,150 (2011), *order denying rehearing*, 138 FERC ¶ 61,110 (2012).

⁶⁰ 18 C.F.R. § 35.19a.

⁶¹ *Prior Notice*, 64 FERC ¶ 61,139 at 61,980.

⁶² *Id.*; *see* 16 U.S.C. § 825h (2006); *see Southern California Water Co.*, 106 FERC ¶ 61,305, at PP 15-16, *reh'g denied*, 108 FERC ¶ 61,168 (2004); *see also Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,356 (1999); *Public Service Co. of Colorado*, 85 FERC ¶ 61,146, at 61,588 (1998).

proxy for such a rate).⁶³ San Gorgonio should identify its avoided cost rate in its refund report ordered below (or, if it has no such avoided cost rate, explain why it cannot be calculated and articulate a reasonable proxy for such rate).⁶⁴ Whether or not an individual customer actually suffered any harm, we add, is irrelevant to our inquiry here. The injury to be remedied by refunds for late filings is not merely to redress injury to an individual customer but particularly to address “the Commission’s ability to enforce FPA section 205’s requirement that there be prior notice and that the rates charged be just and reasonable at the time they are being charged.”⁶⁵ Therefore, we conclude that refunds, plus interest are due.⁶⁶

4. Reporting Requirements

46. 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.⁶⁷

⁶³ 18 C.F.R. § 292.304(a) (2012); *Mendota Hills*, 110 FERC ¶ 61,222, at P 26 (2005).

⁶⁴ *Mendota Hills*, 110 FERC ¶ 61,222 at P 26.

⁶⁵ *El Paso Electric Company*, 105 FERC ¶ 61,131, at P 21 (2003) (footnote omitted) (citing *Carolina Power*, 87 FERC ¶ 61,083 at 61,356).

⁶⁶ The Commission limits the application of the time value formula to an amount that permits the public utility to recover its variable costs. *See Carolina Power & Light Co.*, 84 FERC ¶ 61,103 (1998), *order on reh’g*, 87 FERC ¶ 61,083, at 61,357 (1999)

⁶⁷ *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

(continued...)

Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.⁶⁸

47. Additionally, San Gorgonio 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.⁶⁹

48. In Order No. 697, the Commission created two categories of sellers.⁷⁰ 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. 888⁷¹); 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.⁷² Sellers that do not fall into Category 1 are designated as Category 2 and are required to file updated market power analyses.⁷³

Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

⁶⁸ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2012). 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.

⁶⁹ *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 (2012).

⁷⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

⁷¹ Order No. 888, FERC Stats. & Regs. ¶ 31,036.

⁷² 18 C.F.R. § 35.36(a) (2012).

⁷³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

49. San Gorgonio asserts that the generation owned by San Gorgonio and its affiliates totals less than 500 MW in aggregate per region. San Gorgonio also states that neither San Gorgonio nor its affiliates own, operate, or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the distribution and transmission grids. San Gorgonio states that it is not affiliated with a franchised public utility. Finally, San Gorgonio represents that its application for market-based rate authority does not raise any vertical market power issues. Based on San Gorgonio's representations, and the Commission's decision herein to grant waiver of the OATT requirement, we designate San Gorgonio as a Category 1 seller in the Northeast, Southeast, Central, Southwest Power Pool, Southwest, and Northwest regions. However, the Commission reserves the right to require an updated market power analysis at any time.⁷⁴

The Commission orders:

(A) San Gorgonio's market-based rate tariff is hereby accepted for filing, effective August 15, 2012, as discussed in the body of this order.

(B) San Gorgonio is hereby directed to revise the limitations and exemptions section of its tariff to include a citation to this order, as discussed in the body of this order.

(C) Waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, with the exception of sections 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted.

(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 section 204 of the FPA and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is granted. San Gorgonio 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 San Gorgonio, 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 San Gorgonio's issuances of securities or

⁷⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 853.

assumptions of liabilities.

(G) San Gorgonio 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.

(H) San Gorgonio's request for waiver of the prior notice requirement is denied, as discussed in the body of this order.

(I) San Gorgonio is hereby ordered to make refunds, with interest, within 30 days of the date of this order, as discussed in the body of this order. Such refunds shall include: (a) the time value of gross revenues for market-based rate sales made without Commission authorization from March 23, 2012 until August 15, 2012, calculated in accordance with 18 C.F.R. § 35.19a (2012); and (b) the difference between the gross revenues for market-based rate sales made without Commission authorization and the cost-justified rate (or alternatives as discussed herein). San Gorgonio is hereby directed to submit a refund report within 15 days thereafter, regarding the basis for and calculations of the refunds paid.

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