

141 FERC ¶ 61,179
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.

Niagara Wind Power, LLC

Docket No. ER13-17-000

ORDER CONDITIONALLY ACCEPTING AND SUSPENDING MARKET-BASED
RATE TARIFF AND DENYING WAIVER OF PRIOR NOTICE REQUIREMENT

(Issued November 30, 2012)

1. In this order, the Commission conditionally accepts and suspends, for a nominal period, to become effective December 3, 2012, subject to refund and subject to the outcome of a pending proceeding in Docket No. ER10-2460-001,¹ a proposed tariff filed by Niagara Wind Power, LLC (Niagara). The proposed tariff would permit Niagara to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates. Our acceptance here is also subject to the compliance filing ordered herein. Additionally, the Commission denies Niagara's request for waiver of prior notice and grants Niagara's request for other waivers commonly granted to market-based rate sellers.

2. We find that Niagara meets the criteria for a Category 1 seller in the Northwest, Central, Southeast, Southwest, and Southwest Power Pool regions and is so designated. Further, we designate Niagara as a Category 2 seller in the Northeast region. Accordingly, Niagara must file updated market power analyses for the region in which it is designated as a Category 2 seller in compliance with the regional reporting schedule adopted in Order No. 697.²

¹ Canandaigua Power Partners, LLC, Notice of Change in Status, Docket No. ER10-2460-001 (filed July 16, 2012).

² 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,

(continued...)

I. Background

3. On October 3, 2012, pursuant to section 205 of the Federal Power Act (FPA),³ Niagara 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.⁴

4. Niagara is an indirect, wholly-owned subsidiary of Northeast Wind Partners II, LLC (NE Wind Partners II). First Wind Holdings, LLC indirectly owns 51 percent of NE Wind Partners II and Northeast Wind Holdings LLC, a wholly-owned subsidiary of Emera Incorporated (Emera), owns the remaining 49 percent of NE Wind Partners II.

5. Niagara owns and operates a 19.9 megawatt (MW) wind-powered, electric-generating facility (the Steel Winds I Facility) located in Lackawanna, Erie County, New York, which is interconnected with the transmission system of National Grid USA in the NYISO market. Niagara represents that it has self-certified as a Qualifying Facility (QF)⁵ under the Public Utility Regulatory Policies Act of 1978 (PURPA).⁶ Niagara states that it sells all of the energy from its facility to Commerce Energy, Inc. under a long-term power purchase agreement that was executed in 2010 (Commerce PPA).

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).

³ 16 U.S.C. § 824d (2006).

⁴ Niagara requests authorization to sell ancillary services in the markets administered by the PJM Interconnection, L.L.C., New York Independent System Operator, Inc. (NYISO), ISO New England Inc., California Independent System Operator Corporation, and Midwest Independent Transmission System Operator, Inc., as well as authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁵ Niagara's October 3, 2012 Filing at 4, n.4 (citing Niagara Wind Power, LLC, "Notice of Self-Recertification," Docket No. QF07-39-004 (filed Aug. 1, 2012)).

⁶ 16 U.S.C. § 824a-3 (2006).

6. Niagara represents that prior to December 16, 2011, Niagara was exempt from section 205 of the FPA because the Steel Winds I Facility had a net power production capacity of less than 20 MW. However, on December 16, 2011, Niagara's affiliate, Erie Wind, LLC (Erie), began producing energy from its 15 MW wind powered generation facility (the Steel Winds II Facility), which is located within one mile of Niagara's Steel Winds I Facility. Niagara states that given that the combination of the Steel Winds I Facility and the Steel Winds II Facility is 35 MW, Niagara, as of December 16, 2011, no longer qualifies for exemption from section 205 of the FPA,⁷ and therefore is submitting a request for market-based rate authority under section 205 of the FPA.

7. Niagara requests that the Commission accept its market-based rate tariff with an effective date of December 16, 2011 or, alternatively, to the extent the Commission does not grant an effective date of December 16, 2011, accept Niagara's tariff with an effective date of one day after filing, i.e., October 4, 2012. To the extent that the Commission denies Niagara's request for waiver of prior notice, Niagara requests that the Commission conclude that a refund requirement is not warranted under these circumstances.

II. Notice of Filing

8. Notice of Niagara's October 3, 2012 filing was published in the *Federal Register*, 77 Fed. Reg. 62,506 (2012), with interventions and comments due on or before October 24, 2012. None was filed.

9. Notice of Niagara's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*, 77 Fed. Reg. 62,510 (2012), with interventions or protests due on or before October 25, 2012. None was filed.

III. Discussion

10. As discussed below, we will conditionally accept and suspend, for a nominal period, Niagara's market-based rate tariff, to be effective December 3, 2012, subject to refund and subject to the outcome of a pending proceeding in Docket No. ER10-2460-

⁷ Under section 292.601(c) of the Commission's regulations, sales of energy or capacity made by qualifying facilities 20 MWs or smaller are exempt from section 205 of the FPA. 18 C.F.R. § 292.601(c) (2012).

001.⁸ We deny Niagara's request for waiver of the Commission's prior notice requirement, and grant Niagara's request for certain other waivers.

A. Market-Based Rate Authorization

11. 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.⁹

1. Horizontal Market Power

12. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹⁰ 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.¹¹

13. Niagara states that Canandaigua Power Partners, LLC (Canandaigua Power), affiliates of Niagara, submitted a notice of change in status on July 16, 2012 in Docket No. ER10-2460-001, which included indicative screens for the NYISO market using the December 2010 to November 2011 study period. Niagara states that its 20 MW of capacity was included in those screens, and there have been no subsequent changes to the generation capacity data used to perform the indicative screens. Accordingly, Niagara relies on Canandaigua Power's market power analysis in Docket No. ER10-2460-001 to demonstrate that Niagara passes both the pivotal supplier and the wholesale market share screens for the NYISO market. Niagara's market share screen indicates that its market share in the NYISO market ranges from 11.5 to 12.9 percent. Niagara's pivotal supplier screen analysis indicates that the net uncommitted supply in the NYISO market exceeds Niagara's uncommitted capacity.

14. Our preliminary analysis indicates that Niagara's request for market-based rate authorization has not been shown to be just and reasonable and may be unjust,

⁸ Niagara is reminded that it must submit required filings on a timely basis, or face possible sanctions by the Commission.

⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

¹⁰ *Id.* P 62.

¹¹ *Id.* PP 33, 62-63.

unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the proposed market-based rate tariff for filing, suspend it for a nominal period, and make it effective December 3, 2012, subject to refund and subject to the outcome of the Canandaigua Power pending proceeding in Docket No. ER10-2460-001. The screen analysis on which Niagara relies to support its argument that it does not possess horizontal market power is pending before the Commission in Docket No. ER10-2460-001. The Commission will determine whether Niagara passes the indicative screens in the NYISO market upon completion of its review of Docket No. ER10-2460-001. In this regard, we will direct Niagara to make a compliance filing in this docket (ER13-17-000) updating the record in this proceeding to reflect the results of the Commission's determination(s) with respect to the horizontal market power analysis in Docket No. ER10-2460-001 after an order has been issued in that proceeding, within 30 days from the date of that order.

2. Vertical Market Power

15. 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 or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.¹²

16. Niagara represents that it does not own or operate electric transmission facilities other than the limited equipment necessary to deliver its power to National Grid's 115 kV transmission facilities adjacent to the generation site. Additionally, Niagara represents that certain of its affiliates that own generation projects also own limited and discrete interconnection facilities used solely to deliver their output to the transmission grid. Niagara states that its affiliates that own interests in limited interconnection facilities that are used by multiple affiliates have been granted OATT waivers.¹³ Niagara also states that three subsidiaries of Emera, namely Bangor Hydro Electric Company, Maine Electric Power Company, and Maine Public Service Company, own and operate transmission systems and facilities that provide open access transmission services under Commission-approved OATTs.¹⁴

¹² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

¹³ Niagara's October 3, 2012 Filing at 8 (*citing Evergreen Wind Power V, LLC*, 130 FERC ¶ 61,186 (2010); *Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149 (2009)).

¹⁴ Niagara's October 3, 2012 Filing at 8-9 & n.21. Niagara states that the transmission of Bangor Hydro Electric Company and Maine Electric Power Company is

(continued...)

17. 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

18. Regarding other barriers to entry, Niagara represents that neither it nor any of its affiliates own or control coal supplies or coal transportation facilities in the United States. Niagara also represents that through Emera, Niagara is affiliated with: (1) EnergyNorth Natural Gas, Inc., which owns approximately 2,140 miles of gas distribution pipeline, 2.8 miles of transmission pressure mains and eight city gates in New Hampshire; and (2) Liberty Energy (Midstates) Corp., which owns approximately 243 miles of intrastate transportation facilities and certain distribution facilities located in Illinois, Iowa and Missouri. Niagara states that it or its affiliates also own or control sites for new generation capacity development in certain markets. Niagara states that to the extent affiliates of Niagara own or control sites for new generation capacity development that trigger the requirement to file a land acquisition report, such affiliates have submitted or will submit the required land acquisition reports.¹⁹

under the control of ISO-NE, and is subject to the ISO-NE OATT. Niagara further states that Maine Public Service Company provides transmission service pursuant to the Maine Public Service Company OATT. *Id.* at Appendix D.

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.

¹⁹ Niagara's October 3, 2012 Filing at 10 n.24.

19. Finally, Niagara affirmatively states that it has not erected barriers to entry into the relevant geographic market and will not erect barriers to entry into the relevant market.²⁰

20. Based on Niagara's representations, we find that Niagara satisfies the Commission's requirements for market-based rate authority regarding vertical market power.

B. Other Waivers, Approvals, and Authorizations

21. Niagara 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 FPA²¹ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

22. The Commission will grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.²² Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects Niagara to keep its accounting records in accordance with generally accepted accounting principles.

C. Waiver of the Prior Notice Requirement and Refunds

23. Niagara contends that it was compliant with regulatory requirements when it commenced the Commerce PPA, that there have been no changes in service under the Commerce PPA, and that Niagara made diligent efforts to identify regulatory requirements. Niagara believes that these facts represent extraordinary circumstances

²⁰ We interpret this statement to apply to Niagara and its affiliates. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

²¹ 16 U.S.C. § 824c (2006).

²² 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) and PP 999-1000 (regarding blanket approval under Part 34).

sufficient to justify waiver of the prior notice requirement. Niagara states that there has been no interruption in service to Commerce Energy, Inc. or change in rates, terms and conditions as a consequence of Erie installing and operating the Steel Winds II Facility at the same site as Niagara's Steel Winds I Facility. Niagara states that it timely sought the advice of outside counsel experienced in regulatory requirements to identify the regulatory implications arising from the addition of the Steel Winds II Facility at the same site as Niagara's Steel Winds I Facility. Niagara states that outside counsel advised only that Niagara needed to submit a self-recertification of its QF status to report the increase in capacity at the site to 35 MW, which it submitted on January 23, 2012. Niagara states that, although outside counsel did not advise Niagara that it would lose its eligibility for FPA exemptions, Niagara subsequently identified the loss of its FPA section 205 exemption as part of a fleet-wide compliance review undertaken by First Wind's newly appointed General Counsel. Niagara states that it then self-reported this matter to the Commission's Office of Enforcement. Niagara also contends that, to the extent that refunds are intended to penalize the failure to take steps to ensure compliance and to incent awareness and prudent actions, Niagara believes that refunds are inappropriate here. Accordingly, given these factors, Niagara requests that the Commission not impose a refund obligation even if it denies waiver of prior notice.

24. Section 205 of the FPA explicitly requires that, absent waiver, proposed rates be filed with the Commission at least 60 days in advance of their proposed effective date.²³ 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."²⁴ Thus, a public utility must timely file its rates -- that is, absent waiver, file at least 60 days in advance of the proposed effective date -- 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."²⁵ In *Central Maine Power Co.*,²⁶ *Central Hudson Gas*

²³ See *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 9-11 (2003).

²⁴ *Id.* P 14.

²⁵ *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).

and Electric Co.,²⁷ and *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*,²⁸ the Commission explained that it would grant waiver of the prior notice requirement for proposals to charge market-based rates only in extraordinary circumstances.

25. Based on the information presented by Niagara, Niagara 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.²⁹ The Commission denies Niagara's request for waiver of the prior notice requirement and will not allow its market-based rate tariff to become effective on December 16, 2011, as requested, and instead conditionally accepts and suspends, for a nominal period, Niagara's market-based rate tariff for filing to be effective on December 3, 2012, 61 days after filing,³⁰ subject to refund and subject to the outcome of the Canandaigua Power Partners, LLC pending proceeding in Docket No. ER10-2460-001.

26. 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 18 C.F.R. § 35.19a of the Commission's regulations,³¹ for the entire period that the rate was collected without Commission

²⁶ *Central Maine Power Co.*, 56 FERC ¶ 61,200, *order on reh'g*, 57 FERC ¶ 61,083 (1991).

²⁷ *Central Hudson Gas and Electric Co.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

²⁸ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,984, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

²⁹ *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).

³⁰ In light of our denial of Niagara's request for waiver of prior notice, we deny Niagara's alternative request for waiver of the prior notice requirement with a different effective date of October 4, 2012, one day after the date of filing. As stated above, we find that Niagara has failed to justify its request for waiver of the prior notice requirement.

³¹ 18 C.F.R. § 35.19a (2012).

authorization.³² In addition to returning the time value of the 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 also has stated that:

The utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate. . . . The late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized filing of cost-based rates, until the date of Commission authorization.³³

27. For a QF like Niagara, the difference between the market-based rate and the cost-justified rate would be the difference between the market-based rate and its avoided cost rate (or, if it has no such avoided cost rate, a reasonable proxy for such rate).³⁴ Niagara should identify its avoided-cost rate in its refund report ordered below (or, if it has no such avoided cost rate, a reasonable proxy for such rate). Whether or not an individual customer actually suffered any harm, we add, is irrelevant to our inquiry here. The injury being remedied by refunds for late filing is not merely redress for that customer but particularly “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.”³⁵ Therefore, the Commission denies Niagara’s request that a refund requirement not be imposed under these circumstances.

28. Niagara is directed to make refunds, with interest, within 30 days of the date of this order. Additionally, Niagara is directed to submit a refund report within 15 days thereafter, regarding the basis for and calculations of the refunds paid.³⁶

³² *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,980.

³³ *Id.*

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

³⁵ *El Paso Electric Co.*, 105 FERC ¶ 61,131 at P 21 (footnote omitted) (citing *Carolina Power Co.*, 87 FERC ¶ 61,083, at 61,356 (1999)).

³⁶ When submitting its report, Niagara should use Type of Filing Code 1190 – Refund Report.

D. Reporting Requirements

29. 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.³⁷ Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.³⁸

30. Additionally, Niagara 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.³⁹

³⁷ *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>.

³⁸ 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.

³⁹ *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).

31. In Order No. 697, the Commission created two categories of sellers.⁴⁰ 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. 888⁴¹); 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.⁴² Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.⁴³

32. Niagara represents that it and its affiliates own or control generation in excess of 500 MW in the Northeast region and that the Emera Transmission Companies⁴⁴ own or control transmission facilities in the same region, therefore Niagara is a Category 2 Seller in the Northeast region. Niagara requests classification as a Category 1 Seller in each of the Southwest, Central, Southwest Power Pool, Northwest, and Southeast regions because: (i) Niagara does not own or control any generation facilities located in any of these regions; (ii) Niagara does not own, operate or control any transmission facilities in these regions and, except as otherwise described in its filing, Niagara is not affiliated with anyone that owns, operates or controls transmission facilities in the same region as its generation assets; (iii) Niagara is not affiliated with a franchised public utility in any

⁴⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

⁴¹ *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).

⁴² 18 C.F.R. § 35.36(a) (2012).

⁴³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

⁴⁴ The Emera Transmission Companies are Bangor Hydro Electric Company, Maine Public Service Company and Maine Electric Power Company.

region for which it is seeking Category 1 status, except for the Northwest region; however, as noted, Niagara does not own or control generation assets in the Northwest region; and (iv) there are no vertical market power concerns.

33. Based on Niagara's representations, we designate Niagara as a Category 1 seller in the Northwest, Central, Southeast, Southwest, and Southwest Power Pool regions. Further, based on Niagara's representations, we designate Niagara as a Category 2 seller in the Northeast region; thus, Niagara must file updated market power analyses for the Northeast region in compliance with the regional reporting schedule adopted in Order No. 697. The Commission also reserves the right to require an updated market power analysis at any time for any region.⁴⁵

The Commission orders:

(A) Niagara's market-based rate tariff is hereby conditionally accepted for filing, and suspended for a nominal period, to become effective December 3, 2012, subject to refund and subject to the outcome of the proceeding in ER10-2460-001, as discussed in the body of this order.

(B) Niagara is hereby directed to submit a compliance filing, within 30 days from the date that an order has been issued in Docket No. ER10-2460-001, as discussed in the body of this order.

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

(D) Niagara 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 the period that market-based rates were collected without Commission authorization, i.e., from December 16, 2011 until December 3, 2012. Niagara is hereby directed to submit a refund report within 15 days thereafter, regarding the basis for and calculations of the refunds paid.

(E) 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.

⁴⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 853.

(F) 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.

(G) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted. Niagara 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 Niagara, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(H) 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 Niagara's issuance of securities or assumptions of liability.

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

(J) Niagara is hereby directed to file updated market power analyses according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.