

141 FERC ¶ 61,194
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.

MP2 Energy NE LLC

Docket No.

ER12-2381-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION

(Issued December 7, 2012)

1. In this order, the Commission grants MP2 Energy NE LLC's (MP2 NE) request for authority to make wholesale sales of electric energy, capacity and ancillary services at market-based rates, effective December 7, 2012. Also, as discussed below, we find that MP2 NE meets the criteria for a Category 1 seller in the Northeast, Northwest, Southeast, Southwest, Southwest Power Pool, and Central regions, and is so designated.¹ We also grant MP2 NE's request for other waivers commonly granted to market-based rate sellers.

I. Background

2. On August 1, 2012, as amended on October 10, 2012, pursuant to section 205 of the Federal Power Act (FPA),² MP2 NE filed an initial application for market-based rate

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. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 2012 U.S. LEXIS 4820 (U.S. June 25, 2012).

² 16 U.S.C. § 824d (2006).

authority with an accompanying tariff providing for the sale of energy, capacity, and ancillary services at market-based rates.³ MP2 NE states that it is a Texas limited liability company with its principal place of business located in The Woodlands, Texas. MP2 NE requests waivers commonly granted to other market-based rate applicants.

3. MP2 NE represents that it is a wholly-owned subsidiary of MP2 Energy LLC (MP2 Energy).⁴ MP2 NE states that the membership interests of MP2 Energy are owned by both individual investors and entities, with all but two members holding a less than 10 percent interest. MP2 NE further states that Whale Capital, L.P. (Whale Capital) is one of the members that own a greater than 10 percent membership interest in MP2 Energy. MP2 NE states that the principal of Whale Capital, Michael P. Whalen (Mr. Whalen), owns a greater than 10 percent interest in Vista Energy Marketing, LP (Vista Marketing) and Bounce Energy, Inc.⁵

4. MP2 NE notes that the Commission previously expressed concerns regarding the potential for involvement of Mr. Whalen in the affairs of jurisdictional public utilities.⁶

³ MP2 NE requests authorization to sell ancillary services in the markets administered by California Independent System Operator Corporation, ISO New England, Inc., Midwest Independent Transmission System Operator, Inc., New York Independent System Operator, Inc., and PJM Interconnection, LLC. MP2 NE also requests authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁴ MP2 NE states that its parent company MP2 Energy also owns MP2 Energy Texas LLC, Mpower2 LLC, EPP LLC and MP2 Energy GenCo LLC, none of which owns or controls electric generating capacity or assets subject to Commission jurisdiction. In its response to the data request, MP2 NE identifies MP2 Energy NJ LLC and MP2 Energy IL LLC as two new affiliates formed by MP2 since the time of the original filing in August 2012.

⁵ Vista Marketing previously sought and obtained market-based rate authority from the Commission in 2009, but withdrew its market-based rate tariff in July 2010. Bounce Energy PA, LLC and Bounce Energy NY, LLC (collectively, the Bounce Energy Companies), both wholly-owned subsidiaries of Bounce Energy, Inc., received authorization to make sales of energy, capacity and ancillary services at market-based rates. *Bounce Energy PA, LLC*, 140 FERC ¶ 61,014 (2012).

⁶ Mr. Whalen previously pled guilty to charges involving the delivery of false, misleading or inaccurate reports of market information to natural gas price indices. In its market-based rate application, Vista Marketing made certain representations and

(continued...)

MP2 NE states that it is willing to make and keep similar commitments precluding such involvement as were made by Vista Marketing and the Bounce Energy Companies in relation to the Commission orders granting market-based rate authority to Vista Marketing,⁷ Bounce Energy PA, LLC and Bounce Energy NY, LLC.⁸ Specifically, MP2 NE represents and commits that:

- a. Mr. Whalen is not an officer, manager, voting member or employee of MP2 Energy or MP2 NE and has no role in MP2 NE or MP2 Energy other than indirectly through his investment in Whale Capital and its nonvoting investor membership interest in MP2 Energy;

commitments regarding its management and operations and how it intended to ensure compliance with the Commission's rules and regulations. In the order granting Vista Marketing market-based rate authority, the Commission accepted these commitments as appropriate safeguards against Vista Marketing's employees engaging in market manipulation. In addition, the Commission informed Vista Marketing that it was subject to audit to ensure its compliance with the representations and commitments, and with Commission rules, regulations and policies. The Commission also directed Vista Marketing to report to the Commission if the terms of any of the representations and commitments changed. *See Vista Energy Marketing, L.P.*, 128 FERC ¶ 61,188 (2009) (Vista Marketing Order).

⁷ On May 24, 2012, the Commission approved a Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement), Vista Marketing and Mr. Whalen. *See Vista Energy Marketing, L.P.*, 139 FERC ¶ 61,154 (2012). The Agreement resolved Enforcement's investigation into whether Vista Marketing accurately described Mr. Whalen's role in Vista Marketing in its application for market-based rate authority and whether Vista Marketing and Mr. Whalen violated the terms of the Vista Marketing Order. Under the terms of the Agreement, Vista Marketing agreed to pay a civil penalty of \$350,000 and both Vista Marketing and Mr. Whalen agreed to certain restrictions on their participation in Commission-jurisdictional activities for two years. Among other things, Mr. Whalen agreed not to be an officer, director or voting member in any entity that sells electric energy at wholesale in interstate commerce and agreed to limit business and commercial contacts with any entity selling electric energy at wholesale in interstate commerce for a two-year period beginning on May 24, 2012.

⁸ *See* MP2 NE's August 1, 2012 Application, Attachment C at PP 8-9.

- b. The MP2 Energy Board of Managers has sole management authority over MP2 Energy and MP2 NE. Mr. Whalen is not a member of MP2 Energy's Board of Managers, nor is he an officer of MP2 Energy or any of its subsidiaries;
 - c. Mr. Whalen has no right to participate in the management of MP2 Energy's business and affairs, nor any power or authority to act for or on behalf of MP2 Energy in any respect whatsoever, which, in turn, eliminates his ability to exert any control over the management or day-to-day operations of MP2 NE;
 - d. Mr. Whalen has no day-to-day operational responsibilities and has no other managerial or operational responsibilities in MP2 Energy, and therefore no such responsibilities in MP2 NE;
 - e. Mr. Whalen will have no power to sign for, or to bind, MP2 Energy or MP2 NE; and
 - f. Mr. Whalen is not now, nor will he be in the future, an officer of MP2 Energy, MP2 NE or any other MP2 subsidiary.
5. On September 11, 2012, the Director, Division of Electric Power Regulation – West, sent MP2 NE a data request seeking additional information regarding commitments and affiliations between MP2 NE and the MP2 Energy owners.⁹ Among other things, the data request also asked the recipients to explain “what assurances and safeguards, if any, are in place to ensure that these officers will not act as conduits of information between the aforementioned individual investor [Mr. Whalen] and the managers of the day-to-day activities of MP2 NE.”
6. On October 10, 2012, MP2 NE filed its response to the data request (October 10 Response). In the October 10 Response MP2 NE states:
- a. Its Board of Managers have adopted and implemented an Internal Policy and Compliance directive to inform the members and employees of the restrictions and controls that are in place to ensure they do not act as conduits of information between the individual investor and the managers of the day-to-day activities of MP2 NE;
 - b. Other than Mr. Whalen, none of the members or upstream owners of MP2 Energy or any of its subsidiaries hold, or have held, positions with Vista

⁹ MP2 Energy NE LLC, Docket No. ER12-2381-000 (September 11, 2012).

Marketing, Bounce Energy PA, LLC or Bounce Energy NY, LLC;

c. All MP2 NE employees with wholesale electric market responsibility will undergo comprehensive Commission compliance training prior to participation in Commission jurisdictional markets;

d. The Compliance Officer is tasked with bringing any concerns regarding MP2 NE's trading and activities within the Commission's jurisdictional markets to the attention of the Office of Enforcement at the Commission in the event he observes any activities or practices that cause concern or in any way may be in violation of the Commission's rules and regulations; and

e. The Compliance Officer will not trade natural gas or electricity or direct others to trade natural gas or electricity for MP2 NE.

7. In the October 10 response, MP2 NE also identifies the other owners with membership interests in MP2 Energy and describes the business activities of all direct and upstream owners, stating whether they are involved in the energy industry.

II. Notice of Filing

8. Notice of the MP2 NE's market-based rate application was published in the *Federal Register*,¹⁰ with interventions or protests due on or before August 23, 2012. None was filed.

9. Notice of the MP2 NE's request for blanket authorization under Part 34 was separately published in the *Federal Register*,¹¹ with interventions and protests due on or before August 24, 2012. None was filed.

10. Notice of the October 10 Response was published in the *Federal Register*,¹² with interventions or protests due on or before October 31, 2012. None was filed.

¹⁰ 77 Fed. Reg. 47,831 (2012).

¹¹ 77 Fed. Reg. 47,624 (2012).

¹² 77 Fed. Reg. 63,808 (2012).

III. Discussion

11. As discussed below, we will grant MP2 NE's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and we will accept the MP2 NE market-based rate tariff, effective December 7, 2012. We will also grant MP2 NE's request for certain waivers.

A. Market-Based Rate Authorization

12. 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.¹³

1. Horizontal Market Power

13. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹⁴

14. MP2 NE represents that neither it nor any of its affiliates owns, operates, or controls any electric generation facilities and consequently that it has no uncommitted capacity attributed to it.¹⁵ Based on MP2 NE's representations, we find that MP2 NE satisfies the Commission's requirements for market-based rate authorization regarding horizontal market power.

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.¹⁶

¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

¹⁴ *Id.* P 62.

¹⁵ MP2 NE represents that because neither it nor any of its affiliates own or control generation resources and none have long-term power purchase agreements in place that shift control over third-party supply sources, the Commission's indicative screens for generation market power are not required for MP2 NE.

¹⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

16. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁷ 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).¹⁸ 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.¹⁹ 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.²⁰

17. MP2 NE represents that neither it nor any of the MP2 NE affiliates own, operate, or control any transmission assets.

18. With regard to other barriers to entry, MP2 NE represents that neither it nor any of its affiliates own or control intrastate natural gas transportation, storage or distribution facilities; any unique sites for generation capacity development; physical coal supply sources and ownership or control over who may access transportation of coal supplies; or other essential resources or inputs that could be used to restrict market entry by competing power suppliers.

19. MP2 NE also affirmatively states that it has not erected barriers to entry into the relevant market and MP2 NE will not erect barriers to entry into the relevant market.²¹

20. Based on MP2 NE's representations, the Commission finds that MP2 NE satisfies the Commission's requirements for market-based rate authorization regarding vertical market power.

¹⁷ *Id.* P 440.

¹⁸ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

²⁰ *Id.* P 446.

²¹ We interpret this statement to apply to MP2 NE and its affiliates. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

B. Additional Commitments

21. As noted above, in its market-based rate application and the October 10 Response, MP2 NE made certain additional representations and commitments regarding its management and operations and how MP2 Energy and MP2 NE intend to ensure compliance with the Commission's rules and regulations. In addition to the representations and commitments contained in its market-based rate application and the October 10 Response, we will require that MP2 NE continue at all times to have an experienced Compliance Officer to monitor compliance with the Commission's rules and regulations. If the individual serving as Compliance Officer leaves MP2 NE or otherwise ceases to perform his duties as Compliance Officer, MP2 NE will be required to notify the Commission within 30 days of his departure and to inform the Commission as to the name and relevant background of the new Compliance Officer. We will accept these representations and commitments, as modified herein, as additional safeguards against MP2 Energy and MP2 NE employees engaging in violations of Commission rules, regulations, and orders. As such, for so long as Mr. Whalen is directly or indirectly associated with MP2 NE, we will monitor MP2 NE's compliance with these representations, commitments and requirements on a regular basis.

22. As noted earlier, Mr. Whalen is also required to comply with the terms of the Stipulations and Consent Agreement with the Office of Enforcement.²² We direct MP2 NE to report to the Commission if the terms of any of the representations and commitments as accepted herein undergo a change, including any change in Whale Capital's voting status in MP2 Energy or any concerns observed by the Compliance Officer as discussed above. Such report should be submitted no later than 30 days of the date of such change.

C. Waivers, Approvals, and Authorizations

23. MP2 NE 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 requiring the filing of cost-of-service information, except as to 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 accounting and periodic reporting requirements except sections 141.14 and 141.15; and (3) blanket authorization under section 204 of the FPA²³ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

²² See *Vista Energy Marketing, L.P.*, 139 FERC ¶ 61,154.

²³ 16 U.S.C. § 824c (2006).

24. The Commission will grant the requested waivers and authorizations consistent with those granted to some other entities with market-based rate authorizations.²⁴ Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects MP2 NE to keep its accounting records in accordance with generally accepted accounting principles.

25. We direct MP2 NE to submit a compliance filing containing revisions to the limitations and exemptions section of its market-based rate tariff to include a citation to this order.²⁵

D. Reporting Requirements

26. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rate authorization must file electronically with the Commission an Electric Quarterly Report (EQR) 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.²⁶

²⁴ We note that the Commission has examined and approved the continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141), as well as 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 999-1000 (regarding blanket approval under Part 34).

²⁵ *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at App. C, *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 384. *See also* *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275, at P 8 (2007). These tariff revisions may be filed no later than the next time MP2 NE makes a market-based rate filing with the Commission.

²⁶ *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

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Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.²⁷

27. Additionally, MP2 NE 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.²⁸

28. In Order No. 697, the Commission created two categories of sellers.²⁹ 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. 888³⁰); 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

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

²⁷ 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.

²⁸ *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(a) (2012).

²⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

³⁰ *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).

issues.³¹ Sellers that do not fall into Category 1 are designated as Category 2 and are required to file updated market power analyses.³²

29. MP2 NE represents that it meets the criteria for Category 1 seller status in all regions. MP2 NE states that it does not own, operate or control any generation capacity in any region. MP2 NE further states that it does not own, operate or control transmission facilities in any region. Further, MP2 NE states it is not affiliated with a franchised public utility in any region and MP2 NE does not raise any other vertical market power concerns. Based on MP2 NE's representations, we designate MP2 NE as a Category 1 seller in the Northeast, Northwest, Southeast, Southwest, Southwest Power Pool, and Central regions. However, the Commission also reserves the right to require an updated market power analysis at any time for these regions.³³

The Commission orders:

(A) MP2 NE's market-based rate tariff is accepted for filing, effective December 7, 2012, as discussed in the body of this order.

(B) MP2 NE is hereby directed to revise the limitations and exemptions section of its market-based rate tariff to include a citation to this order, as discussed in the body of this order.

(C) Waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15 and 35.16, are hereby granted.

(D) Waiver of Parts 41, 101, and 141 of the Commission's regulations, with the exception of sections 141.14 and 141.15 is hereby granted.

(E) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted. MP2 NE is hereby granted authority to issue securities and assume obligations or liabilities as guarantors, indorsers, sureties, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate

³¹ 18 C.F.R. § 35.36(a)(2) (2012).

³² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

³³ *Id.* P 853.

purposes of MP2 NE, 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 MP2 NE's issuances of securities or assumptions of liabilities.

(G) MP2 NE's representations and commitments regarding its management and operations, as modified herein, are hereby accepted and MP2 NE is hereby directed to report any change to the terms of these representations and commitments within 30 days of such a change, as discussed in the body of this order.

(H) MP2 NE is subject to audit to determine whether it is in compliance with the representations, conditions and requirements upon which the authorizations are granted and with Commission rules, regulations and policies. In the event of a violation, the Commission may take action within the scope of its oversight and enforcement authority.

(I) MP2 NE is required to file EQRs in compliance with Order No. 2001. If the effective date of the MP2 NE market-based rate tariff falls within a quarter of the year that has already expired, the MP2 NE EQRs for the expired quarter(s) are due within 30 days of the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.