

144 FERC ¶ 61,161  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Electron Hydro, LLC

Docket No. ER13-1646-001

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND REQUEST  
FOR WAIVERS

(Issued August 29, 2013)

1. In this order, the Commission grants Electron Hydro, LLC (Electron Hydro) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective August 7, 2013. Also, as discussed below, we grant Electron Hydro full waiver of Part 141 of the Commission's regulations and other waivers commonly granted to market-based rate sellers.

2. Additionally, we find that Electron Hydro meets the criteria for a Category 1 seller in the Northeast, Southeast, Central, Southwest Power Pool, Southwest, and Northwest regions and is so designated.<sup>1</sup>

**I. Background**

3. On June 7, 2013, as amended on July 2, 2013, pursuant to section 205 of the Federal Power Act (FPA),<sup>2</sup> Electron Hydro filed an application for market-based rate

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<sup>1</sup> See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at PP 848-850, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

<sup>2</sup> 16 U.S.C. § 824d (2006).

authority with an accompanying tariff providing for the sale of electric energy, capacity, and ancillary services at market-based rates.<sup>3</sup> Electron Hydro states that it was formed to acquire, own, and operate the 25.8 megawatt (MW) Electron Hydroelectric Facility and associated interconnection equipment located in Pierce County, Washington (Facility).<sup>4</sup>

4. Electron Hydro explains that it is a joint venture that is 25 percent owned by Electron Management, LLC and 75 percent owned by Electron Holdings, Inc. Electron Management, LLC is 90 percent owned by Thom Fischer and the remaining 10 percent is owned by Steve Marmon.

5. Electron Hydro represents that Electron Holdings, Inc. is a wholly owned subsidiary of JAVA Hydro Electric, Inc., which in turn is a wholly owned subsidiary of JAVA Holdings Ltd. JAVA Holdings Ltd. is wholly owned by 1428802 Alberta Ltd., which, in turn, is wholly owned by Victor Budzinski.

6. Electron Hydro represents that it is affiliated with Black Creek Hydro, Inc. (Black Creek), the owner and operator of the 3.8 MW Black Creek Hydroelectric Project.<sup>5</sup> Black Creek is wholly owned by Valtec Power, LLC. Valtec Power, LLC is 25 percent owned by Tollhouse Energy Company (Tollhouse) and 75 percent owned by JAVA Holdings Ltd. Tollhouse is wholly owned by Thom Fischer and currently is in the process of developing three hydroelectric projects in the states of Washington and Montana.<sup>6</sup>

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<sup>3</sup> Electron Hydro requests authorization to sell ancillary services in the market administered by the California Independent System Operator Corp. (CAISO), as well as authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

<sup>4</sup> Electron Hydro states that it and Puget Sound Energy, Inc. (Puget Sound) concurrently are filing an application with the Commission seeking authorization for disposition and consolidation of jurisdictional facilities and acquisition of an existing generation facility, pursuant to section 203 of the FPA, 16 U.S.C. § 824b (2006).

<sup>5</sup> The Black Creek Hydroelectric Project is a small power production qualifying facility (QP) in King County, Washington, which is interconnected to the transmission system owned by Puget Sound.

<sup>6</sup> Tollhouse has obtained preliminary permits from the Commission for two hydroelectric facilities: (1) White River Hydro, LLC (FERC Project No. 13804); and (2) Black Canyon Hydro, LLC (FERC Project No. 14110). It has also obtained a FERC

(continued...)

7. Electron Hydro represents that it does not own or control any wholesale power generation facilities in North America other than the proposed purchase of the Facility and that, except for Black Creek, none of its affiliates owns or controls generation currently operating in the United States. Further, Electron Hydro represents that neither it nor any of its affiliates owns or controls interests in transmission or distribution facilities in the United States, except for the limited equipment necessary to interconnect its generating facility to the transmission grid.

8. Additionally, Electron Hydro states it is concurrently filing with the Commission a self-certification as a small power production QF. It acknowledges that since the Facility has a capacity greater than 20 MW and is not exempt from section 205 of the FPA, Electron Hydro must file this market-based rate application in addition to the self-certification.<sup>7</sup> Electron Hydro represents that the entire electrical output of the Facility is fully committed to be sold to Puget Sound pursuant to a long-term power purchase agreement between Electron Hydro and Puget Sound.

## **II. Notice of Filing**

9. Notice of Electron Hydro's June 7, 2013 filing was published in the *Federal Register*, 78 Fed. Reg. 36,767 (2013), with interventions and comments due on or before June 28, 2013. None was filed. Notice of Electron Hydro's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*, 78 Fed. Reg. 36,768 (2013), with interventions or protests due on or before July 3, 2013. None was filed.

10. Notice of Electron Hydro's July 2, 2013 filing was published in the *Federal Register*, 78 Fed. Reg. 41,792 (2013), with interventions and comments due on or before July 23, 2013. None was filed.

## **III. Discussion**

11. As discussed below, we will grant Electron Hydro's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based

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original license for the Gibson Dam Hydroelectric Company, LLC (FERC Project No. 12478).

<sup>7</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 525 ("If a QF's sales are not exempt from section 205 [of the FPA], but the QF would like to make sales at market-based rates, the QF is required to request market-based rate authority.").

rates, and we will accept its market-based rate tariff, effective August 7, 2013. We will also grant Electron Hydro'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.<sup>8</sup>

**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.<sup>9</sup> 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.<sup>10</sup>

14. Electron Hydro states that it does not own or control any wholesale power generation facilities in North America other than the proposed purchase of the Facility. The only other generation facility owned by any affiliate of Electron Hydro is the Black Creek Hydroelectric Project. Electron Hydro states that both facilities are located in the Puget Sound balancing authority area. Electron Hydro represents that the entire capacity of both the Facility (25.8 MW) and the Black Creek Hydroelectric Project (3.8 MW) is fully committed under long-term power purchase agreements for run-of-river power delivery to Puget Sound.<sup>11</sup>

15. Electron Hydro represents that it and its affiliates do not have uncommitted capacity in the Puget Sound balancing authority area and do not own or control any other generation in the United States. Accordingly, we find that Electron Hydro's application satisfies the Commission's requirements for market-based rate authority regarding horizontal market power in the Puget Sound balancing authority area.

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<sup>8</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

<sup>9</sup> *Id.* P 62.

<sup>10</sup> *Id.* PP 33, 62-63.

<sup>11</sup> *See* Electron Hydro June 7, 2013 Initial Application at 8.

## 2. Vertical Market Power

16. 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.<sup>12</sup>

17. Electron Hydro represents that neither it nor any of its affiliates owns or controls interests in transmission or distribution in the United States, except for the limited equipment necessary to interconnect a generating facility to the transmission grid.

18. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>13</sup> 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).<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

19. Regarding other barriers to entry, Electron Hydro represents that neither it nor any of its affiliates owns or controls any intrastate natural gas transportation, storage or distribution facilities; any sites for the construction of generation capacity, sources of coal supplies, and the transportation of coal supplies; or other essential resources or

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

<sup>13</sup> *Id.* P 440.

<sup>14</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

<sup>15</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>16</sup> *Id.* P 446.

inputs that could be used to restrict market entry by competing power supplies in North America.<sup>17</sup>

20. Finally, Electron Hydro states that it has not erected barriers to entry in the relevant market and will not erect barriers to entry into the relevant market.<sup>18</sup>

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

### **B. Other Waivers, Approvals, and Authorizations**

22. Electron Hydro 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; and (3) blanket authorization under section 204 of the FPA<sup>19</sup> and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

23. While the Commission grants waiver of most of Part 141 to market-based rate sellers, it typically does not grant market-based rate sellers waiver of sections 141.14 and 141.15 of the Commission's regulations, which address certain reporting requirements applicable to hydropower licensees.<sup>20</sup> Electron Hydro, while a hydropower seller, is not a hydropower licensee and, therefore, sections 141.14 and 141.15 do not apply to Electron Hydro.<sup>21</sup> Therefore, we will grant Electron Hydro full waiver of Part 141 based on the fact that Electron Hydro's sole facility is exempt from the Commission's

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<sup>17</sup> Electron Hydro June 7, 2013 Initial Application at 10.

<sup>18</sup> We interpret this statement to apply to Electron Hydro and its affiliates, and our authorizations herein are predicated on Electron Hydro complying with this commitment. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>19</sup> 16 U.S.C. § 824c (2006).

<sup>20</sup> *See* 18 C.F.R. §§ 141.14, 141.15 (2013).

<sup>21</sup> *See Puget Sound Power & Light Co. v. Federal Power Commission*, 557 F.2d 1311, 1316 (9th Cir. 1977) (finding that because the Federal Power Commission's 1935 authorizing statute was not retroactive, the Facility, built in 1904, was exempt from the Commission's licensing jurisdiction).

hydropower licensing jurisdiction. If in the future Electron Hydro acquires additional facilities or the jurisdictional status of the Facility changes, it must file a notice of change in status in accordance with 18 C.F.R. § 35.42 and address how such change may impact the waiver granted herein.

24. Accordingly, the Commission will grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations, and will also grant Electron Hydro waiver of sections 141.14 and 141.15 of the Commission's regulations.<sup>22</sup> Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects Electron Hydro to keep its accounting records in accordance with generally accepted accounting principles.

25. We will direct Electron Hydro to submit a compliance filing containing revisions to its asset appendix and the limitations and exemptions section of its market-based rate tariff to include appropriate citations.<sup>23</sup>

### **C. Reporting Requirements**

26. 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.<sup>24</sup>

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<sup>22</sup> 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).

<sup>23</sup> *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendices B and C; 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 the next time Electron Hydro makes a market-based rate filing with the Commission.

<sup>24</sup> *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

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Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.<sup>25</sup>

27. Additionally, Electron Hydro 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.<sup>26</sup>

28. In Order No. 697, the Commission created two categories of sellers.<sup>27</sup> Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888<sup>28</sup>); that are not affiliated with anyone that

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(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>.

<sup>25</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2013). 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.

<sup>26</sup> *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 (2013).

<sup>27</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

<sup>28</sup> *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*

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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.<sup>29</sup> Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.<sup>30</sup>

29. Electron Hydro represents that it is a Category 1 seller in the Northeast, Southeast, Central, Southwest Power Pool, Southwest, and Northwest regions because it and its affiliates own or control less than 500 MW of generation in all regions.<sup>31</sup> It further represents that in each region other than the Northwest, neither it nor its affiliates owns or controls any generation or transmission. Also, Electron Hydro states that it does not own, operate or control transmission facilities other than the limited equipment necessary to connect individual generating facilities to the transmission grid and is not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as the seller's generation assets. Electron Hydro states that it is not affiliated with a public utility in the same region as the seller's generation assets and does not raise other vertical market power issues.

30. Based on Electron Hydro's representations, we designate Electron Hydro as a Category 1 seller in the Northeast, Southeast, Central, Southwest Power Pool, Southwest, and Northwest regions. The Commission reserves the right to require an updated market power analysis at any time.<sup>32</sup>

The Commission orders:

(A) Electron Hydro's market-based rate tariff is hereby accepted for filing, effective August 7, 2013, as discussed in the body of this order.

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*v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>29</sup> 18 C.F.R. § 35.36(a) (2013).

<sup>30</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

<sup>31</sup> Electron Hydro states that it owns generation totaling only 25.8 MW in the Northwest region and its affiliate, Black Creek Hydro, Inc., owns an additional 3.8 MW in the same region. *See* Electron Hydro June 7, 2013 Initial Application at 12.

<sup>32</sup> *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 853.

(B) Electron Hydro is hereby directed to revise its asset appendix and the limitations and exemptions section of its tariff to include appropriate citations, as discussed in the body of this order.

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

(D) Waiver of Parts 41, 101, and 141 of the Commission's regulations 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. Electron Hydro 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 Electron Hydro, 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 Electron Hydro's issuance of securities or assumptions of liability.

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