

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

March 3, 2005

In Reply Refer To:
Mendota Hills LLC
Docket No. ER05-463-000

Orrick, Herrington & Sutcliffe LLP
Attn: Mr. Michael D. Hornstein, Esq.
Counsel for Mendota Hills LLC
3050 K Street, N.W.
Washington, D.C. 20007

Dear Mr. Hornstein:

1. On January 19, 2005, Mendota Hills LLC (Mendota) filed an application for market-based rate authority, with an accompanying tariff and service agreement.¹ The proposed market-based rate tariff provides for the sale of capacity and energy at market-based rates and the reassignment of transmission capacity. It also includes the Commission's market behavior rules.² Mendota's submittal, as discussed below, satisfies the Commission's standards for market-based rate authority and is accepted for filing, effective the date of this order.³
2. Mendota is a Minnesota limited liability company with its principal place of business in Compton, Illinois. Mendota is wholly owned by Gamesa Energia SA, a Spanish renewable energy developer, who is wholly owned by Gamesa Tecnologica Corporacion, S.A (Gamesa). Mendota states that its sole business is the ownership and operation of the Mendota Hills wind generation facility (the Facility), and all energy

¹ This service agreement is provided under Commonwealth Edison Company's (ComEd) tariff entitled Rate Rider 4.

² *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

³ FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-3.

produced by the Facility is sold to Commonwealth Edison Company (ComEd). Mendota states that the Facility has a nameplate capacity of approximately 50 megawatts (MW), the largest electric generating project operated by Gamesa or any of its affiliates in the United States.⁴

3. Mendota states that although Mendota is not required to demonstrate its lack of generation dominance because the Facility was constructed after July 9, 1996, Mendota has prepared both the pivotal supplier and the wholesale market share screens for the ComEd market and easily passes the market share screens in the relevant market.

4. Mendota requests waiver of the Commission's prior notice requirement. Mendota notes that the Facility was initially certified as a Qualifying Facility (QF) December 2001 and recertified September 2003. Mendota states that it was unaware that as a small power producer larger than 30 MW, its QF status did not afford it an exemption from section 205 of the Federal Power Act (FPA) and did not eliminate the need to have a tariff on file with the Commission.⁵ Mendota states that its failure to submit its rates prior to the commencement of sales to ComEd was a good faith error caused by its lack of experience with the U.S. energy markets and the regulatory requirements applicable to entities engaged in the generation and sale of electric energy. Although Mendota has provided sales to ComEd since November 2003, Mendota requests that the sales to ComEd become effective sixty days after the date of this filing.

5. Mendota recognizes that it is obligated to refund to ComEd the time value of the revenues collected prior to the effective date of this filing. However, Mendota requests that the Commission not require it to refund the difference between the amounts collected from ComEd and the amount that would have been collected had a cost-justified rate been in effect. Under the service agreement, as required under the Illinois laws, QFs providing energy to a utility are paid rates based on the avoidance of capacity and energy costs by the utility. Mendota notes that the Commission has held that, for small power production facilities between 30 and 80 MW, avoided cost rates established by states in accordance with the Commission's regulations will generally be accepted as "just and

⁴ Mendota states that all other U.S. generators are 5 MW or less. *See Application* at p 4.

⁵ Section 210(e) of PURPA prohibits the Commission from exempting qualifying small power production facilities between 30 and 80 MW (other than geothermal facilities and certain eligible facilities under section 3(17)(E) of the FPA) from the provisions of the FPA. As a result, such facilities are not eligible for the exemption from the provisions of the FPA afforded small power QFs under the Commission's PURPA regulations. *See* 18 C.F.R. § 292.601(b) (2004).

reasonable” rates under section 205 of the FPA.⁶ Mendota requests that the Commission apply this policy of deferring to state determinations with respect to avoided costs and declare Mendota’s rates fair and reasonable. Moreover, Mendota requests that because the service agreement reflects ComEd’s avoided energy costs, it would be reasonable to treat the service agreement as the variable cost minimum that the Commission permits sellers to recover.⁷ Mendota state that with respect to the requirement to charge a cost-based rate for the remaining term of its agreement, that requirement is inapplicable because Mendota does not have a long-term agreement with ComEd. Mendota notes that rather it sells all of its output under ComEd’s Rate Rider 4.

Procedural Matters

6. Notice of Mendota’s filing was published in the *Federal Register*, 70 Fed. Reg. 5,434 (2005), with protests and interventions due on or before February 9, 2005. On February 7, 2005, Exelon Corporation, ComEd’s parent, filed a motion to intervene raising no substantive issues.

Discussion

Market-Based Rate Authorization

7. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁸ As discussed below, the Commission concludes that Mendota satisfies the Commission’s standards for market-based rate authority.

⁶ See *American Ref-Fuel Company Of Hempstead*, 47 FERC ¶ 61,161 (1989); *Signal Shasta Energy Company*, 41 FERC ¶ 61,120 (1987); *Resources Recovery (Dade County), Inc.*, 18 FERC ¶ 61,243 (1982).

⁷ See *Carolina Power & Light Company*, 87 FERC ¶ 61,083, at 61,357 (1999) (announcing the Commission’s policy that limits application to the refund to an amount that permits a utility to recover at least its variable costs).

⁸ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

8. In its order issued in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power. Mendota cites section 35.27(a) of the Commission's regulations, which provides that applicants shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity constructed after July 9, 1996.⁹ If an applicant sites generation in an area where it or its affiliates own or control other generation assets, the applicant must study whether its new capacity, when added to existing capacity, raises generation market power concerns.¹⁰ Mendota states that construction of the Facility commenced in November 2003.

9. Further, Mendota has prepared both the pivotal supplier and the wholesale market share screens for the ComEd market. The Commission has reviewed Mendota's generation market power screens for the ComEd market, which indicate that Mendota passes both the pivotal supplier and wholesale market share screens in that market. Accordingly, the Commission finds that Mendota satisfies the Commission's generation market power standard for the grant of market-based rate authority.

10. Mendota states that Mendota does not own or control transmission facilities. Based on this representation, the Commission finds that Mendota satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

11. Mendota states that it or any of its affiliates own or control raw materials, fuels, emissions allowances, or other inputs needed to build or operate electric production, distribution or transmission facilities in the relevant market. However, Mendota notes that it has affiliates engaged in the manufacturer of wind turbines and such affiliates sell in a competitive sales market, and to date such sales have been a small percentage of total sales throughout the U.S., and thus will not result in a barrier to entry. Mendota states there is no reason to believe that Mendota or any of its affiliates could block or deter the entry of competing sellers into the relevant generation market. Based on this representation, the Commission is satisfied that Mendota cannot erect barriers to entry. However, should Mendota or its affiliates deny, delay, or require unreasonable terms,

⁹ 18 C.F.R. § 35.27(a) (2004). We note that the Commission intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify section 35.27 of its regulations.

¹⁰ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 69, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

conditions or rates for natural gas service to a potential electric competitor in bulk power markets, then that electric competitor may file a complaint with the Commission that could result in the suspension of Mendota's authority to sell power at market-based rates.¹¹

12. Mendota states that it does not have a franchised service territory. In addition, Mendota's proposed tariff states that no sale may be made under the tariff to any public utility with a franchised electric service territory that is controlled by, or under common control with Mendota. Based on these representations, the Commission finds that Mendota satisfies the Commission's concerns with regard to affiliate abuse.

Other Waivers, Authorizations and Reporting Requirements

13. Mendota requests the following waivers and authorizations: (1) waiver 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 Parts 41, 101 and 141 of the Commission's accounting and periodic reporting requirements; (3) abbreviated filings with respect to interlocking directorates under Part 45 of the Commission's regulations; and (4) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

14. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.¹² Notwithstanding the waiver of the accounting and reporting requirements here, we expect Mendota to keep its accounting records in accordance with generally accepted accounting principles.

15. Within 30 days of the date of the issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Mendota should file a motion to intervene or protest with the

¹¹ *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

¹² It should be noted that the Commission is examining the issue of 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 obligations and liabilities (18 C.F.R. Part 34). See *Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities*, Order No. 627, 67 Fed. Reg. 67,691 at P 23 and P 24 (October 10, 2002), FERC Stats. & Regs. ¶ 32,558 (2002).

Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.211 and 385.214.

16. Absent a request to be heard within the period set forth above, Mendota 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 Mendota, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

17. Until further order of this Commission, the full requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving Mendota. Any such person instead shall file a sworn application providing the following information:

- (1) full name and business address; and
- (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

18. 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 Mendota's issuances and securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

19. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in very 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 greater) market-based power sales during the most recent calendar quarter.¹³ Electric

¹³ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted 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>.

Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁴ Accordingly, Mendota must file its first Electric Quarterly Report no later than 30 days after the first quarter Mendota's rate schedule is in effect.¹⁵

20. Mendota 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. Any change in status must be filed no later than 30 days after the change in status occurs. A change in status includes, but is not limited to each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.¹⁶

21. The Change in Status Final Rule requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, Mendota is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in the Change in Status Final Rule.

22. In addition, Mendota is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

23. Mendota requests waiver of the Commission's prior notice requirement. Mendota notes that it entered into a service agreement (ComEd's Rate Rider 4) for the sale of capacity and energy November 2003. However, Mendota states that Commission authorization was not requested prior to this filing because it, as a subsidiary of Gamesa, a Spanish manufacturer of wind turbines and generators, was unaware that as a small

¹⁴ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

¹⁵ Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, 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.

¹⁶ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 (2005) (Change in Status Final Rule).

power producer larger than 30 MW, its QF status did not afford it an exemption from section 205 of the FPA and did not eliminate the need to have a tariff on file with the Commission. Mendota states that its failure to submit its rates prior to the commencement of sales to ComEd was a good faith error caused by its lack of experience with the U.S. energy markets and the regulatory requirements applicable to entities engaged in the generation and sale of electric energy.

24. In *Central Maine Power Co.*¹⁷ and *Prior Notice*,¹⁸ the Commission explained that it would grant waiver of prior notice for proposals to charge market-based rates only in extreme or extraordinary circumstances.

25. Based on the information presented by Mendota, the Commission finds that Mendota has not demonstrated the presence of extraordinary circumstances that would warrant a waiver of the Commission's prior notice requirement. Accordingly, the Commission denies Mendota's request for waiver of the 60-day prior notice requirement with regard to the service agreement and the market-based rate tariff. The Commission accepts the proposed tariff for filing to be effective March 21, 2005, 60 days from the date of the filing.

26. If a utility files a market-based rates less than 60 days prior to the proposed effective date of new service, and waiver is denied, the Commission requires the utility to refund to its customers the time value of the revenues collected for the entire period that the rate was collected without Commission authorization. In addition, the utility is required to refund the difference, if any, between the market-based rate and what the customer would have otherwise been required to pay.¹⁹ Here, the just and reasonable rate that Mendota, as a 30 to 60 MW small power producer, would otherwise be permitted to collect would be the avoided-cost rates established by the state in accordance with the Commission's regulations.²⁰ Mendota has been selling energy to ComEd at ComEd's avoided energy costs pursuant to ComEd's Rider 4 on file with the Illinois Commerce Commission. Thus, in addition to refunding to its customers the time value of the

¹⁷ 56 FERC ¶ 61,200, *order on reh'g*, 57 FERC ¶ 61,083 (1991).

¹⁸ 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081.

¹⁹ *Prior Notice*, 64 FERC at 61,980.

²⁰ See *American Ref-Fuel Company of Hempstead*, 47 FERC ¶ 61,161 (1989); *Signal Shasta Energy Compahny*, 41 FERC ¶ 61,120 (1987); *Resources Recover (Dade County), Inc.*, 18 FERC ¶ 61,243 (1982).

revenues collected for the entire period that the rate was collected without Commission authorization, Mendota must refund the difference, if any, between its market-based rate and the Rider 4 rate. Mendota shall make the refunds required by this order within 30 days of this order and shall file a refund report with the Commission within 30 days thereafter.

By direction of the Commission.

Magalie R. Salas,
Secretary.