

111 FERC ¶ 61,040
FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

April 14, 2005

In Reply Refer To:
American Ref-Fuel Company of Niagara, L.P.
Docket No. ER01-1302-004

LeBoeuf, Lamb, Greene & MacRae, L.L.P.
Attn: Nicholas A. Giannasca, Esq.
Counsel for American Ref-Fuel Company of Niagara, L.P.
125 West 55th Street
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Dear Mr. Giannasca:

1. On December 29, 2004, American Ref-Fuel Company of Niagara (ARC-Niagara) filed an updated market power analysis pursuant to the requirements of the Commission's order granting ARC-Niagara market-based rate authority.¹ ARC-Niagara has previously submitted a revised schedule incorporating the Commission's market behavior rules.² As discussed below, the Commission concludes that ARC-Niagara satisfies the Commission's standards for market-based rate authority.

¹ The Commission granted ARC-Niagara market-based rate authority in *American Ref-Fuel Company of Niagara, L.P.*, Docket No. ER01-1302-000 (April 12, 2001) (unpublished letter order). The Commission accepted the filing with the condition that the tariff be modified to conform with the designations required by Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000). ARC-Niagara's rate schedule designations were accepted in *American Ref-Fuel Company of Niagara, L.P.*, Docket No. ER01-1302-001 (May 24, 2001) (unpublished letter order). We note that ARC-Niagara is late in filing its triennial updated market power analysis. ARC-Niagara's next updated market power analysis is due within three years of the date of this order and we expect that filing to be made in a timely fashion.

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). *See Acadia Power Partners, LLC*, Docket No. ER03-1372-001, *et al.* (March 29, 2004) (unpublished letter order).

2. ARC-Niagara owns a 100 percent leasehold interest in the Niagara Falls Resource Recovery Facility, a 50 MW waste-to-energy qualifying facility located in Niagara Falls, New York, in the New York Independent System Operator (NYISO) control area. ARC-Niagara states that Credit Suisse First Boston owns a 60 percent interest in ARC-Niagara and one or more affiliates of AIG Inc. own the remaining 40 percent.

3. ARC-Niagara is also affiliated with the following entities that own or control interests in generating facilities: American Ref-Fuel Company of Hempstead, Brooklyn Navy Yard Cogeneration Partners, L.P. in the NYISO market; American Ref-Fuel Company of Essex and American Ref-Fuel Company of Delaware Valley, L.P. in the Pennsylvania-New Jersey-Maryland (PJM) market; American Ref Fuel Company of SEMASS, American Ref-Fuel Company of Southeastern Connecticut, Collins Hydroelectric Limited Partnership, Sebec Electric Limited Partnership, Mystic Development, LLC, Mystic I, LLC, Fore River Development, LLC in the ISO New England (ISO-NE) market; Green Mountain Energy Company in the PJM and ISO-NE markets; NRG Energy Inc in the PJM, NYISO and ISO-NE markets; and MACH Gen in the NYISO, ISO-NE, Michigan Electric Coordinated System and Arizona Public Service control areas. The uncommitted capacity of these affiliates has been reflected in the generation market power analyses submitted by ARC-Niagara.

4. On December 29, 2004, ARC-Niagara submitted for filing an updated market power analysis pursuant to the Commission order granting ARC-Niagara market-based rate authority.³

Notice and Responsive Pleadings

5. Notice of ARC-Niagara's December 29, 2004 Filing was published in the *Federal Register*, 70 Fed. Reg. 1884 (2005), with protests and interventions due on or before January 19, 2005. None were filed.

³ *American Ref-Fuel Company of Niagara, L.P.*, Docket No. ER01-1302-000 (April 12, 2001) (unpublished letter order). The Commission accepted the filing with the condition that the filing be modified to conform with the designations required by Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000). ARC-Niagara's rate schedule designations were accepted in *American Ref-Fuel Company of Niagara, L.P.*, Docket No. ER01-1302-001 (May 24, 2001) (unpublished letter order).

Discussion

Market-Based Rate Authorization

6. 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.⁴ As discussed below, the Commission concludes that ARC-Niagara satisfies the Commission's standards for market-based rate authority.

7. In its order issued in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. ARC-Niagara has prepared both the pivotal supplier and the wholesale market share screen analyses for the NYISO, ISO-NE and PJM markets.⁵ Based on the analysis provided, ARC-Niagara states that it passes both the pivotal supplier screen and the wholesale market share screen for the NYISO, ISO-NE and PJM markets.

8. The Commission has reviewed ARC-Niagara's generation market power screens analyses for the three markets listed above and determined that ARC-Niagara passes both the pivotal supplier and wholesale market share screens in those markets. Based on ARC-Niagara's representations, the Commission finds that ARC-Niagara satisfies the Commission's generation market power standard for the grant of market-based rate authority.

9. ARC-Niagara states that neither it nor its affiliates own any facilities for the purpose of transmitting electricity other than those necessary to interconnect their generating assets with the grid. Based on ARC-Niagara's representations, the Commission finds that ARC-Niagara satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

⁴ 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).

⁵ The ARC Niagara facility is located in the NYISO region. ARC-Niagara has affiliates in ISO-NE and PJM.

10. ARC-Niagara states that neither ARC-Niagara nor any of its affiliates controls key inputs into the domestic power supply industry, such as interstate or intrastate natural gas transportation or distribution facilities, generation plant sites, or the manufacture of electric equipment such that ARC-Niagara or its affiliates could erect barriers to entry for competing power suppliers. However, ARC-Niagara notes that under the terms of a pending transaction, an affiliate will acquire an indirect 2.8 percent interest in TECO-Panda Generating Company. The affidavit submitted with the filing notes that TECO-Panda Generating Company holds, in addition to generation assets, a 41-mile interstate natural gas pipeline. The affidavit states that this acquisition raises no market power concerns because the affiliate lacks control over the management of this gas pipeline. Based on the representations made in ARC-Niagara's filings, the Commission is satisfied that ARC-Niagara cannot erect barriers to entry. However, should ARC-Niagara or any of its affiliates deny, delay or require unreasonable terms, 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 ARC-Niagara's authority to sell power at market-based rates.⁶

11. ARC-Niagara states that its initial application for market-based rate authority indicated that as a result of its affiliation at that time with Duke Energy and Nantahala Power and Light Company (Nantahala), ARC-Niagara committed not to sell or buy power from either entity without prior approval from the Commission under section 205 of the Federal Power Act. ARC-Niagara states that it is no longer affiliated with Duke Energy, Nantahala or any electric utility with captive customers and is therefore unable to engage in the types of affiliate activities that are of concern to the Commission. Based on ARC-Niagara's representations, the Commission finds that the ARC-Niagara satisfies the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

12. 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 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

⁶ See, e.g., *Louisville Gas & Electric Company*, 62 FERC ¶ 61,016 (1993).

greater) market-based power sales during the most recent calendar quarter.⁷ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.⁸

13. ARC-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.⁹ Order No. 652 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, ARC-Niagara is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariffs to incorporate the following provision:

[market-based rate seller name] 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. 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. Any change in status must be filed no later than 30 days after the change in status occurs.

⁷ *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>.

⁸ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). 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.

⁹ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175 (2005) (Order No. 652).

14. ARC-Niagara 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.

By direction of the Commission.

Magalie R. Salas,
Secretary.