

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

April 14, 2005

In Reply Refer To:
Merrill Lynch Capital Services, Inc.,
Docket No. ER99-830-009

McDermott Will & Emery LLP
Attn: Catherine M. Krupa, Esq.
Attorney for Merrill Lynch Capital Services, Inc.,
600 13th Street, N.W.
Washington, D.C. 20005-3096

Dear Ms. Krupa:

1. On January 21, 2005, Merrill Lynch Capital Services, Inc., (Merrill Lynch) filed an updated market power analysis pursuant to the requirements of the Commission's order granting Merrill Lynch authority to sell capacity and energy at market-based rates.¹ Merrill Lynch already has on file the Commission's market behavior rules.² As discussed below, the Commission concludes that Merrill Lynch satisfies the Commission's standards for market-based rate authority.
2. Merrill Lynch Capital Services is a Delaware corporation with its principal place of business in New York City, New York. Merrill Lynch Capital Services is a wholly owned subsidiary of Merrill Lynch & Co., Inc. Merrill Lynch Capital Services does not own, operate or control any electric power transmission or distribution facilities nor is it affiliated with any entity which owns, operates or controls such facilities in the United States.

¹ Merrill Lynch Capital Services, Inc., Docket No. ER99-830-000 (January 20, 1999) (unpublished letter order).

² *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003). Merrill Lynch's tariff incorporating the Commission's market behavior rules was previously accepted by the Commission. See *Merrill Lynch*, Docket No. ER99-830-008 (March 29, 2004) (unpublished letter order).

Procedural Matters

3. Notice of Merrill Lynch's filing was published in the *Federal Register*, 70 Fed. Reg. 5991 (2005), with motions to intervene and protests due on or before February 11, 2005. None was filed.

Discussion

Market-Based Rate Authorization

4. 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.³ As discussed below, the Commission concludes that Merrill Lynch satisfies the Commission's standards for market-based rate authority.

5. 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. According to the submittal, neither Merrill Lynch nor any of its energy affiliates own or control any generation facilities in the United States. Merrill Lynch states its non-energy affiliates (financial institutions) may act as passive lenders to, or have only indirect passive participant or member interests in, generation facilities. Merrill Lynch further states that these financial institutions do not control the rate schedules or jurisdictional activities associated with any generation facilities. Based on this representation the Commission finds that Merrill Lynch satisfies the Commission's generation market power standard for market-based rate authority.

6. Merrill Lynch states that neither Merrill Lynch nor any of its affiliates own or control any transmission facilities in the United States. Based on this representation, the Commission finds that Merrill Lynch satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

7. Merrill Lynch explains that neither it nor any of its affiliates own, operate, or control resources that could be used to restrict the market entry of competing suppliers, marketers, or brokers. Further, Merrill Lynch states that neither it nor its affiliates own or

³ 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., et al.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

control any sites for the construction of new generation capacity, construction or engineering firms, or natural gas pipelines. Based on this representation, the Commission is satisfied that Merrill Lynch cannot erect barriers to entry.

8. Merrill Lynch states that neither it nor any of its affiliates are affiliated with an electric utility with a franchised service territory. Based on this representation, the Commission finds that Merrill Lynch satisfies the Commission's concerns with regard to affiliate abuse.

9. 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 greater) market-based power sales during the most recent calendar quarter.⁴ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.⁵

10. Merrill Lynch 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.⁶ 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, Merrill Lynch is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the following provision:

⁴ *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/doc-filing/eqr.asp>.

⁵ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10(b) (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.

⁶ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175 (2005).

Merrill Lynch 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.

11. In addition, Merrill Lynch 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.