

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

April 14, 2005

In Reply Refer To:
Pittsfield Generating Company
Docket Nos. ER98-4400-003
ER98-4400-008
ER05-685-000

Vinson & Elkins, L.L.P.
Attn: Stephen Angle, Esq.
1455 Pennsylvania Ave., N.W.
Washington D.C. 20004-1008

Dear Mr. Angle:

1. On February 15, 2005, Pittsfield Generating Company, L.P. (Pittsfield) filed revised tariff sheets to include the sale of ancillary services at market-based rates¹ and, to remove the code of conduct and the prohibition on affiliate sales. In addition, it filed an updated market power analysis pursuant to the requirements of the Commission's order granting Pittsfield authority to sell capacity and energy at market-based rates.² This filing was also made pursuant to the Commission's order issued on May 13, 2004.³ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and July 8, 2004.⁴ Pittsfield already has on file the

¹ Pittsfield plans to sell certain ancillary services in the market administered by ISO New England, Inc. (ISO-NE).

² *Pittsfield Generating Company L.P.*, 85 FERC ¶ 61,147 (1998) and

³ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

⁴ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,108 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

Commission's market-behavior rules.⁵ As discussed below, the Commission concludes that Pittsfield satisfies the Commission's standards for market-based rate authority. Pittsfield's proposed revised tariff is accepted for filing, effective April 16, 2005.⁶

2. Pittsfield states that it leases and operates a project, which consists of a 163 MW natural gas-fired combined-cycle power generation facility located in Pittsfield, Massachusetts. The project consists of three combustion turbine generators, three separately fired heat recovery boilers and an extraction/condensing steam turbine generator. The project began commercial operation on September 1, 1990. As lessee of the project, Pittsfield states that it controls, maintains, and operates the project.

3. Pittsfield is comprised of one general and two limited partners. The current general partner is PE-Pittsfield LLC (PE-Pittsfield). As the sole general partner PE-Pittsfield is the managing general partner of Pittsfield and is responsible for the day-to-day operations, including all activities and facilities subject to the Federal Power Act (FPA). Pittsfield makes sales from the project exclusively at wholesale, subject to the direction of and control of PE-Pittsfield. Pittsfield states that its two limited partners are General Electric Capital Corporation (GECapital) and General Electric Credit Corporation-Tennessee (GECC-T), a wholly-owned subsidiary of GECapital. GECapital owns a one percent limited partnership interest in Pittsfield. GECC-T owns the other 99 percent limited partnership interest in Pittsfield. Pittsfield states that the limited partners of Pittsfield have no management responsibilities, no electric power operational or power marketing personnel, and are solely beneficial investors.

4. Pittsfield states that GECC-T and its immediate parent, GECapital, are indirect wholly-owned subsidiaries of General Electric Company (GE). It states that GE holds passive interests in a number of generating facilities pursuant to lease agreements, whereby a subsidiary of GE or a financing institution holds title to the facility for the benefit of GE, and leases the facility to another entity. In each case, Pittsfield states that the lessee, not GE, has complete control over management, operation and maintenance of the facility, and over any sale, pricing, and dispatch of power. SFG CLA Pittsfield, LLC, an indirect subsidiary of GE, is the beneficial owner under a trust administered by the U.S. Bank National Association. The trust holds legal title to the Pittsfield project.

⁵ *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). Pittsfield market behavior rules were previously accepted by the Commission. *Pittsfield Generating Company*, Docket No. ER98-4400-007 (March 29, 2004) (unpublished letter order).

⁶ First Revised FERC Electric Rate Schedule No.1, Second Revised Sheet No. 1 (Superseding Original FERC Electric Rate Schedule No. 1, First Revised Sheet No. 1).

5. Pittsfield states that GECC-T is engaged in the generation or sale of electric power through Qualifying Facilities (QFs), Exempt Wholesale Generators (EWGs) and Foreign Utility Companies (FUCOs). Further, Pittsfield states that all such generation facilities which are QFs or EWGs are located in the ISO New England, Inc. (ISO-NE) market, and the output of those generation facilities are fully committed under long-term power purchase agreements.

Procedural Matters

6. Notice of Pittsfield's filing on December 14, 2001, was issued, with comments, protests, and interventions due on or before January 4, 2002. Massachusetts Municipal Wholesale Electric Company (Massachusetts Municipal) filed an intervention and protest arguing that the supply margin assessment screen is inadequate. PG&E National Energy Group, Inc. filed an answer arguing that Massachusetts Municipal's protest was an improper collateral attack on the Commission's interim market-based rate policy.⁷

7. Notice of Pittsfield's February 15, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 9,943 (2005), with comments, interventions protests due on or before March 1, 2005. None was filed.

Discussion

Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept PG&E National Energy Group, Inc's answer and will, therefore reject it.

Market-Based Rate Authorization

9. 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 barriers to entry. The Commission also considers whether

⁷ With regard to Massachusetts Municipal's protest, we note that the Commission has now abandoned the supply margin assessment screen, as discussed in the April 14, May 13, and July 8 Orders. As a result we will dismiss its protest asserting that the supply margin assessment screen is inadequate as moot.

there is evidence of affiliate abuse or reciprocal dealing.⁸ As discussed below, the Commission concludes that, with the tariff modifications directed herein, Pittsfield satisfies the Commission's standards for market-based rate authority.

10. 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. Pittsfield has prepared both the pivotal supplier and the wholesale market share screen analysis for the ISO-NE market. The Commission has reviewed Pittsfield's generation market screen analysis for the ISO-NE market and finds that Pittsfield passes the screens in that market. Accordingly, the Commission finds that Pittsfield satisfies the Commission's generation market power standard for the grant of market-based rate authority.

11. Pittsfield states that neither it nor any of its affiliates owns or controls transmission facilities within ISO-NE other than generation interconnection facilities. Based on Pittsfield's representation, the Commission finds that Pittsfield satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

12. Pittsfield states neither it nor any of its affiliates has control over any generation sites in ISO-NE, nor do they have control over fuel distribution facilities or any other necessary inputs into generation. Based on Pittsfield representations, the Commission is satisfied that Pittsfield cannot erect barriers to entry.

13. Pittsfield states that neither it nor any of its affiliates controls a franchised service territory or provides service to captive customers. Based on this representation, the Commission finds that Pittsfield satisfies the Commission's concerns with regard to affiliate abuse. Pittsfield states that it currently has on file a code of conduct governing its relationship with Pacific Gas & Electric Company (PG&E). However, Pittsfield states that it is no longer affiliated with PG&E. As a result it requests waiver of the code of conduct requirement. Pittsfield also proposes to revise its market-based rate tariff to remove the provision prohibiting sales to PG&E. The Commission has granted requests for waiver of the code of conduct requirement where there are no captive customers (and thus no potential for affiliate abuse) or where the Commission is satisfied that the utility's captive wholesale and retail customers are adequately protected against affiliate abuse.⁹

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

⁹ See, e.g., *Green Power Partners I LLC.*, 88 FERC ¶ 61,005 (1999); *Alcoa, Inc.*, 88 FERC ¶ 61,045 (1999).

Accordingly, we will grant Pittsfield's request to remove the code of conduct and the prohibition of affiliate sales language because Pittsfield is no longer affiliated with PG&E.

14. We caution that should Pittsfield become affiliated with an entity with a franchised service territory or obtain captive customers in the future, Pittsfield is directed to notify the Commission and we reserve the right to impose the code of conduct requirement and the affiliate sales prohibition. In any event, the Commission's action here does not constitute a waiver of the separate standards of conduct requirements contained in 18 C.F.R. Part 37 (2004), nor does it constitute a waiver of the FPA requirement that all rates be just and reasonable and not unduly discriminatory or preferential.

15. Pittsfield requests authority to engage in the sale of certain ancillary services (listed in the proposed tariff) at market-based rates into the market administered by ISO-NE. Consistent with Commission precedent granting authority to sellers to engage in such transactions in this market, we will grant Pittsfield's request.¹⁰

Other Waivers, Authorizations and Reporting Requirements

16. Pittsfield requested an effective date of February 1, 2005 for its market-based rate authority for sales of ancillary services. Pittsfield states that it requests such authorization effective February 1, 2005 in order to conform to the commencement date of a tolling arrangement that Pittsfield entered into with a purchaser. However, Pittsfield did not explicitly request a waiver of the 60-day prior notice requirement that would be necessary to grant the February 1, 2005 effective date.

17. Section 205 of the FPA requires that rates be timely filed with the Commission.¹¹ In this regard, the Commission has explained that it cannot "ignore its statutory duty to determine whether rates are just and reasonable by permitting utilities to submit filings whenever convenient," and that it "must have the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences."¹² Thus, a regulated entity must timely file its rates to allow the Commission to fulfill its statutory mandate, namely, determining whether the rates being charged are just and reasonable. The Commission has further stated that it "does not allow market-based rates to go into

¹⁰ See, e.g., *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001).

¹¹ See *El Paso Electric Co.*, 105 FERC ¶ 61,131 at P 9-11 (2003) (*El Paso*).

¹² *Id.* at P 14.

effect before a filing has been tendered with the Commission."¹³ In *Central Maine Power Co.*¹⁴ and *Prior Notice*,¹⁵ the Commission explained that it would grant waiver of prior notice for proposals to charge market-based rates only in extreme or extraordinary circumstances.

18. The Commission finds that Pittsfield has not demonstrated the presence of extraordinary circumstances that would warrant a waiver of the Commission's prior notice requirement.¹⁶ Accordingly, the Commission accepts the revised tariff for filing to be effective April 16, 2005, following 60 days notice from the date of the filing.

19. The Commission has noted that if a utility files a market-based rate less than 60 days prior to the proposed effective date of new service, and waiver is not granted, the Commission will require the utility to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission's regulations¹⁷ for the entire period that the rate was collected without Commission authorization.¹⁸ In addition to returning the time value of the revenues collected for the period the rate was charged without Commission authorization, the Commission has established the remedy for failure to file:

The utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate ... The late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized filing of cost-based rates, until the date of Commission authorization.¹⁹

¹³ *El Segundo Power, LLC*, 84 FERC ¶ 61,011 at 61,060, *order on reh'g*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC ¶ 61,208 (1999), *order on reh'g*, 90 FERC ¶ 61,036 (2000).

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

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

¹⁶ *See Idaho Power Company*, 95 FERC ¶ 61,482 at 62,718 & n.16.

¹⁷ 18 C.F.R. § 35.19a (2004).

¹⁸ *Prior Notice*, 64 FERC at 61,980.

¹⁹ *Id.*; *see* 16 U.S.C. § 825h (2000). *See Southern California Water Co.*, 106 FERC ¶ 61,305 at P 15-16, *reh'g denied*, 108 FERC ¶ 61,168 (2004).

20. Whether or not a party actually suffered any harm is irrelevant to our inquiry here. The injury being remedied by refunds for late filing is not merely redress for the customer but particularly “the Commission’s ability to enforce FPA section 205’s requirement that there be prior notice and that the rates charged be just and reasonable at the time they are being charged.”²⁰

21. Pittsfield is directed to make the necessary refunds, with interest, as discussed above, within 30 days from the date of this letter order and to file a refund report with the Commission within 15 days of the date refunds are made.

22. 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.²¹ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²²

23. Pittsfield 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.²³ Order No. 652 requires that the change in status reporting

²⁰ *El Paso*, 105 FERC ¶ 61,131 at P 21 (footnote omitted) (citing *Carolina Power & Light Co.*, 87 FERC 61,083 at 61,356 (1999) (*Carolina Power*)).

²¹ *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/Electric/eqr/eqr.htm>.

²² 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 a 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.

²³ *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).

requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, Pittsfield 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:

Pittsfield 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.

24. In addition, Pittsfield 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.

Linda Mitry,
Deputy Secretary.