

111 FERC ¶ 61,240
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Carthage Energy, LLC	Docket Nos. ER99-2541-005,
Energetix, Inc.	ER99-2541-006,
New York State Electric & Gas Corporation	ER97-3556-012,
NYSEG Solutions, Inc.	ER97-3556-013,
Rochester Gas and Electric Corporation	ER97-3556-014,
PEI Power II, LLC	ER99-221-007,
South Glens Falls Energy, LLC	ER99-221-009,
Central Maine Power Company	ER99-220-010,
	ER99-220-011,
	ER97-3553-001,
	ER97-3553-002,
	ER97-3553-003,
	ER01-1764-002,
	ER01-1764-003,
	ER00-262-004,
	ER00-262-005, and
	ER05-731-000

ORDER ON UPDATED MARKET POWER ANALYSIS
AND MARKET-BASED RATE APPLICATION

(Issued May 25, 2005)

1. In this order we accept an updated market power analysis filed by Carthage Energy, LLC (Carthage), Energetix, Inc. (Energetix), New York State Electric & Gas Corporation (NYSEG), NYSEG Solutions, Inc. (NYSEG Solutions), Rochester Gas and Electric Corporation (RG&E), PEI Power II, LLC (PEI), and South Glens Falls Energy, LLC (South Glens Falls) (collectively, Energy East companies). We also accept Central Maine Power Company's (Central Maine) proposed market-based rate tariff and accompanying code of conduct, to become effective May 28, 2005. Our review indicates that Central Maine charged market-based rates without prior Commission authorization to enter into market-based rate sales. Therefore, we require Central Maine to make

refunds, with interest. Lastly, we accept Central Maine's, Energetix's, RG&E's, and PEI's tariff sheets incorporating the Commission's market behavior rules¹ and the Energy East companies' and Central Maine's tariff sheets incorporating the change in status reporting requirement, consistent with Order No. 652.² As discussed below, we conclude that, with the tariff modifications directed herein, Energy East companies and Central Maine satisfy the Commission's standards for market-based rate authority.

2. This order benefits customers by reviewing the conditions under which market-based rate authority is granted, thus ensuring that the prices charged for jurisdictional sales are just and reasonable. Energy East companies' and Central Maine's next updated market power analysis is due three years from the date of this order.

Background

3. On July 12, 2004, as amended on July 14, 2004, and March 28, 2005, Energy East companies submitted for filing an updated market power analysis in compliance with the Commission's orders granting Energy East companies market-based rate authorization³ and with the Commission's orders issued on April 14, 2004, and clarified on July 8, 2004.⁴

4. On March 28, 2005, Central Maine submitted an application for market-based rate authority, with an accompanying tariff and code of conduct. The proposed market-based

¹ *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) (requiring incorporation of the market behavior rules, to be effective December 17, 2003).

² *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).

³ *PEI Power II, LLC*, Docket No. ER01-1764-000 (June 7, 2001) (unpublished letter order); *Cleco Trading & Marketing LLC*, 87 FERC ¶ 61,311 (1999); *Energy East South Glens Falls, LLC*, 86 FERC ¶ 61,254 (1999); *NYSEG Solutions, Inc.*, 85 FERC ¶ 61,342 (1998); *Rochester Gas & Electric Corp.*, 80 FERC ¶ 61,284 (1997).

⁴ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

rate tariff provides for the sale of capacity, energy, and ancillary services at market-based rates and the reassignment of transmission capacity.⁵

5. On March 28, 2005, Energetix, RG&E, PEI and Central Maine submitted tariff sheets incorporating the Commission's market behavior rules,⁶ and the Energy East companies and Central Maine have included the change in status reporting requirement in their tariffs, consistent with Order No. 652.

6. Energy East companies and Central Maine are indirect subsidiaries of the Energy East Corporation (Energy East) and RGS Group.⁷ Energy East is a registered public utility holding company under the Public Utility Holding Company Act of 1935 (PUHCA).⁸ RGS Group is an exempt public utility holding company pursuant to section 3(a)(1) of PUHCA.⁹ Carthage, Energetix, NYSEG, NYSEG Solutions, and South Glens Falls own 2,114 MW of uncommitted capacity in New York Independent System Operator, Inc. (NYISO); PEI owns 1,439 MW of uncommitted capacity in Pennsylvania-New Jersey-Maryland Interconnection, LLC (PJM); and Central Maine and Hartford Steam Company¹⁰ own 1,395 MW of uncommitted capacity in ISO-NE.

7. Central Maine requests waiver of the Commission's prior notice requirement to allow an effective date of March 28, 2005, for its market-based rate tariff, which is the date of filing. Central Maine states that, as a member of the ISO-NE, it had believed that individual market-based rate authority was not required for it to make limited sales of energy and capacity into the ISO-NE spot market. We deny Central Maine's request for waiver of the prior notice requirement as discussed below, and accept Central Maine's proposed market-based rate tariff, effective May 28, 2005.

⁵ Central Maine plans to sell certain ancillary services in the market administered by ISO New England, Inc. (ISO-NE).

⁶ The Commission previously accepted the market behavior rules for Carthage, NYSEG, NYSEG Solutions, and South Glens Falls in *Acadia Power Partners, LLC*, Docket No. ER03-1372-001 (Mar. 29, 2004) (unpublished letter order).

⁷ The Commission approved a merger transaction involving Energy East and CMP Group in *Energy East Corp. and CMP Group, Inc.*, 91 FERC ¶ 61,001 (2000).

⁸ 15 U.S.C. § 79a *et seq.* (2000).

⁹ *Id.* § 79c.

¹⁰ See *Hartford Steam Co.*, Docket No. ER04-582-000 (Sept. 10, 2004) (unpublished letter order).

Procedural Matters

8. Notices of Energy East companies' filings were published in the *Federal Register*, 69 Fed. Reg. 44,527 (2004), and 70 Fed. Reg. 19,073 (2005), with interventions or protests due on or before August 2, 2004, and April 18, 2005. None was filed.

9. Notice of Central Maine's filing was published in the *Federal Register*, 70 Fed. Reg. 18,388 (2005), with interventions or protests due on or before April 18, 2005. None was filed.

Discussion

Market-Based Rate Authorization

10. 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.¹¹

11. As discussed below, the Commission concludes that, with the tariff modifications directed herein, Energy East companies and Central Maine satisfy the Commission's standards for market-based rate authority.

Generation Market Power

12. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. Energy East companies and Central Maine submitted both indicative screens for the NYISO, PJM, and ISO-NE markets. Energy East companies and Central Maine indicate that they pass both indicative screens for the NYISO, PJM, and ISO-NE markets.

13. The Commission has reviewed Energy East companies' and Central Maine's generation market power screens for the NYISO, PJM, and ISO-NE markets, and has determined that they pass both the pivotal supplier and wholesale market share screens in those markets. Accordingly, the Commission finds that Energy East companies and

¹¹ 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).

Central Maine satisfy the Commission's generation market power standard for the grant of market-based rate authority.

Transmission Market Power

14. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Energy East companies state that RG&E, NYSEG, and their affiliate Central Maine, own transmission facilities, but have given operational control of their transmission facilities to NYISO and ISO-NE, respectively.¹² Further, no intervenors have raised transmission market power concerns. Based on these representations, the Commission finds that Energy East companies and Central Maine satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

15. Energy East companies state that in granting them market-based rate authority on several occasions, the Commission found that the Energy East companies' applications did not raise any issue with respect to barriers to entry.¹³ Energy East companies state that no relevant facts have changed since the September 26, 2001 order that would warrant a change to this conclusion. In addition, no intervenors have raised barrier to entry concerns. Based on these representations, the Commission is satisfied that neither Energy East companies nor Central Maine can erect barriers to entry. However, as the Energy East companies and Central Maine have noted, should Energy East companies or their affiliates, including Central Maine, 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 the Energy East companies and/or Central Maine's authority to sell power at market-based rates.¹⁴

¹² *Central Hudson Gas & Elec. Corp.*, 86 FERC ¶ 61,352 (1999) (accepting NYISO's OATT) and *ISO New England Inc.*, 101 FERC ¶ 61,305 (2002) (accepting ISO-NE's OATT).

¹³ *See Energy East Corp.*, 96 FERC ¶ 61,322, at 62,229 (2001).

¹⁴ *See Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

Affiliate Abuse

16. Energy East companies state that they have codes of conduct on file with the Commission, and that there has been no change in facts that would raise affiliate abuse issues. Central Maine states that no affiliate abuse or reciprocal dealing concerns exist or will arise in the present context because the Energy East companies operate under a code of conduct, which governs the relationship between Central Maine and its affiliates. Central Maine's proposed market-based rate tariff includes a provision that prohibits the sale or purchase of power between Central Maine and its affiliated public utilities "without first receiving" Commission authorization under section 205 of the Federal Power Act (FPA),¹⁵ consistent with *Aquila*.¹⁶ Although, RG&E's market-based rate tariff states that it will not make affiliate sales, the Commission's review of the remaining Energy East companies' market-based rate tariffs reveals that the tariffs do not state that they will not make sales to an affiliated public utility "without first receiving" Commission authorization. In addition, no intervenors have raised affiliate abuse concerns. Accordingly, consistent with Commission precedent, Energy East companies are directed to make a compliance filing within 30 days of the date of issuance of this order to revise their market-based rate tariffs, with the exception of the Central Maine and RG&E tariffs, to include such language. Based on these representations, and subject to the tariff revisions, we direct herein, we find that Energy East companies and Central Maine satisfy the Commission's concerns with regard to affiliate abuse.

Central Maine's Additional Requests

17. Central Maine requests authority to engage in the sale of 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 that market, the Commission will grant Central Maine's request.¹⁷

18. Central Maine proposes to offer additional ancillary services in the geographic market identified above, as the Commission may specify and authorize from time to time in orders that extend such authority to all sellers authorized to sell energy and capacity at market-based rates. The Commission will grant Central Maine's request in this regard; however, the Commission's grant does not relieve Central Maine of the requirement to

¹⁵ 16 U.S.C. § 824d (2000).

¹⁶ *Aquila, Inc.*, 101 FERC ¶ 61,331, at P 7-9, 12 (2002).

¹⁷ *See, e.g., New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001).

have a current and complete tariff on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2004).¹⁸

19. Central Maine's proposed tariff also includes a provision governing reassignment of transmission capacity. The Commission finds this provision to be consistent with the Commission's requirements.¹⁹ Accordingly, we grant this request.

Waiver of Prior Notice Requirement

20. Central Maine requests waiver of the Commission's prior notice requirement.²⁰ Central Maine states that, because of its membership in ISO-NE, it believed that individual market-based rate authority was not required for it to make limited sales of energy and capacity into the spot market.²¹ Central Maine states that the first sale related to non-utility generation entitlements took place on March 1, 2000, and installed capacity transactions took place in March 2001.

21. Central Maine argues that, with respect to its sales into the ISO-NE market, the amounts of energy and capacity that it sold into the market were *de minimis*, were made mainly for balancing purposes, were caused not by Central Maine but by the actions of others, and the price of those sales were not negotiated by Central Maine but determined by ISO-NE. Central Maine states that, until the Commission's decision in a recent order,²² Central Maine believed that as a New England Power Pool (NEPOOL) participant, Central Maine was entitled to sell into the ISO-NE market under NEPOOL Market Rule 1 (NEPOOL Rate Schedule No. 7). Central Maine supports its contention with the argument that on February 1, 2005, ISO-NE began operation as an RTO and assumed broader authority over the New England transmission system. Central Maine notes that it has never controlled the terms and conditions relating to how capacity was sold and has never negotiated the rate paid to Central Maine for its capacity with third parties. Central Maine states it is a price taker in the market and it does not have a profit-seeking merchant function.

¹⁸ See *Calhoun Power Co.*, 96 FERC ¶ 61,056 (2001).

¹⁹ See, e.g., *Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997).

²⁰ 18 C.F.R. § 35.3 (2004).

²¹ On April 5, 2000, in Docket No. ER00-2123-000, Central Maine filed a notice of termination of its market-based rate tariff and umbrella service agreements, effective March 1, 2000. The Commission accepted that filing on June 5, 2000, by delegated letter order.

²² *Vermont Electric Cooperative, Inc.*, 108 FERC ¶ 61,223 (2004), *order on reh'g*, 110 FERC ¶ 61,232 (2005) (*Vermont Order*).

22. As stated in the *Vermont Order*, NEPOOL Market Rule 1 (NEPOOL Rate Schedule No. 7) does not convey authority for NEPOOL members to sell energy at market-based rates.²³ Rather, Market Rule 1 sets forth the scheduling, other procedures, and general provisions applicable to the operation of the ISO-NE market within the ISO-NE control area. While our regulations do set forth a means by which the Commission can authorize one public utility to file rate schedules or certificates of concurrence on behalf of others when all are parties to the same rate schedule,²⁴ that does not obviate the necessity of demonstrating that a wholesale seller should be authorized to enter into transactions at market-based rates. It is each utility's responsibility to provide support to satisfy the Commission's four-part market-based rate analysis.

23. Section 205 of the FPA explicitly requires that rates be timely filed with the Commission.²⁵ 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."²⁶ Thus, a regulated entity must timely file its rates to allow the Commission to fulfill its statutory mandate, namely, to determine 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 effect before a filing has been tendered with the Commission."²⁷ In *Central Maine Power Co.*²⁸ and *Prior Notice and Filing Requirements under Part II of the Federal Power Act*,²⁹ the Commission explained that it would grant waiver of prior notice for proposals to charge market-based rates only in extreme or extraordinary circumstances. We do not find that Central Maine has presented us with such extreme or extraordinary circumstances.

²³ *Vermont Electric*, 108 FERC ¶ 61,223 at P 19.

²⁴ 18 C.F.R. § 35.1(a) (2004).

²⁵ 16 U.S.C. § 824d (2000); *see also El Paso Electric Co.*, 105 FERC ¶ 61,131, at P 9-11 (2003) (*El Paso*).

²⁶ *El Paso*, 105 FERC ¶ 61,131 at P 14.

²⁷ *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).

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

²⁹ *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*).

24. Further, 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 denied, 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 regulations,³⁰ for the entire period that the rate was collected without Commission authorization.³¹ 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.³²

25. 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."³³ Therefore, the Commission concludes that refunds are due, plus interest.

Other Waivers, Authorizations, and Reporting Requirements

26. Central Maine requests 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. The Commission will grant the requested waiver consistent with those granted to other traditional utilities with market-based rate authorizations.

27. 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

³⁰ 18 C.F.R. § 35.19a (2004).

³¹ *Prior Notice*, 64 FERC at 61,980.

³² *Id.*; see 16 U.S.C. § 825h (2000). See also *Southern California Water Co.*, 106 FERC ¶ 61,305, at P 15-16, *reh'g denied*, 108 FERC ¶ 61,168 (2004).

³³ *El Paso*, 105 FERC ¶ 61,131, at P 21 (footnote omitted) (citing *Carolina Power & Light Co.*, 87 FERC 61,083, at 61,356 (1999)).

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.³⁴ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.³⁵ Accordingly, Central Maine must file its first Electric Quarterly Report no later than 30 days after the first quarter Central Maine's tariff is in effect.³⁶

28. Energy East companies and Central Maine 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. 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. As noted above, the Energy East companies have revised their tariffs and Central Maine has included the change in status reporting requirement.

29. Energy East companies and Central Maine are directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Energy East companies updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

³⁴ *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>.

³⁵ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

³⁶ 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.

(B) Central Maine's proposed market-based rate tariff is accepted for filing, effective May 28, 2005, as discussed in the body of this order.³⁷

(C) Energy East companies' revised tariff sheets incorporating the market behavior rules are hereby accepted for filing, effective December 17, 2003.

(D) Energy East companies' revised tariff sheets incorporating the Order No. 652 language are hereby accepted for filing, effective March 21, 2005.³⁸

(E) Energy East companies and Central Maine are hereby directed to file an updated market analysis within three years of the date of this order and every three years thereafter.

(F) Energy East companies, excluding RG&E, are directed to revise the affiliate sales prohibition language in their market-based rate tariffs within 30 days of the date of issuance of this order, as discussed in the body of this order.

(G) Central Maine is hereby ordered to make refunds regarding sales of energy and capacity into the ISO-NE spot market, with interest, within 30 days of the date of issuance of this order, as discussed in the body of this order, and to file a refund report with the Commission within 15 days of the date refunds are made.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

³⁷ FERC Electric Tariff, Original Volume No. 5, Original Sheet Nos. 1-8.

³⁸ Carthage Energy, LLC, FERC Electric Tariff, Second Revised Volume No. 1, Original Sheet No. 6; Energetix, Inc., Third Revised Rate Schedule FERC No. 1, Original Sheet Nos. 3-5; New York State Electric & Gas Corp., FERC Electric Tariff, Original Volume No. 3, Original Sheet No. 23; NYSEG Solutions, Inc., FERC Electric Tariff, Original Volume No. 2, Original Sheet No. 14; Rochester Gas and Electric Corp., FERC Electric Tariff, Second Revised Volume No. 3, Original Sheet Nos. 34-36; PEI Power II, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 6-8; South Glens Falls Energy, LLC, FERC Electric Tariff, Third Revised Volume No. 1, Original Sheet No. 6.