

123 FERC ¶ 61,172
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Northeast Utilities Service Company

Docket Nos. ER96-496-016
ER99-14-013

Select Energy, Inc.

ER99-3658-003

ORDER CONDITIONALLY ACCEPTING UPDATED MARKET POWER
ANALYSIS AND ORDER NO. 697 COMPLIANCE FILING

(Issued May 16, 2008)

1. In this order, the Commission conditionally accepts the updated market power analysis filed by Northeast Utilities Service Company (NUSCO), on behalf of the Northeast Utilities Companies (NU Companies),¹ and Select Energy, Inc. (Select) (collectively, Applicants). As discussed below, the Commission concludes that, subject to the Commission's acceptance of the compliance filing directed herein, Applicants satisfy the Commission's standards for market-based rate authority. We will direct Applicants to file, within 30 days of the date of this order, and as discussed herein, a revised affirmative statement in accordance with 18 C.F.R. § 35.37(e)(4) as well as revised proposed market-based rate tariffs to bring them into compliance with Order No. 697.²

2. Additionally, the Commission finds that Applicants meet the criteria for a Category 2 seller and are so designated. Applicants will be required to file their next

¹ The NU Companies are: The Connecticut Light and Power Company (Connecticut L&P), Western Massachusetts Electric Company (Western Mass Electric), Holyoke Water Power Company (Holyoke Water Power), Holyoke Power and Electric Company (Holyoke P&E), and Public Service Company of New Hampshire.

² *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 914-918, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008).

updated market power analysis according to the regional schedule adopted in Order No. 697.³

Background

3. On January 14, 2008, Applicants filed an updated market analysis in accordance with the regional reporting schedule adopted in Order No. 697.⁴ Applicants also filed proposed revisions to their market-based rate tariffs in compliance with Order No. 697.⁵

4. Applicants state that they are wholly-owned subsidiaries of Northeast Utilities (NU),⁶ a registered public utility holding company under the Public Utility Holding Company Act of 2005.⁷ According to the Application, several NU Companies, including Connecticut L&P, Western Mass Electric and the Public Service Company of New Hampshire, are state-regulated utilities in Connecticut, Massachusetts and New Hampshire, respectively. Applicants represent that, due to divestitures that occurred pursuant to state electric restructuring initiatives, Connecticut L&P and Western Mass Electric are primarily transmission and distribution companies. Holyoke Water Power,

³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-893, App. D; Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 9, 10, App. D-1.

⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 882. The Commission stated that “both the Commission and market participants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers’ rates remain just and reasonable.” *See also* Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 13.

⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-917.

⁶ NUSCO, on behalf of the NU Companies, was authorized to sell electric energy and capacity at wholesale at market-based rates outside New England in *Northeast Utils. Serv. Co.*, 74 FERC ¶ 61,135 (1996). The Commission granted the NU Companies the additional authority to sell power and ancillary services at market-based rates within the New England Power Pool (NEPOOL) in *Northeast Utils. Serv. Co.*, 87 FERC ¶ 61,063 (1999). Applicants note that NU subsidiaries divested approximately 1,440 MW of generating capacity in 2006, significantly decreasing the market share held by NU-affiliated entities since the Commission last reviewed their potential horizontal market power.

⁷ 42 U.S.C. §§ 1261, *et seq.* (2005).

due to divestitures of its generation assets, no longer provides service to retail customers, and owns very limited transmission facilities. Holyoke P&E is a wholly-owned subsidiary of Holyoke Water Power and also owns very limited transmission facilities.⁸

5. Select is a wholly-owned power marketing subsidiary of NY Enterprises, Inc. (NUEI), which in turn is a wholly-owned subsidiary of NU.⁹ Applicants submit that while Select does not own any generation or transmission assets, it does have contractual authority to operate certain facilities that Connecticut L&P transferred to the Connecticut Resources Recovery Authority (CRRA).¹⁰

6. According to the Applicants' filing, they own or control approximately 1,925 MW within New England,¹¹ and operate to serve wholesale load in the following markets: (1) ISO-New England Inc. (ISO-NE); (2) Southwest Connecticut (SWCT); (3) the Connecticut Import Interface (CT);¹² (4) the Rest of CT; and (5) the Rest of ISO-NE excluding CT.¹³ They have submitted market power analyses for these markets. Applicants also make power sales into the New York Independent System Operator, Inc. (NYISO) and PJM Interconnection, L.L.C. (PJM) markets.

⁸ Application at 4-5.

⁹ Select was initially granted authority to sell power at market-based rates in *Select Energy, Inc.*, 85 FERC ¶ 61,290 (1998). The last updated market power analysis filed on behalf of the NU Companies and Select was accepted for filing in *Northeast Utils. Serv. Co.*, 110 FERC ¶ 61,327 (2005).

¹⁰ Application at 5.

¹¹ See Application, Exhibit No. PQH/RPB-10 Panel A. Of the approximately 1,925 MW that Applicants own or control in New England, approximately 655 MW are controlled through long-term purchase agreements with Qualifying Facilities and other suppliers. See also *id.*, Affidavit of Philip Q. Hanser and Romkaew P. Broehm at 6-9, App. B.1.

¹² Applicants refer to CT as "Entire CT" in their application.

¹³ Although the Applicants' definition of "Rest of CT" is unclear, the Applicants did not need to perform the two indicative screens for this area. Nor did the Applicants need to perform the indicative screens for the "Rest of ISO-NE excluding CT" area. See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 236. As the Applicants acknowledge, the Commission has identified SWCT and CT as the separate submarkets within ISO-NE. See *id.* P 246.

Notice and Responsive Pleadings

7. Notice of the January 14, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 5540 (2008), with interventions or protests due on or before March 14, 2008. Exelon Corporation filed a motion to intervene on January 24, 2008.

Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), Exelon Corporation's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. 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, horizontal and vertical market power.¹⁴ As discussed below, the Commission concludes that the Applicants satisfy the Commission's standards for market-based rate authority.

C. Horizontal Market Power

10. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.¹⁵

11. Applicants have prepared the pivotal supplier and wholesale market share screens for the ISO-NE market and the SWCT and CT submarkets, consistent with the requirements of Order No. 697.¹⁶ The Southwest Connecticut load area is supplied via a 115-kV transmission system that ties to the 345-kV Connecticut transmission grid via autotransformers at the Plumtree, Frost Bridge, Southington and East Shore substations.¹⁷ Southwest Connecticut can be described roughly as the area approximately south of

¹⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

¹⁵ *Id.* P 62.

¹⁶ *Id.* P 235-236.

¹⁷ *Southwest Connecticut Electric Reliability Study*, December 2002, ISO-NE Southwest Connecticut Working Group at 3.

Route I-84 and west of Route I-91 between Meriden and New Haven.¹⁸ There are fifty-two towns in Southwest Connecticut including the Norwalk-Stamford area. The Southwest Connecticut load area consists of two interfaces: Southwest Connecticut and Norwalk-Stamford.¹⁹ The 2006 SWCT Report identifies 2,350 MW as the simultaneous import limitation (SIL) for SWCT in 2007 and 2,500 MW as the SIL for the entire CT submarket.²⁰

12. For the ISO-NE market, Applicants did not submit a SIL study but instead referenced the ISO-NE's 2006 Regional System Plan. We find Applicants' reliance on ISO-NE's 2006 Regional System Plan to be acceptable. As the Commission explained in the April 14 Order, an applicant is required to provide a reasonable approximation of simultaneous import capability that would have been available to suppliers in surrounding first-tier markets during each seasonal peak.²¹ As discussed below, we believe that the ISO-NE's 2006 Regional System Plan satisfies these requirements.

13. In particular, the 2006 Regional System Plan assumed a 90/10 peak-load forecast to simulate higher transmission stress conditions in major load pockets, consistent with ISO-NE planning principles.²² It also accounts for the single largest contingency and considers other probabilistic unavailable resources at the time of peak. In addition, the 2006 Regional System Plan considers ISO-NE interconnections with external balancing authorities of the NYISO, Hydro-Quebec, and the Maritimes and assumes reasonable import flows based on historical use from those balancing authorities.

14. The Commission has reviewed Applicants' pivotal supplier screen and wholesale market share screen and has determined that Applicants pass the pivotal supplier screen and the wholesale market share screen in the ISO-NE market and the SWCT and CT

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 8-9.

²⁰ This value reflects the completion of Phase 1 of the SWCT Reliability Project by June 2007.

²¹ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at P 84 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,206 (2004). *See also Pinnacle West Capital Corp.*, 117 FERC ¶ 61,316 (2006).

²² The 90/10 peak load forecasts take into account the possibility of abnormal weather conditions. In a 50/50 peak load forecast, peak load has a 50 percent chance of being exceeded due to weather conditions, while in a 90/10 peak load forecast, peak load has a 90 percent chance of being exceeded due to weather conditions.

submarkets. Applicants represent that their market shares in the relevant geographic markets range from 4.97 percent to 17.55 percent. Specifically, the market shares for SWCT range from 13.64 to 17.55; the market shares for CT range from 13.58 to 15.88; and the market shares for ISO-NE range from 4.98 to 7.07.

15. Applicants also have prepared the pivotal supplier and wholesale market share screens for the NYISO market using conservative simplifying assumptions.²³ The Commission has reviewed Applicants' pivotal supplier screen and wholesale market share screen and has determined that Applicants pass the pivotal supplier screens and the wholesale market share screens in the NYISO market. Applicants' market share is less than one percent in each of the four seasons. Applicants did not study the PJM market because they have no uncommitted capacity in this market.

16. Accordingly, the Commission finds that Applicants satisfy the Commission's requirements for market-based rates regarding horizontal market power.

D. Vertical Market Power

17. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file before granting a seller market-based rate authorization.²⁴

18. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.²⁵ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and equipment for the transportation of coal supplies, such as barges and rail cars (collectively, inputs to electric

²³ According to Applicants, even if it was assumed that all of Applicants' uncommitted capacity in ISO-NE would be available in the NYISO market, Applicants' combined market share in the NYISO market is less than five percent assuming no other imports. Application, Attachment 1, n.19.

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

²⁵ *Id.* P 440.

power production).²⁶ The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.²⁷

19. Applicants state that all NU-owned transmission facilities in ISO-NE have been turned over to the operational control of ISO-NE, which has an OATT on file with the Commission.²⁸

20. Further, Applicants state that their affiliate, Yankee Gas Services Company (Yankee Gas), is a local gas distribution company that serves retail gas customers and provides open access intrastate natural gas transportation, storage, and peaking services to marketers in Connecticut. Applicants represent that Yankee Gas is fully regulated by the Connecticut Department of Public Utility Control (DPUC).²⁹ Applicants further state that Connecticut L&P and Yankee Gas own certain property sites in Connecticut that could be used by Connecticut L&P for the development of utility-constructed generation. Applicants explain that Connecticut L&P would have to be selected over competing utilities or non-utility proposals under the DPUC's solicitation guidelines before any of these sites could be developed. Applicants add that the Public Service Company of New

²⁶ *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include “physical coal supply sources and ownership of or control over who may access transportation of coal supplies.” Order No. 697-A, FERC Stats. & Regs. ¶ 61,268 at P 176.

²⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

²⁸ *New England Power Pool*, 83 FERC ¶ 61,045 (1998); *ISO New England Inc.*, 106 FERC ¶ 61,280, *order on reh'g and compliance*, 109 FERC ¶ 61,147 (2004), *order on reh'g and compliance*, 110 FERC ¶ 61,111, *order on reh'g and compliance*, 110 FERC ¶ 61,335, *order on reh'g and compliance*, 110 FERC ¶ 61,344 (2005).

²⁹ Applicants state that Yankee Gas is a Connecticut natural gas distribution company that provides retail natural gas service to approximately 200,000 residential, commercial, and industrial customers in Connecticut. Connecticut has adopted retail choice for natural gas. Moreover, Yankee Gas provides limited intrastate transportation for National Grid affiliate Narragansett Electric Company for delivery at the Rhode Island border under a DPUC-approved special contract. Yankee Gas also performs transportation for retail gas marketers in Connecticut under the DPUC-approved Rate Schedule TRS (Transportation Receipt Service) and an Operating Agreement. Yankee Gas also owns a liquefied natural gas (LNG) storage facility in Waterbury, CT that holds 1.2 billion cubic feet of LNG.

Hampshire has sites where existing generation is located that could be expanded only if the New Hampshire legislature amended existing electricity competition law to remove the current restrictions on such expansion.

21. The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.³⁰

22. Applicants note that the Commission requires applicants to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market. Applicants make the following statement regarding barriers to entry:

Despite Yankee Gas' ownership of intrastate natural gas distribution, transportation, and storage facilities in Connecticut, neither Applicants nor Yankee Gas have erected barriers to entry in the relevant geographic markets. . . . Moreover, Applicants and Yankee Gas represent that they will not erect barriers to entry into the relevant geographic markets because of their ownership of intrastate gas and potential generation sites given that their facilities and operations are under the full regulatory oversight of the DPUC and the New Hampshire Public Utilities Commission.

23. We find that Applicants' affirmative statement is unclear and does not fully comply with 18 C.F.R. § 35.37(e)(4). In particular, Applicants appear to limit their commitment not to erect barriers to entry "because of their ownership of intrastate gas and potential generation sites." Therefore, we will require Applicants to make a compliance filing in accordance with 18 C.F.R. § 35.37(e)(4) that affirmatively states, without limitation, that they have "not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market."

24. Based on Applicants' representations, and subject to the compliance filing directed above, we find that Applicants satisfy the Commission's requirements for market-based rates regarding vertical market power. Therefore our grant of acceptance of Applicants' updated market power analysis is conditioned on Applicants submitting the required compliance filing.

³⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

E. Order No. 697 Compliance Filing

25. In Order No. 697, the Commission adopted two standard required provisions that each seller must include in its market-based rate tariff: a provision requiring compliance with the Commission's regulations and a provision identifying any limitations and exemptions regarding the seller's market-based rate authority.³¹ In addition to the required tariff provisions, the Commission adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable.³²

26. NUSCO's and Select's revised market-based rate tariffs include the Commission's two standard required provisions and a set of standard provisions with regard to sales of certain ancillary services in the ISO-NE, NYISO and PJM markets, as well as a provision regarding sales of ancillary services as a third-party provider. NUSCO's and Select's revised market-based rate tariffs also delete the market behavior rules³³ and notice of change in status provisions. NUSCO's and Select's proposed tariff sheets are accepted, subject to them making compliance filings as directed below.

27. However, NUSCO's and Select's proposed market-based rate tariff designations do not comply with Order No. 614.³⁴ NUSCO's and Select's proposed market-based rate tariffs include improper tariff sheet designations. In addition, NUSCO's market-based rate tariff contains a revised company name, which appears to deviate from what was previously accepted by the Commission. NUSCO is directed to explain why such change in name is being made herein and designate the official company name. NUSCO and Select are directed to file revised market-based rate tariffs in compliance with Order No. 614 (including the correct company name), within 30 days of the date of this order.

28. In addition, in Order No. 664 the Commission stated that it no longer intends to grant waivers of the full requirements of Part 45 in its orders granting market-based rate authority. Rather, persons seeking to hold interlocking positions will be required henceforth to comply with the full requirements of Part 45.³⁵ With respect to an

³¹ *Id.* P 914.

³² *Id.* P 917.

³³ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, *reh'g denied*, 115 FERC ¶ 61,053 (2006).

³⁴ *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

³⁵ *Commission Authorization to Hold Interlocking Positions*, Order No. 664, 70 Fed. Reg. 17,219 (September 23, 2005), FERC Stats. & Regs. ¶ 31,194, at P 34 (2005), *order on reh'g*, Order No. 664-A, 114 FERC ¶ 61,142 (2006).

individual who currently is authorized to hold interlocking positions, that individual will not need to refile under the full requirements of Part 45 to continue to hold such interlocking positions (unless and until that individual assumes different or additional interlocking positions).³⁶ Thus, consistent with Order No. 664, Applicants are required to comply with the full requirements of Part 45. Select is therefore ordered to remove any reference to an exemption from the full requirements of Part 45 from the Limitations and Exemptions provisions in its two market-based rate schedules.

29. Applicants also include in their filing an asset appendix, as required by Order No. 697,³⁷ which identifies generation assets, transmission assets, natural gas intrastate pipelines and gas storage facilities owned or controlled by Applicants and their affiliates.

F. Reporting Requirements

30. 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 longer) market-based power sales during the most recent calendar quarter.³⁸ Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.³⁹

³⁶ Order No. 664, FERC Stats. & Regs. ¶ 31,194 at P 36.

³⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 894-895.

³⁸ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Report 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>.

³⁹ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2007). 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.

31. Applicants 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.⁴⁰

32. Additionally, in Order No. 697, the Commission created two categories of sellers.⁴¹ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.⁴² Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.⁴³

33. Based on Applicants' representations, we find that they meet the criteria for a Category 2 seller and are so designated based on their ownership of generation totaling greater than 500 MW of capacity and because they own transmission in the ISO-NE market. Thus, Applicants must file an updated market power analysis in compliance with the regional reporting schedule adopted in Order No. 697.⁴⁴ The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Applicants' updated market power analysis is hereby conditionally accepted for filing, subject to Commission acceptance of the compliance filing directed in Ordering Paragraph (B), as discussed in the body of this order.

⁴⁰ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42.

⁴¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

⁴² 18 C.F.R. § 35.36(a)(2).

⁴³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

⁴⁴ *Id.* P 882.

(B) Applicants are hereby directed, within 30 days of the date of this order, to submit a compliance filing as discussed in the body of this order.

(C) Applicants are hereby directed to file an updated market analysis according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.