

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midland Cogeneration Venture
Limited Partnership

Docket Nos. ER06-733-000
ER06-733-001

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION

(Issued July 6, 2006)

1. On March 11, 2006, as amended May 10, 2006, Midland Cogeneration Venture Limited Partnership (Midland) filed an application for market-based rate authority, with an accompanying tariff. The proposed market-based rate tariff provides for the sale of energy, capacity, and ancillary services at market-based rates, the reassignment of transmission capacity, and the resale of firm transmission rights (FTRs).¹ Midland's market-based rate tariff also includes the Commission's change in status reporting requirement pursuant to Order No. 652.² In this order, the Commission accepts Midland's market-based rate tariff for filing,³ effective March 17, 2006, as requested.⁴

¹ Midland states that it plans to sell certain ancillary services in the markets administered by PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc. (NYISO), ISO New England Inc. (ISO-NE), and California Independent System Operator Corporation (CAISO). Midland also states that it intends to engage in the sale of certain ancillary services to third party suppliers in other markets consistent with *Avista Corp.*, 87 FERC ¶ 61,223, *order on reh'g*, 89 FERC ¶ 61,136 (1999).

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, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

³ FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1 and 5, and Substitute Original Sheet Nos. 2-4.

⁴ We will grant Midland's request for waiver of the prior notice requirement to allow the market-based rate tariff to become effective on March 17, 2006, the effective date of Order No. 671. *See Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 (2006); *order on clarification*, 114 FERC ¶ 61,128 (2006) (clarifying

(continued...)

Background

2. Midland states that it is a limited partnership organized in the state of Michigan that owns and operates a 1,854 MW cogeneration facility located near Midland, Michigan in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). Midland states that it is jointly-owned by affiliates or subsidiaries of CMS Energy Corporation (CMS Energy), El Paso Corporation (El Paso), and The Dow Chemical Company (Dow Chemical). Midland states that CMS Energy holds a 49 percent interest, El Paso holds a 43.5 percent interest, and Dow Chemical holds a 7.5 percent interest in Midland.
3. Midland states that the majority of the facility's output is contractually committed to Consumers Energy Company (Consumers) and Dow Chemical under long-term agreements.
4. Midland also states that CMS Energy owns or controls approximately 8,000 MW in the Midwest ISO.

Notice of Filing and Responsive Pleadings

5. Notice of Midland's March 11, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 14,881 (2006), with interventions and protests due on or before April 5, 2006. The Michigan Public Service Commission filed a notice of intervention.
6. Notice of Midland's May 10, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 29,329 (2006), with interventions and protests due on or before May 22, 2006. Michigan Electric Transmission Company, LLC (METC) filed a motion to intervene and protest. On June 6, 2006, Midland filed an answer to METC's protest.
7. METC states that although it does not oppose Midland's application for market-based rate authority, one aspect of the application requires clarification. It states that the application indicates that Midland's cogeneration facility is rated as having a capacity of 1,580.7 MW and, while METC does not dispute that this may be the actual rating of the facility, it states that the facility is limited to a maximum allowed rating of 1,350 MW with respect to deliveries to the METC transmission system.

that the Commission will waive the 60-day prior notice requirement of section 205 of the Federal Power Act (FPA) for electric energy sales that, pursuant to Order No. 671's elimination of certain regulatory exemptions, will now be subject to section 205 filings, provided that such section 205 filings are made prior to Order No. 671's effective date of March 17, 2006).

Discussion

Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the notice of intervention and timely unopposed motion to intervene serve to make the entities that filed them parties to this proceeding.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Midland's answer and will, therefore, reject it.

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.⁵

11. As discussed below, the Commission concludes that Midland satisfies the Commission's standards for market-based rate authority.

Generation Market Power

12. In the Commission's 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. Midland has prepared both the pivotal supplier and the wholesale market share screens for generation that Midland and its affiliates own or control in the Midwest ISO market. Midland states that it passes the pivotal supplier screen and the wholesale market share screen in the Midwest ISO market.

13. The Commission has reviewed Midland's generation market power analysis and has determined that Midland passes the wholesale market share screen and the pivotal

⁵ 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).

supplier screen in the Midwest ISO market.⁶ Accordingly, the Commission finds that Midland satisfies the Commission's generation market power standard for the grant of market-based rate authority.

Transmission Market Power

14. Midland states that neither it nor its affiliates own or control any transmission facilities other than those necessary to interconnect their generation facilities to the grid. Midland notes that its affiliate, Consumers, has transferred its transmission facilities to a non-affiliated independent transmission company, METC. Further, no intervenor has raised transmission market power concerns. Based on Midland's representations, the Commission finds that Midland satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Barriers to Entry

15. Midland states that neither it nor its affiliates own or control any sites for the construction of new generation capacity, or other essential resources or inputs that could be used to restrict market entry by competing suppliers. Midland states that Dow Chemical, through its affiliate Dow Pipeline, has an indirect interest in and is affiliated with entities that own intrastate natural gas pipelines. Midland states that these pipeline interests raise no barriers to entry concerns. Further, no intervenors have raised barriers to entry concerns. Based on Midland's representations, the Commission is satisfied that Midland cannot erect barriers to entry. However, should Midland 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 Midland's authority to sell power at market-based rates.⁷

Affiliate Abuse

16. Midland states that its only affiliate with a franchised electric service territory is Consumers. Midland requests waiver of the code of conduct requirement and prohibition

⁶ With regard to METC's protest which states that the facility is limited to a maximum allowed rating of 1,350 MW with respect to deliveries to the METC transmission system, the Commission notes that Midland used the generator's nameplate capacity of 1,854 MW in its updated market-power analysis, as required.

⁷ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

against sales to franchised affiliates without prior Commission approval under section 205 of the FPA. To support this request, Midland argues that the Commission has previously waived the code of conduct requirement for another Consumer affiliate, CMS Marketing, Services and Trading Company (CMS Marketing), finding that Consumer's captive wholesale customers would be protected against affiliate abuse by commitments made by Consumers and by additional safeguards imposed by the Commission.⁸ Midland states that in compliance with the Commission's order in *CMS Marketing*, Consumers revised its wholesale contracts to ensure that the wholesale customers would not subsidize any affiliate sales. Midland notes that with these amendments, the Commission determined it was satisfied that the contracts could not be used as a vehicle for cross-subsidization of affiliate power sales or sales of non-power goods and services.⁹ Midland adds that Consumers recently attested that these factual circumstances underlying its authorization and affiliate transactions remain unchanged and that the Commission found that the CMS Energy Companies satisfy the Commission's standards with regard to affiliate abuse.¹⁰ Additionally, Midland argues that since January 1, 2002, retail customers in Consumers' service territory have had retail choice under Michigan's Electric Customer Choice Program. Midland states that the Commission has granted waiver of the affiliate sales prohibition where retail ratepayers are protected by a retail rate freeze or the availability of retail rate choice.¹¹

17. The Commission has allowed sales between affiliates at market-based rates as long as it is satisfied that there are no affiliate abuse concerns. The Commission has allowed sales by a power marketer or power producer to its affiliated public utility where there are no captive wholesale customers and where retail ratepayers are protected by the

⁸ Midland Application at 9, *citing CMS Marketing, Services and Trading Co.*, 95 FERC ¶ 61,308 at 62,051 (2001) (*CMS Marketing*). The Commission also authorized CMS Marketing to engage in affiliate transactions with Consumers pursuant to a service agreement under CMS Marketing's market-based rate tariff. *CMS Marketing, Services and Trading Co.*, 92 FERC ¶ 61,262 (2000).

⁹ *Id.* at 10.

¹⁰ *Id.*, *citing Consumers Energy Co.*, 109 FERC ¶ 61,279 at P 19 (2004). CMS Energy Companies include Consumers Energy Company, CMS Energy Resource Management Company, Grayling Generating Station Limited Partnership, Genesee Power Station Limited Partnership, CMS Generation Michigan Power L.L.C., and Dearborn Industrial Generation, L.L.C.

¹¹ *See Sunbury and Duquesne Power, L.P.*, 108 FERC ¶ 61,160 at P 38-40 (2004).

availability of retail choice.¹² The Commission has waived the code of conduct requirement when applicants made a showing that there are no captive customers, or when the Commission is satisfied that the public utility's captive wholesale and retail customers are adequately protected against affiliate abuse.¹³ Additionally, no intervenors have raised affiliate abuse concerns. As Midland notes, the Commission has previously found that Consumers' wholesale contracts cannot be used as a vehicle for cross-subsidization of affiliate power sales or sales of non-power goods and services and that captive customers are adequately protected against the potential for affiliate abuse, such that the waiver of the code of conduct and affiliate sales prohibition is appropriate. Accordingly, on this basis, and the fact that retail customers in Consumers' service territory have retail choice, the Commission finds that Midland satisfies the Commission's concerns with regard to affiliate abuse and satisfies the standard that the Commission has applied in past cases for waiver of the code of conduct requirement and the affiliate sales prohibition.¹⁴

18. However, we direct Midland to notify us if the circumstances on which we rely to waive the code of conduct and the affiliate sales prohibition should change. The Commission reserves the right to impose the code of conduct requirement and the affiliate sales prohibition. In any event, our action here does not constitute a waiver of the FPA requirement that all rates be just and reasonable and not unduly discriminatory or preferential.

Ancillary Services and Other Requests

19. Midland requests authority to engage in the sale of certain ancillary services (listed in the proposed tariff) at market-based rates into the markets administered by PJM, NYISO, ISO-NE, and CAISO. Consistent with Commission precedent granting authority to sellers to engage in such transactions in those markets, the Commission will grant

¹² See, e.g., *Delmarva Power & Light Co.*, 94 FERC ¶ 61,068 (2001); *AmerGen Energy Co.*, 90 FERC ¶ 61,080 (2000); *Illinova Power Marketing, Inc.*, 88 FERC ¶ 61,189 (1999).

¹³ See, e.g., *Green Power Partners I LLC*, 88 FERC ¶ 61,005 (1999); *Baltimore Gas & Electric Co.*, 91 FERC ¶ 61,270 (2000).

¹⁴ See *CMS Marketing, Services and Trading Co.*, 95 FERC ¶ 61,308 at 62,051 (2001); see also *Sunbury and Duquesne Power, L.P.*, 108 FERC ¶ 61,160 at P 40 (2004).

Midland's request.¹⁵ In addition, Midland proposes to sell additional ancillary services in these markets and in additional geographic markets as the Commission may specify and authorize from time-to-time in orders that extend such authority to all sellers previously authorized to sell energy and/or capacity at market-based rates. Midland's request is granted in this regard; however, this grant does not relieve Midland of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2005).¹⁶ Midland further requests authority to engage in the sale of certain ancillary services to third party suppliers in other markets subject to certain conditions set forth in *Avista*.¹⁷ The Commission will grant Midland's request.

20. Midland also requests authority to reassign transmission capacity and to resell FTRs or their equivalent. The Commission finds these provisions consistent with the Commission's requirements.¹⁸ Accordingly, the Commission will grant this request.

Waivers, Authorizations, and Reporting Requirements

21. Midland requests the following waivers and authorizations: (1) 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; (2) waiver of Parts 41, 101, and 141 of the Commission's accounting and periodic reporting requirements; and (3) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

¹⁵ See, e.g., *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001); *Atlantic City Electric Co.*, 86 FERC ¶ 61,248, *clarified*, 86 FERC ¶ 61,310 (1999); *Central Hudson Gas & Electric Corp.*, 86 FERC ¶ 61,062, *order on reh'g*, 88 FERC ¶ 61,138 (1999); *AES Redondo Beach, L.L.C.*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC ¶ 61,208 (1999), *order on reh'g and clarification*, 90 FERC ¶ 61,036 (2000).

¹⁶ *Calhoun Power Company*, 96 FERC ¶ 61,056 (2001).

¹⁷ *Avista Corp.*, 87 FERC ¶ 61,223, *order on reh'g*, 89 FERC ¶ 61,136 (1999) (*Avista*).

¹⁸ See *Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997); *Calif. Indep. Sys. Operator Corp.*, 89 FERC ¶ 61,153 (1999).

22. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.¹⁹ Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Midland to keep its accounting records in accordance with generally accepted accounting principles.

23. Midland also requests waiver of certain requirements of Order No. 888²⁰ (e.g., filing an open access transmission tariff) and Order No. 889²¹ (e.g., OASIS requirement) because Midland does not own, operate, or control any transmission-related equipment other than the component interconnecting the facility to the transmission grid. Based on Midland's representation that it does not own or control transmission facilities, no waiver is necessary. Accordingly, Midland's request in this regard is denied.²²

¹⁹ It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141), as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities (18 C.F.R. Part 34). See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Notice of Proposed Rulemaking*, 71 Fed. Reg. 33,102 (June 7, 2006), FERC Stats. & Regs. ¶ 32,602 at P 169 (2006).

²⁰ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom., Transmission Access Study Group v. Federal Energy Regulatory Commission*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom., New York v. FERC*, 535 U.S. 1 (2002).

²¹ *Open-Access Same-time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. Regulations Preambles July 1996-December 2000 ¶ 31,049 (1997), *order on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997), *order on reh'g*, Order No. 889-C, 82 FERC ¶ 61,046 (1998).

²² See *Pinelawn Power, LLC*, 110 FERC ¶ 61,160 at P 21 (2005).

24. 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.²³ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²⁴ Accordingly, Midland must file its first Electric Quarterly Report no later than 30 days after the first quarter Midland's tariff is in effect.²⁵

25. Midland 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.²⁶ 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, Midland has included the change in status reporting requirement in its market-based rate tariff.

26. Midland is directed to file an updated market power analysis within the time period established for the CMS Energy Companies.²⁷ The Commission also reserves the right to require such an analysis at any intervening time.

²³ *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>.

²⁴ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2005).

²⁵ 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.

²⁶ *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, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

²⁷ *See Consumers Energy Co.*, 109 FERC ¶ 61,279 at P 22 (2004).

The Commission orders:

(A) Midland's market-based rate tariff is hereby accepted for filing effective March 17, 2006, as discussed in the body of this order.

(B) Waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted.

(C) Waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted, with the exception of 18 C.F.R. §§ 141.14, 141.15 (2005).

(D) Within 30 days of the date of the issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Midland should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (2005).

(E) Absent a request to be heard within the period set forth above, Midland is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of Midland, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Midland's issuances of securities or assumptions of liabilities.

(G) Consistent with the procedures the Commission adopted in Order No. 2001, Midland must file electronically with the Commission Electric Quarterly Reports no later than 30 days after the end of the reporting quarter. Midland is directed to file its first Electric Quarterly Report no later than 30 days after the first quarter Midland's tariff is in effect.

(H) Midland is hereby directed to file an updated market power analysis within the time period established for the CMS Energy Companies.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.