

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

May 26, 2005

In Reply Refer To:
Deephaven RV Sub Fund Ltd.
Docket Nos. ER05-725-000, and
ER05-725-001

Sidley Austin Brown & Wood LLP
Attn: Kurt H. Jacobs, Esq.
Attorney for Deephaven RV Sub Fund Ltd.
1501 K Street, N.W.
Washington, D.C. 20005

Dear Mr. Jacobs:

1. On March 25, 2005, as amended on April 22, 2005, Deephaven RV Sub Fund Ltd. (Deephaven) filed an application for market-based rate authority with an accompanying tariff. The proposed market-based rate tariff provides for the sale of capacity, energy, and ancillary services at market-based rates, the reassignment of transmission capacity, and the resale of firm transmission rights (FTRs).¹ Deephaven's submittal includes the Commission's market behavior rules² and a proposed tariff revision to comply with the

¹ Deephaven 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).

² *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).

Commission's change in status requirement.³ With the tariff modification directed herein, Deephaven's submittal satisfies the Commission's standards for market-based rate authority and is accepted for filing, effective April 25, 2005, as requested.⁴

2. Deephaven states that it is a private investment vehicle managed by Deephaven Capital Management LLC (Deephaven Capital), which is headquartered in Minnetonka, Minnesota. Deephaven further states that it was formed under the laws of the Cayman Islands on July 14, 2004, and that it intends to act as a power marketer. Deephaven is a direct wholly-owned subsidiary of KFP Holdings I LLC, which is a wholly-owned direct subsidiary of Knight Trading Group, Inc. Deephaven states that it has no affiliates in the energy sector.

Procedural Matters

3. Notices of Deephaven's filings were published in the *Federal Register*, 70 Fed. Reg. 17,683 and 23,860 (2005), with motions to intervene and protests due on or before April 14, 2005 and May 2, 2005, respectively. None was filed.

Discussion

Market-Based Rate Authorization

4. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁵ As discussed below, the Commission concludes that, with the tariff modification directed herein, Deephaven satisfies the Commission's standards for market-based rate authority.

³ *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).

⁴ Rate Schedule FERC No. 1, Original Sheet Nos. 1-5. Waiver of section 35.3 of the Commission's regulations, 18 C.F.R. § 35.3 (2004), is granted to allow for the effective date noted above.

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).

5. In its order issued in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. Deephaven states that neither it nor any of its affiliates own, operate or control any generating capacity. Furthermore, Deephaven states that neither Deephaven nor any of its affiliates is a party to any long-term power agreements. Based on these representations, the Commission finds that Deephaven satisfies the Commission's generation market power standard for market-based rate authority.

6. Deephaven also states that neither it nor any of its affiliates owns, controls or operates facilities for the transmission of electricity in interstate commerce. In addition, Deephaven states that it does not intend to construct electric transmission facilities or own, or control, any sites required for that purpose. Based on these representations, the Commission finds that Deephaven satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

7. Deephaven states that it does not directly or indirectly own building sites, interstate natural gas pipelines, engineering and construction firms, or local natural gas distribution systems. Based on this representation, the Commission is satisfied that Deephaven cannot erect barriers to entry.

8. Deephaven states that it does not have a franchised service territory or captive wholesale customers, nor do any of its affiliates. Furthermore, Deephaven states that it does not currently have any affiliates engaged in the energy field, including speculative trading in the energy area. Based on this representation, the Commission finds that Deephaven satisfies the Commission's concerns with regard to affiliate abuse.

9. Deephaven 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 ISO-NE, PJM, NYISO, and CAISO. Consistent with Commission precedent granting authority to sellers to engage in such transactions in those markets, the Commission will grant Deephaven's request.⁶

⁶ 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).

10. Deephaven also requests authority to sell additional ancillary services in these markets, the market served by the Midwest Independent Transmission System Operator (Midwest ISO), 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. The Commission will grant Deephaven's request as it relates to ISO-NE, PJM, NYISO, and CAISO; however, this grant does not relieve Deephaven of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2004).⁷

11. There is no organized market in Midwest ISO for the sale of ancillary services at market-based rates. Therefore, we direct Deephaven to make a compliance filing within 30 days of the date of issuance of this order revising the ancillary services section of its market-based rate tariff to remove the reference to the sale of any ancillary services that the Commission may authorize in the Midwest ISO. We note that if the Commission does authorize such sales, Deephaven may then revise its market-based rate tariff to allow the sale of ancillary services in the Midwest ISO.

12. Deephaven 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.⁸ Accordingly, the Commission will grant this request.

Other Waivers, Authorizations and Reporting Requirements

13. Deephaven 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; (3) abbreviated filings with respect to interlocking directorates under Part 45 of the Commission's regulations; and (4) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

⁷ See *Calhoun Power Co.*, 96 FERC ¶ 61,056 (2001).

⁸ See *Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997); *Calif. Indep. Sys. Operator, Inc.*, 89 FERC ¶ 61,153 (1999).

14. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.⁹ Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Deephaven to keep its accounting records in accordance with generally accepted accounting principles.

15. 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 Deephaven 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 (2004).

16. Absent a request to be heard within the period set forth above, Deephaven 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 Deephaven, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

17. Until further order of this Commission, the full requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving Deephaven. Any such person, instead, shall timely file a sworn application providing the following information¹⁰:

⁹ 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 obligations and liabilities (18 C.F.R. Part 34). *See Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities*, Order No. 627, 67 Fed. Reg. 67,691 (Oct. 10, 2002), FERC Stats. & Regs. ¶ 32,558, at P 23-24 (2002).

¹⁰ For current interlocks, applications should be filed within 30 days of the date of this order. We note that the Commission has issued a proposed rulemaking, *Commission Authorization to Hold Interlocking Directorates*, 110 FERC ¶ 61,343 (2005), which is considering modifications to 18 C.F.R. Part 45. The Commission is considering changing its requirements as to timing and also is examining the possibility of no longer granting a waiver of the full requirements of Part 45 in its orders granting market-based rate authority.

- (1) full name and business address; and
- (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

18. 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 Deephaven's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

19. 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.¹¹ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹² Accordingly, Deephaven must file its first Electric Quarterly Report no later than 30 days after the first quarter Deephaven's rate schedule is in effect.

20. Deephaven 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.¹³ 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. Deephaven, in its amended filing, states that it has revised its tariff to include the required language. However, the tariff language proposed by Deephaven does not comply with the requirements of Order No. 652. Accordingly,

¹¹ *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>.

¹² The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

¹³ See note 3, *supra*.

Deephaven 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, without variation, consistent with Order No. 652:

[insert market-based rate seller name] 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.

21. Finally, Deephaven is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

By direction of the Commission.

Magalie R. Salas,
Secretary.