

168 FERC ¶ 61,154
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Performance Materials NA, Inc.

Docket No. ER19-1646-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND REQUEST
FOR WAIVERS

(Issued September 13, 2019)

1. In this order, we grant market-based rate authorization to Performance Materials NA, Inc. (Performance Materials), effective June 23, 2019, as requested.¹ We also grant Performance Materials' request for waiver of time value refunds and certain waivers commonly granted to market-based rate sellers, except as noted herein.
2. In addition, we find that Performance Materials meets the criteria for a Category 2 seller in the Central Region and a Category 1 seller in all other regions and is so designated.²

¹ Performance Materials NA, Inc., FERC FPA Electric Tariff, FERC Electric Tariff; [Rate Schedule FERC No. 1, 0.0.0](#).

² See *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, 153 FERC ¶ 61,065, at P 320 (2015), *order on reh'g*, Order No. 816-A, 155 FERC ¶ 61,188 (2016); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at PP 848-850, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

I. Background

3. On April 23, 2019, as amended July 15, 2019, Performance Materials filed an initial application for market-based rate authority with an accompanying tariff providing for the sale of electric energy, capacity, and ancillary services at market-based rates.³ Performance Materials requests that the Commission accept its tariff effective June 23, 2019.

4. Performance Materials also requests that the Commission not require it to provide time value refunds for the power sales made without authorization to Dow Chemical Company (Dow) since February 1, 2019 because the transactions have been made exclusively with an affiliate company.

5. Performance Materials states that it is a wholly-owned subsidiary of Dow. Performance Materials represents that on February 1, 2019, it acquired ownership of 503 MW of electric generation at the Sabine River Operations (Sabine River) industrial campus in Orange, Texas. Performance Materials states that Sabine River consists of two plants that have been separately certified as Qualifying Cogeneration Facilities under Section 201 of the Public Utility Regulatory Policies Act of 1978⁴ and are interconnected to transmission facilities owned by Entergy Texas, Inc., within the Midcontinent Independent System Operator, Inc. (MISO) market.

6. Performance Materials states that after it acquired Sabine River on February 1, 2019 it made internal sales to Dow from Sabine River, and that Dow then made wholesale power sales into the MISO market under Dow's market-based rate tariff. However, Performance Materials recognized that the internal sales to Dow constituted wholesale sales subject to the Commission's jurisdiction, and that Performance Materials did not have the appropriate authorization to make such sales.⁵

³ Performance Materials requests authorization to sell ancillary services in all of the regional transmission organization or independent system operator markets for which the Commission has approved sales of specific ancillary services. Performance Materials also requests authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁴ 16 U.S.C. § 796(18)(B) (2018).

⁵ We remind Performance Materials that it must submit required filings on a timely basis, or face possible sanctions by the Commission.

7. Performance Materials represents that, going forward, it intends to continue making sales to Dow for resale into the MISO market. Performance Materials states that having Dow registered as the sole market participant within MISO is administratively preferable to having both Dow and Performance Materials registered.

8. On June 20, 2019, Commission staff issued a deficiency letter. On July 15, 2019, Performance Materials timely responded to the deficiency letter, providing details regarding the total monthly quantity of energy (in megawatt hours) delivered from the Sabine River Operations into the MISO market since February 1, 2019, as requested.

II. Notice

9. Notice of Performance Materials' filing was published in the *Federal Register*,⁶ with comments, protests, or interventions due on or before May 14, 2019. None were filed.

10. Notice of Performance Materials' response was published in the *Federal Register*,⁷ with comments, protests, or interventions due on or before August 5, 2019. None were filed.

III. Discussion

11. As discussed below, we grant Performance Materials' request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and we accept its market-based rate tariff effective June 23, 2019, as requested. We also grant Performance Materials' request for waiver of time value refunds, and grant Performance Materials' request for certain other waivers.

A. Market Based Rate Authorization

12. 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.⁸

⁶ 84 Fed. Reg. 18,016 (2019).

⁷ 84 Fed. Reg. 35,383 (2019).

⁸ Order No. 697, 119 FERC ¶ 61,295 at PP 62, 399, 408, 440.

1. Horizontal Market Power

13. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.⁹ The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.¹⁰

14. Performance Materials submitted a market power analysis for the MISO market; Performance Materials represents that it passes both the pivotal supplier and wholesale market share screens in that market.¹¹ Based on Performance Materials' representations, we find that Performance Materials satisfies the Commission's requirements for market-based rate authority regarding horizontal market power.¹²

2. Vertical Market Power

15. 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, or that the seller has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) (2019) or satisfies the requirements for blanket waiver under 18 C.F.R. § 35.28(d)(2).¹³

⁹ *Id.* P 62.

¹⁰ *Id.* PP 33, 62-63.

¹¹ Performance Materials' study of the MISO market relies on The Dow Chemical Company's market power analysis, which has been accepted by the Commission. *See Dow Chemical Co.*, Docket No. ER14-1348-005 (March 15, 2019) (delegated order).

¹² We note that Performance Materials is not being granted authority to make third-party sales of operating reserves to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers. If Performance Materials seeks such authority, it must make the required showing and receive Commission authorization prior to making such sales. *See Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies*, Order No. 784, 144 FERC ¶ 61,056, at PP 200-202 (2013), *order on clarification*, Order No. 784-A, 146 FERC ¶ 61,114 (2014).

¹³ *See Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, 150 FERC ¶ 61,211, at P 57, *order on reh'g*, Order No. 807-A, 153 FERC ¶ 61,047 (2015) (waiving the OATT requirements of

16. Performance Materials states that neither it nor any affiliate owns, operates, or controls any jurisdictional electric transmission facilities other than limited and discrete transmission related equipment necessary to interconnect to the transmission grid and that it qualifies for the blanket waiver.

17. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁴ 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, and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).¹⁵ 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.¹⁶ 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.¹⁷

18. Performance Materials represents that neither it nor any of its affiliates own or control intrastate gas transportation, intrastate natural gas storage or distribution facilities, or physical coal supply sources, and they do not have ownership or control over who may access transportation of coal supplies.

19. Finally, Performance Materials affirmatively states that it and its affiliates have not erected barriers to entry in the relevant geographic markets, and will not erect barriers to entry into the relevant market.

18 C.F.R. § 35.28, the Open Access Same-Time Information System requirements of Part 37, and the Standards of Conduct requirements of Part 358, under certain conditions, for entities that own interconnection facilities). *See also Balko Wind Transmission, LLC*, 152 FERC ¶ 61,011, at PP 24-25 (2015).

¹⁴ Order No. 697, 119 FERC ¶ 61,295 at P 440.

¹⁵ Order No. 697-A, 119 FERC ¶ 61,295 at P 176. *See also* Order No. 816, 153 FERC ¶ 61,065 at PP 207-212.

¹⁶ Order No. 697, 119 FERC ¶ 61,295 at P 447. *See also* Order No. 816, 153 FERC ¶ 61,065 at PP 354, 356.

¹⁷ Order No. 697, 119 FERC ¶ 61,295 at P 446.

20. Based on Performance Materials' representations, we find that Performance Materials satisfies the Commission's requirements for market-based rate authority regarding vertical market power.

B. Other Waivers and Authorizations

21. Performance Materials' proposed market-based rate tariff allows for the following waivers and authorizations: (1) waiver of the filing requirements of subparts B and C of Part 35 of the Commission's regulations, except sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101, and 141 of the Commission's regulations, except sections 141.14 and 141.15; and (3) blanket authorization under section 204 of the Federal Power Act (FPA)¹⁸ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability, subject to objection by an interested party.

22. We grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.¹⁹ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects Performance

¹⁸ 16 U.S.C. § 824c (2018).

¹⁹ We note that the Commission has examined and approved the continued applicability of the waiver of its accounting and reporting requirements in Parts 41, 101, and 141 of the Commission's regulations, as well as the continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities in Part 34 of the Commission's regulations. *See* Order No. 697, 119 FERC ¶ 61,295 at PP 984-985 (regarding waiver of Parts 41, 101, and 141) and PP 999-1000 (regarding blanket approval under Part 34). However, waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Hydropower licensees are required to comply with the requirements of the Uniform System of Accounts pursuant to 18 C.F.R. pt. 101 (2019) to the extent necessary to carry out their responsibilities under Part I of the FPA. We further note that a licensee's status as a market-based rate seller under Part II of the FPA does not exempt it from its accounting responsibilities as a licensee under Part I of the FPA. *See* Order No. 816, 153 FERC ¶ 61,065 at PP 345-350; *Seneca Generation, LLC*, 145 FERC ¶ 61,096, at P 23 n.20 (2013) (citing *Trafalgar Power, Inc.*, 87 FERC ¶ 61,207, at 61,798 (1999) (noting that "all licensees are required to comply with the requirements of the Uniform System of Accounts to the extent necessary to carry out their responsibilities under [s]ections 4(b), 10(d) and 14 of the FPA")). *See also* Order No. 697, 119 FERC ¶ 61,295 at P 983 & n.1126 (granting waiver of subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except for 18 C.F.R §§ 35.12(a), 35.13(b), 35.15 and 35.16)).

Materials to keep its accounting records in accordance with generally accepted accounting principles.

23. The next time Performance Materials makes a market-based rate filing with the Commission, it must include a revised tariff in compliance with Order Nos. 697 and 697-A to include a citation to this order in the Limitations and Exemptions section of its tariff.²⁰

C. Refunds

24. Performance Materials states that it has made market-based rate sales (or *de facto* market-based rate sales, to the extent that it is deemed to have made sales to Dow after acquiring the Sabine River generation facilities), from February 1, 2019 forward, and that such sales are between affiliated entities as part of an internal arrangement designed to facilitate electricity resales into the MISO market. It further states that the Commission has “typically found good cause to waive time value refunds when refunds would be made from one affiliate to another.”²¹

25. Imposition of time value refunds is the Commission’s method of encouraging compliance by public utilities with the requirements of section 205 of the FPA,²² and compensating customers that have been deprived of the use of their monies for the period that the rates had not been filed.²³ The time value refund is paid, not to the Commission, but to the ratepayers who paid the rates that had not been filed.²⁴ In the instance where the customer is the same entity as the owner, the objective of requiring the time value of refunds would not be served. Therefore, we will not order refunds in this case where the

²⁰ See Order No. 697, 119 FERC ¶ 61,295 at P 916; Order No. 697-A, 123 FERC ¶ 61,055 at P 384. See also *Niagara Mohawk Power Corporation*, 121 FERC ¶ 61,275, at P 8 (2007).

²¹ Performance Materials April 23, 2019 Filing at 15 (citing *Tucson Electric Power Co.*, 155 FERC ¶ 61,170, at P 19 (2016)).

²² 16 U.S.C. § 824d (2018).

²³ *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at P 40 (2003).

²⁴ *Id.* at n.26.

customer, Dow, is an affiliate of Performance Materials. This result is consistent with previous Commission orders in which we did not order refunds between affiliates.²⁵

D. Reporting Requirements

26. An entity with market-based rate authorization must file Electric Quarterly Reports (EQRs) with the Commission, consistent with Orders Nos. 2001²⁶ and 768,²⁷ to fulfill its responsibility under FPA section 205(c)²⁸ to have rates on file in a convenient form and place.²⁹ Performance Materials must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.³⁰ Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which Performance Materials may be subject to refund, civil penalties, and/or revocation of market-based rate authority.³¹

²⁵ See, e.g., *AC Landfill Energy, LLC*, 127 FERC ¶ 61,112 (2009); *TransCanada Power, LLC*, 111 FERC ¶ 61,264 (2005).

²⁶ *Revised Public Utility Filing Requirements*, Order No. 2001, 100 FERC ¶ 61,074, *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, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008).

²⁷ *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, FERC Stats. & Regs. ¶ 31,336 (2012) (cross-referenced at 140 FERC ¶ 61,232), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

²⁸ 16 U.S.C. § 824d(c) (2018).

²⁹ See *Revisions to Electric Quarterly Report Filing Process*, Order No. 770, 141 FERC ¶ 61,120, at P 3 (2012) (citing Order No. 2001, 100 FERC ¶ 61,074 at P 31).

³⁰ *Id.*

³¹ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2019). Forfeiture of market-based rate authority may require a new application for

27. Performance Materials 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.³²

28. In Order No. 697, the Commission created two categories of sellers.³³ 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. 888³⁴); 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.³⁵ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.³⁶

29. Performance Materials states that, for the Central region, it should appropriately be classified as a Category 2 seller. Performance Materials represents that for the Northeast, Northwest, Southeast, Southwest, and Southwest Power Pool regions, it and its

market-based rate authority if the applicant wishes to resume making sales at market-based rates.

³² 18 C.F.R. § 35.42 (2019); *see also Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

³³ Order No. 697, 119 FERC ¶ 61,295 at P 848.

³⁴ *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. ¶ 31,036 (1996) (crossed referenced at 77 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (crossed referenced at 78 FERC ¶ 61,220), *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 Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

³⁵ 18 C.F.R. § 35.36(a) (2019).

³⁶ Order No. 697, 119 FERC ¶ 61,295 at P 850.

affiliates (1) own or control less than 500 MW of generation in aggregate in each region; (2) do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid; (3) are not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as generation assets owned or controlled by Performance Materials or its affiliates; (4) are not affiliated with a franchised public utility in the same region as generation assets owned or controlled by Performance Materials or its affiliates; and (5) do not raise other vertical market power issues.

30. Based on Performance Materials' representations, we designate it as a Category 2 seller in the Central region and a Category 1 seller in all other regions. Performance Materials must file updated market power analyses for the Central region in compliance with the regional reporting schedule adopted in Order No. 697.³⁷ The Commission also reserves the right to require such an analysis at any time for any region.³⁸

The Commission orders:

(A) Performance Materials' market-based rate tariff is hereby accepted for filing, effective June 23, 2019, 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 Part 101 of the Commission's regulations is hereby granted, with the exception that waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Waiver of Parts 41 and 141 of the Commission's regulations is hereby granted, with the exception of sections 141.14 and 141.15.

(D) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted. Performance Materials 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 Performance Materials, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

³⁷ *Id.* PP 882-893.

³⁸ *Id.* P 853.

(E) 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 Performance Materials' issuance of securities or assumptions of liability.

(F) Performance Materials is hereby required to file EQRs in compliance with Order Nos. 2001 and 768. If the effective date of Performance Materials' market-based rate tariff falls within a quarter of the year that has already expired, Performance Materials' EQRs for the expired quarter are due within 30 days of the date of this order.

(G) Performance Materials is hereby directed to revise the limitations and exemptions section of its market-based rate tariff, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.