

170 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kimball Wind LLC

Docket No. ER20-319-001

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND
ORDERING REFUNDS

(Issued February 25, 2020)

1. In this order, we grant Kimball Wind LLC's (Kimball Wind) request to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective January 5, 2020. We also grant Kimball Wind's request for certain waivers commonly granted to market-based rate sellers, except as noted herein. In addition, we deny Kimball Wind's request for waiver of any refund obligations and we direct Kimball Wind to make refunds, with interest, within 30 days of the date of this order.
2. Additionally, we find that Kimball Wind meets the criteria for a Category 1 seller in all regions and is so designated.¹

I. Background

3. On November 5, 2019, as amended on December 27, 2019, pursuant to section 205 of the Federal Power Act (FPA),² Kimball Wind filed an application for market-based rate authority with an accompanying tariff providing for the sale of electric

¹ See *Refinements to Policies & Procedures for Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, 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 Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, at PP 848-50, *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 sub nom. Public Citizen, Inc. v. FERC*, 567 U.S. 934 (2012).

² 16 U.S.C. § 824d (2018).

energy, capacity, and ancillary services at market-based rates.³ Kimball Wind also requests waiver of any refund obligations.

4. Kimball Wind states that it was formed for the purpose of owning, developing, constructing, operating and maintaining a 30 megawatt (MW) nameplate wind-powered energy project (Project) in Kimball County, Nebraska. Kimball Wind states that the Project, a qualifying facility (QF), is interconnected with the utility system of the City of Kimball, a municipal electric authority, and has a long-term wholesale power sales agreement with the Municipal Energy Agency of Nebraska (MEAN) for its entire capacity for a term of 20 years with an expiration date of 2038.

5. Kimball Wind states that it commenced operation in June 2018. Kimball Wind requests waiver of refund liability for the period of time it made sales without Commission authorization. Kimball Wind represents that it was operating under the assumption that it was exempt from section 205 of the FPA because its contract with MEAN qualified as “a contract executed on or before March 17, 2006 or made pursuant to a state regulatory authority’s implementation of section 210 [of] the Public Utility Regulatory Policies Act [PURPA] of 1978.”⁴ Kimball Wind asserts that the state of Nebraska does not have a ratemaking authority that would permit implementation of the PURPA rules and as a result, each non-regulated utility is required to implement the PURPA rules. Kimball Wind asserts that since there is no state regulatory authority that regulates the rates of MEAN, MEAN becomes the self-regulating regulatory authority for the state. Kimball Wind contends that the exemption rule is ambiguous and that in light of the ambiguity, the Commission should waive any refund obligation it might otherwise impose for the failure to file for market-based rates prior to the date of its initial operation under the power purchase agreement.

6. On December 18, 2019, Commission Staff issued a letter under delegated authority asking for additional information concerning the ownership of Kimball Wind.⁵ On December 27, 2019, Kimball Wind filed a response to the letter. In its response, Kimball Wind states that it is wholly owned by Aspenall Energies (Delaware) LLC

³ Kimball Wind 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. Kimball Wind also requests authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁴ Kimball Wind November 5 Filing at 12 (quoting 18 C.F.R. § 292.601(c) (2019)).

⁵ *Kimball Wind LLC*, Docket No. ER20-319-000 (Dec. 18, 2019) (delegated order).

(Aspenall Energies), which is owned 99% by Treehouse Investments, LLC, which is owned 99.9% by an individual.

II. Notice of Filings

7. Notice of Kimball Wind's November 5, 2019 filing was published in the *Federal Register*,⁶ with interventions and protests due on or before November 26, 2019. None was filed.

8. Notice of Kimball Wind's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*,⁷ with interventions and protests due on or before November 26, 2019. None was filed.

9. Notice of Kimball Wind's December 27, 2019 filing was published the *Federal Register*,⁸ with interventions and protests due on or before January 17, 2020. None was filed.

III. Discussion

10. As discussed below, we grant Kimball Wind's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and accept its market-based rate tariff, effective January 5, 2020.⁹ In addition, we grant Kimball Wind's request for certain other waivers commonly granted to market-based rate sellers, except as noted herein, and we deny Kimball Wind's request for waiver of any refund obligations.¹⁰

⁶ 84 Fed. Reg. 61,610 (Nov. 13, 2019).

⁷ 84 Fed. Reg. 61,609 (Nov. 13, 2019).

⁸ 85 Fed. Reg. 305 (Jan. 3, 2019).

⁹ We note that Kimball Wind 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 (OATT) requirements to offer ancillary services to its own customers. If Kimball Wind seeks such authority, it must make the required showing and receive Commission authorization prior to making such sales. *See Third-Party Provision of Ancillary Servs.; Accounting & Fin. Reporting for New Elec. Storage Techs.*, Order No. 784, 144 FERC ¶ 61,056, at PP 200-02 (2013), *order on clarification*, Order No. 784-A, 146 FERC ¶ 61,114 (2014).

¹⁰ We remind Kimball Wind that it must submit required filings on a timely basis or face possible sanctions by the Commission.

A. Market-Based Rate Authorization

11. 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.¹¹

1. Horizontal Market Power

12. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹² 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.¹³

13. Kimball Wind represents that its entire capacity is committed to MEAN pursuant to a long-term, 20 year power purchase agreement. Kimball Wind represents that there is no generation capacity that is owned or controlled by any affiliates of Kimball Wind in the relevant balancing authority area or any other market except for two QFs located in the MISO market, both of which have long-term power contracts for the entire capacity of the facilities. Based on Kimball Wind's representations, we find that Kimball Wind satisfies the Commission's requirements for market-based rates regarding horizontal market power.

2. Vertical Market Power

14. 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 OATT on file or that the seller has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) or satisfies the requirements for blanket waiver under 18 C.F.R. §35.28(d)(2).¹⁴

¹¹ Order No. 697, 119 FERC ¶ 61,295 at PP 62, 399, 408, 440.

¹² *Id.* P 62.

¹³ *Id.* PP 33, 62-63.

¹⁴ See *Open Access & 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 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,

15. Kimball Wind represents that neither it nor any of its affiliates own, operate, or control electric transmission facilities in the United States, other than interconnection facilities that are used to connect affiliated electric generation resources to the transmission grid.

16. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁵ 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).¹⁶ 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.¹⁷ 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.¹⁸

17. Kimball Wind states that neither it nor any of its affiliates own, operate, or control any intrastate natural gas transportation, intrastate natural gas storage or distribution facilities in the United States. Kimball Wind also states that neither it nor any of its affiliates own, operate, or control sources of coal supplies or facilities used in the transportation of coal supplies such as barges or rail cars.

18. Finally, Kimball Wind affirmatively states that it and its affiliates have not erected barriers to entry and will not erect barriers to entry.

for entities that own interconnection facilities); *see also Oildale Energy, LLC*, 153 FERC ¶ 61,013, at PP 12-14 (2015).

¹⁵ Order No. 697, 119 FERC ¶ 61,295 at P 440.

¹⁶ Order No. 697-A, 123 FERC ¶ 61,055 at P 176; *see also* Order No. 816, 153 FERC ¶ 61,065 at PP 207-12.

¹⁷ Order No. 697, 119 FERC ¶ 61,295 at P 447; *see also* Order No. 816, 153 FERC ¶ 61,065 at PP 354, 356.

¹⁸ Order No. 697, 119 FERC ¶ 61,295 at P 446.

19. Based on Kimball Wind's representations, we find that Kimball Wind satisfies the Commission's requirements for market-based rate authority regarding vertical market power.

B. Other Waivers, Approvals, and Authorizations

20. Kimball Wind requests 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 (with the exception of the provisions of Part 101 that apply to hydropower licensees with respect to licensed hydropower projects), and 141 of the Commission's regulations, except sections 141.14 and 141.15; and (3) blanket authorization under section 204 of the FPA¹⁹ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

21. We grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.²⁰ Notwithstanding the waiver of the

¹⁹ 16 U.S.C. § 824c.

²⁰ 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 984-85 (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. Part 101 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 345-50; *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 984 & 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)).

accounting and reporting requirements here, the Commission expects Kimball Wind to keep its accounting records in accordance with generally accepted accounting principles.

22. The next time Kimball Wind 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.²¹

C. Reporting Requirements

23. An entity with market-based rate authorization must file Electric Quarterly Reports (EQRs) with the Commission, consistent with Order Nos. 2001²² and 768,²³ to fulfill its responsibility under FPA section 205(c)²⁴ to have rates on file in a convenient form and place.²⁵ Kimball Wind must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.²⁶ Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which Kimball

²¹ See Order No. 697, FERC 119 FERC ¶ 61,295 at Appendix C, Order No. 697-A, 123 FERC ¶ 61,055 at P 384.

²² *Revised Pub. Util. Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107, *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).

²³ *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, 140 FERC ¶ 61,232 (2012), *order on reh'g and clarification*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

²⁴ 16 U.S.C. § 824d(c).

²⁵ See *Revisions to Elec. Quarterly Report Filing Process*, Order No. 770, 141 FERC ¶ 61,120, at P 3 (2012) (citing Order No. 2001, 99 FERC ¶ 61,107 at P 31).

²⁶ Order No. 770, 141 FERC ¶ 61,120.

Wind may be subject to refund, civil penalties, and/or revocation of market-based rate authority.²⁷

24. Kimball Wind 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.²⁸

25. In Order No. 697, the Commission created two categories of sellers.²⁹ 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. 888³⁰); 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

²⁷ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10(b). Forfeiture of market-based rate authority may require a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

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

²⁹ Order No. 697, 119 FERC ¶ 61,295 at P 848.

³⁰ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-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).

issues.³¹ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.³²

26. Kimball Wind represents that it and its 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 Kimball Wind or its affiliates; (4) are not affiliated with a franchised public utility in the same region as generation assets owned or controlled by Kimball Wind or its affiliates; and (5) do not raise other vertical market power issues.

27. Based on Kimball Wind's representations, we designate Kimball Wind as a Category 1 seller in all regions. The Commission reserves the right to require an updated market power analysis at any time for any region.³³

D. Refunds

28. Finally, we deny Kimball Wind's request for waiver and direct Kimball Wind to make refunds for wholesale sales made during the period it was out of compliance with section 205 of the FPA. Kimball Wind has not shown that the sales are exempt under 18 C.F.R. § 292.601(c)(1) and we are not persuaded by Kimball Wind's argument that the PURPA exemption rule is ambiguous or that the Commission should waive any refund obligation.

29. The Commission has noted that if an entity makes sales without authority it will require the utility to refund to its customers the time-value of the gross revenues collected, calculated pursuant to 18 C.F.R. § 35.19a of the Commission's regulations,³⁴ for the entire period that the rate was collected without Commission authorization.³⁵ In addition to returning the time value of the revenues collected for the period the rate was

³¹ 18 C.F.R. § 35.36(a) (2019).

³² Order No. 697, 119 FERC ¶ 61,295 at P 850.

³³ *Id.* P 853.

³⁴ 18 C.F.R. § 35.19a (2019).

³⁵ *Prior Notice & Filing Requirements Under Part II of the Fed. Power Act*, 64 FERC ¶ 61,139, at 61,980, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

charged without Commission authorization, when dealing with market-based rates that are not timely filed, the Commission also has stated that:

[T]he utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate. . . . [T]he 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.³⁶

30. For a QF like Kimball Wind, the difference between the market-based rate and the cost-justified rate would be the difference between the QF's rate collected and its avoided cost rate (or, if it has no such avoided cost rate, a reasonable proxy for such rate).³⁷ Kimball Wind should identify its avoided-cost rate in its refund report ordered below (or, if it has no such avoided cost rate, a reasonable proxy for such rate).

31. Kimball Wind is directed to make refunds, with interest, within 30 days of the date of this order. Additionally, Kimball Wind is directed to submit a refund report within 15 days thereafter, regarding the basis for and calculations of the refunds paid.³⁸

The Commission orders:

(A) Kimball Wind's market-based rate tariff is hereby accepted for filing, effective January 5, 2020, 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.

³⁶ *Id.*

³⁷ 18 C.F.R. § 292.304(a) (2019); *Mendota Hills LLC*, 110 FERC ¶ 61,222, at P 26 (2005).

³⁸ When submitting the report, Kimball Wind should use Type of Filing Code 1190 – Refund Report.

(D) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted. Kimball Wind is hereby authorized to issue securities and assume obligations or liabilities as guarantor, endorser, 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 Kimball Wind, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(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 Kimball Wind's issuance of securities or assumptions of liability.

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

(G) Kimball Wind is hereby ordered to make refunds, with interest, within 30 days of the date of this order, as discussed in the body of this order. Kimball Wind is hereby directed to submit a refund report within 15 days thereafter, regarding the basis for and calculations of the refunds paid. Such refunds shall include the period that market-based rates were collected without Commission authorization, i.e., June 2018 to January 4, 2020.

(H) Kimball Wind 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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.