

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

H.Q. Energy Services (U.S.) Inc.

Docket Nos. ER97-851-012
ER97-851-013
ER97-851-015

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS

(Issued May 26, 2005)

1. In this order, we accept an updated market power analysis filed by H.Q. Energy Services (U.S.) Inc. (H.Q. Energy). We accept also the revisions to H.Q. Energy's market-based rate tariff that incorporate the Commission's market behavior rules.¹ As discussed below, we conclude that H.Q. Energy satisfies the Commission's standards for market-based rate authority. This order benefits customers by reviewing the conditions under which market-based rate authority is granted, thus ensuring that the prices charged for jurisdictional sales are just and reasonable. H.Q. Energy's next updated market power analysis is due three years from the date of this order.

Background

2. H.Q. Energy states that it is a wholly-owned indirect subsidiary of Hydro-Québec, a government corporation in Quebec, Canada. H.Q. Energy states that it and its affiliates do not own generation, transmission, or distribution facilities in the United States, except for the 50-percent ownership interest of its affiliate, TransÉnergie U.S. Ltd. (TransÉnergie), in the Cross Sound Cable Interconnector facility (Cross Sound Cable)² in the Northeast. H.Q. Energy states that it controls

¹ First Revised FERC Rate Schedule No. 1, First Revised Sheet Nos. 1-4 (Supersedes First Revised FERC Rate Schedule No. 1, Original Sheet Nos. 1-4).

² H.Q. Energy states that the Cross Sound Cable is a merchant 330 MW direct current transmission link between the ISO New England Inc. (ISO-NE) and
(continued...)

via contract approximately 120 MW of capacity in the ISO-NE market, and does not have a franchised retail service territory in the United States. H.Q. Energy also states that, although divisions of Hydro-Québec own and control facilities for the generation, transmission and distribution of electricity, with the exception of the Cross Sound Cable, such facilities are located outside of the United States in Quebec.

3. On November 9, 2000, H.Q. Energy filed an updated market power analysis pursuant to the Commission's order granting H.Q. Energy authority to sell electric energy and capacity at market-based rates.³ The submittal also included proposed revisions to its market-based rate tariff to provide for the sale of specified ancillary services and the reassignment of transmission rights.

4. On November 12, 2003, as amended on December 22, 2003, H.Q. Energy submitted its second updated market power analysis. H.Q. Energy reported no material changes in status since its November 2000 filing that might affect the Commission's determination that H.Q. Energy lacks market power.

5. On January 18, 2005, H.Q. Energy submitted a revised updated market power analysis pursuant to the Commission's order issued on May 13, 2004.⁴ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004.⁵ H.Q. Energy also submitted revised tariff sheets incorporating the market behavior rules.⁶

the New York Independent System Operator, Inc. (NYISO) markets. It adds that non-discriminatory service over this facility is provided under tariff arrangements approved by the Commission. *See TransÉnergie U.S. Ltd.*, 91 FERC ¶ 61,230, *order on compliance*, 91 FERC ¶ 61,347 (2000) (*TransÉnergie*).

³ *H.Q. Energy Services (U.S.) Inc.*, 81 FERC ¶¶61,184, 61,811 (1997), *reh'g denied*, 82 FERC ¶ 61,234 (1998), *appeal dismissed*, *Grand Council of the Crees v. FERC*, 198 F.3d 950 (D.C. Cir. 2000) (*H.Q. Energy*).

⁴ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (May 13 Order).

⁵ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

⁶ *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003) (November 17 Order), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order).

6. In its January 18 Filing, H.Q. Energy submitted the pivotal supplier screen and the wholesale market share screen for the ISO-NE and the NYISO markets. H. Q. Energy also provided updated information on the transmission market power, barriers to entry, and affiliate abuse prongs of the Commission's market-based rate analysis. H.Q. Energy stated that it cannot exercise generation market power, transmission market power, nor erect barriers to entry or engage in affiliate abuse.

Notices of Filings and Responses

7. Notice of H.Q. Energy's November 9, 2000 filing was published in the *Federal Register*, 65 Fed. Reg. 70,704 (2000), with interventions and protests due on or before November 30, 2000, extended to December 7, 2000.⁷ Filing motions to intervene were: Enron Power Marketing, Inc. (Enron); New York State Electric & Gas Corporation; Niagara Mohawk Energy Marketing, Inc.; NRG Power Marketing, Inc.; and Vermont Public Power Supply Authority and Massachusetts Municipal Wholesale Electric Company (jointly, Vermont-Massachusetts). Filing motions to intervene out of time were: Coral Power, L.L.C. (Coral); the Natural Resources Defense Council (Natural Resources); and, Southern Energy New York, L.L.C., Southern Energy New England, L.L.C., and Southern Company Energy Marketing L.P. (jointly, Southern). Protests were filed jointly by Enron and Coral (Enron-Coral), and by Vermont-Massachusetts. Out of time protests were filed by Natural Resources and Mouvement Au Courant (Au Courant), a Canadian natural resources organization that had intervened previously in these proceedings.

8. Enron-Coral, Natural Resources, Au Courant, and Vermont-Massachusetts protested continuation of H.Q. Energy's market-based rate authority, arguing that the hub and spoke market power analysis is inadequate. Enron-Coral alleged that H.Q. Energy, together with Hydro-Québec, is exercising generation market power during periods of peak usage in the New York and New England markets. Vermont-Massachusetts objected that H.Q. Energy and its affiliates have the ability to affect market prices in New England Power Pool (NEPOOL) by withholding generation from the market. Au Courant asked the Commission to re-evaluate H.Q. Energy's market power as soon as it replaces the hub and spoke method.

9. Enron-Coral protested that Hydro-Québec makes access to its Canadian transmission system uneconomic and has a discriminatory rate structure. Enron-Coral therefore asked the Commission to condition continuation of H.Q. Energy's

⁷ Notice of November 30, 2000 in Docket No. ER97-851-012.

market-based rate authority on Hydro-Québec implementing a market structure that meets the non-discriminatory open-access principles required in the United States, and that Hydro-Québec's activities in the United States market be subject to meaningful oversight by the NYISO or ISO-NE market monitoring unit.

10. Au Courant and Natural Resources objected that the 1997 Order was predicated on the assumption that Quebec's energy control board, the *Régie de l'énergie* (Régie), would have jurisdiction over transmission matters in Quebec comparable to the Commission's jurisdiction in the United States. They stated further that the Régie is not working according to the provisions of its enabling act, and asked the Commission to consider this factor when re-evaluating H.Q. Energy's market power.

11. Vermont-Massachusetts asked the Commission not to extend H.Q. Energy's market-based rate authority to include ancillary services because "a number of ancillary service markets in NEPOOL have exhibited pricing behavior that raises questions of market power."⁸

12. On December 21, 2000, H.Q. Energy filed a motion to answer and its answer. H.Q. Energy denied that it, acting with Hydro-Québec, has market power. It said that its bids into energy markets are subject to monitoring on the same basis as any marketer relying on generation in the United States or Ontario, Canada, and that the examples cited by Enron-Coral are appropriate for market participants responding to market signals. H.Q. Energy states that the location of Hydro-Québec's generation is not a source of market power, and that comparison of the amount of power that Hydro-Québec can deliver against the quantity of energy available in the New York and New England markets demonstrates that Hydro-Québec cannot be a dominant market participant. H.Q. Energy continued that calculation of Hydro-Québec's transmission rates is decided within Quebec, in accordance with Quebec law, and that any challenge to the Régie's ratemaking methodology should be lodged with that body. Moreover, it continued, Hydro-Québec charges itself the same transmission rates for wholesale transactions for export to the United States as it charges United States wheeling customers under its open access transmission tariff, and otherwise complies with the separation of functions and other aspects of its code of conduct.

13. With respect to Vermont-Massachusetts' protest, H.Q. Energy responded that the protestors misunderstood the authorization sought. H.Q. Energy stated that it asked for the same authorization to market ancillary services that

⁸ Vermont-Massachusetts' November 30, 2000 filing in Docket No. ER97-851-012 at 3-4.

Commission granted others, *i.e.*, authorization to sell at market-based rates those ancillary services for which market-based rates are permitted at the time of the transaction and authorized for all entities with market-based rates.

14. Notice of H.Q. Energy's November 12, 2003 filing was published in the *Federal Register*, 68 Fed. Reg. 66,406 (2003), with interventions or protests due on or before December 3, 2003. In response, the Interconnection Rights Holders Management Committee⁹ filed a motion to intervene with no substantive comments.

15. Notice of H.Q. Energy's January 18 Filing¹⁰ was published in the *Federal Register*, 70 Fed. Reg. 5178 (2005), with interventions or protests due on or before February 8, 2005. None was filed.

Discussion

Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings. Additionally, given their interests and the absence of undue prejudice or delay, we will grant the unopposed motions for late intervention of Coral, Natural Resources, and Southern. We will also accept the late-filed protests of Natural Resources and Au Courant.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept H.Q. Energy's answer because it has provided information that assisted us in our decision-making process.

⁹ This committee identified itself as furthering the interests of entities that contracted for exclusive rights to use the transmission capacity of the Hydro-Quebec Interconnection (the United States segment of a transmission interconnection between the systems of Hydro-Québec and NEPOOL).

¹⁰ The notice was issued originally under Docket No. ER05-464-000, a docket number that was subsequently corrected. See April 4, 2005 Errata Notice in Docket No. ER97-851-015.

Market Based Rate Authorization

18. 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.¹¹

19. As discussed below, the Commission concludes that H.Q. Energy satisfies the Commission's standards for market-based rate authority.

Generation Market Power

20. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. The Commission has reviewed H.Q. Energy's generation market power screen analyses for the ISO-NE and the NYISO markets and has determined that H.Q. Energy passes the screens in those markets. Accordingly, the Commission finds that H.Q. Energy satisfies the Commission's generation market power standard for the grant of market-based rate authority.

21. With regard to the protests filed in response to H.Q. Energy's November 9, 2000 market power analysis, we note that the Commission has now abandoned the hub and spoke analysis, as discussed in the April 14, May 13, and July 8 Orders. In addition, we have reviewed H.Q. Energy's potential to exercise market power in generation under the two new indicative screens, the pivotal supplier screen and the wholesale market share screen. As discussed above, the Commission finds that H.Q. Energy satisfies the Commission's generation market power standard for market-based rate authority.

22. In light of the fact that H.Q. Energy has submitted the market behavior rules pursuant to the Market Behavior Rules Order, and given the existence of the NE-ISO and NYISO's Commission-approved market monitoring and mitigation, we believe that the Protestors' concerns have been addressed. In the April 14 Order, the Commission noted that structured markets with market monitoring and mitigation generally result in a market where prices are transparent and attempts to exercise market power are sufficiently mitigated.¹² The Commission noted in the

¹¹ 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).

¹² April 14 Order, 107 FERC ¶ 61,018 at P 189.

April 14 Order that markets with Commission-approved market monitoring and mitigation “undertake daily and hourly oversight of seller’s pricing behavior to ensure, consistent with clearly established Commission approved rules, that prices do not exceed competitive levels.”¹³ The ISO-NE market monitoring and mitigation rules have been filed with the Commission as a part of ISO-NE’s Transmission, Markets, and Services tariff.¹⁴ In its tariff (Appendix A to Market Rule 1), ISO-NE specifies the conduct and impact approach for monitoring and mitigating market power. Further, the Protestors did not raise any concerns with H.Q. Energy’s most recent filing. Enron-Coral, Natural Resources, Au Courant, and Vermont-Massachusetts raise no factual issues challenging the effectiveness of ISO-NE’s market monitoring and mitigation. In addition, the Commission has previously found that sufficient mitigation exists in ISO-NE.¹⁵ Thus, we are satisfied that ISO-NE has sufficient rules in place to address instances where transmission constraints would otherwise allow generators to exercise local market power within ISO-NE.

Transmission Market Power

22. H.Q. Energy states that it cannot exercise transmission market power. H.Q. Energy states that the affiliated transmission assets in Quebec and the United States owned by Hydro-Québec and TransÉnergie are either governed by open access provisions or operate under special arrangements approved by the Commission and do not allow H.Q. Energy or its affiliates to exercise transmission market power.¹⁶

23. The Commission has clarified that its concerns are more limited for foreign transmission-owning entities than for transmission-owning entities in the United States. The Commission has further stated that its concern is not transmission

¹³ *Id* at P 190.

¹⁴ ISO-NE’s market monitoring and mitigation rules are located in Appendix A of ISO New England, Inc., FERC Electric Tariff No. 3, Section III – Market Rule 1 – Standard Market Design beginning with Original Sheet No. 7400.

¹⁵ *September Order*, 100 FERC ¶ 61,287 at P 41.

¹⁶ *See H.Q. Energy Services (U.S.) Inc.*, 79 FERC ¶ 61,152 at 61,652-53 (1997); *TransÉnergie*, note 2, *supra*, 91 FERC at 61,838.

service to serve Canadian loads — it is transmission to serve United States load.¹⁷ The Commission expanded its concern to include access for United States competitors into Canadian markets on a reciprocal basis.¹⁸ Thus, the Commission seeks to assure reciprocal service into and out of Canada when Canadian entities seek access to United States markets, but the Commission is not seeking to open intra-Canada electric markets through the imposition of open access tariffs for transactions wholly within Canada.¹⁹

24. Therefore, the Commission requires an entity that seeks market-based rate authority but has a Canadian affiliate owning transmission facilities to demonstrate that its affiliate offers non-discriminatory access to those transmission facilities that competitors of the Canadian seller can use to reach United States markets.²⁰ The Commission has previously found that Hydro-Québec's transmission tariff and TransÉnergie's transmission arrangements meet the standard that the Commission requires for open access transmission services under our jurisdiction. The Commission notes that the terms and conditions of those companies' transmission services are virtually identical to the Commission's *pro forma* tariff in all material respects. The main difference is that while the *pro forma* tariff refers to the Commission as the applicable regulatory agency, their tariffs refer to the Régie.²¹ Similarly, the tariffs substitute Canadian law for United States law - *e.g.* Canadian commercial law in lieu of the Uniform Commercial Code.²² With regard to the Cross Sound Cable partially owned by TransÉnergie, the Commission has determined that it will enhance competition in the ISO-NE and

¹⁷ *Energy Alliance Partnership*, 73 FERC ¶ 61,019 at 61,030 (1995) (*Energy Alliance*).

¹⁸ *TransAlta Enterprises Corp.*, 75 FERC ¶ 61,268 at 61,875 (1996) (*TransAlta*).

¹⁹ *See British Columbia Power Exchange Corporation*, 78 FERC ¶ 61,024 at 61,100 (1997).

²⁰ *See, e.g., TransAlta*, 75 FERC at 61,875; *Energy Alliance*, 73 FERC at 61,030-31

²¹ The Régie Act provides that the Régie will operate as an independent commission to regulate transmission rates on a traditional cost-of-service basis, establish terms and conditions of service and address service complaints.

²² *H.Q. Energy Services (U.S.) Inc.*, 79 FERC ¶ 61,152 at 61,652-53 (1997); *TransÉnergie*, note 2, *supra*, 91 FERC at 61,838.

the NYISO markets by expanding capacity and trading opportunities in these two markets.²³

25. Further, in response to the January 18 Filing, no intervenors have raised transmission market power concerns. Based on H.Q. Energy's representations, the Commission finds that H.Q. Energy satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

26. In response to Enron-Coral's protest that Hydro-Québec makes access to its Canadian transmission system uneconomic and has a discriminatory rate structure, and that Hydro-Québec's activities in the United States market should be subject to meaningful oversight by the NYISO or ISO-NE market monitoring unit, the Commission notes, as discussed above, that Hydro-Québec is subject to the market rules adopted by NYISO and ISO-NE to the extent that they are allowed to participate in those markets.

27. In response to Au Courant's and Natural Resources' protests, the Commission finds that these claims are outside the Commission's jurisdiction and could better be addressed by the Canadian regulatory agencies. The calculation of Hydro-Québec's transmission rates is decided within Quebec, in accordance with Quebec law, and any challenge to the Régie's ratemaking methodology is outside the scope of the Commission's jurisdiction. Moreover, H.Q. Energy stated that Hydro-Québec charges itself the same transmission rates for wholesale transactions for export to the United States as it charges United States wheeling customers under its open access transmission tariff, and otherwise complies with the separation of functions and other aspects of its code of conduct. This comparable treatment is consistent with our *pro forma* OATT.

Other Barriers to Entry

28. H.Q. Energy states that neither it nor its affiliates have dominant control over sites or other scarce inputs into generation. H.Q. Energy further states that neither H.Q. Energy nor its affiliates have the ability to frustrate entry or raise rivals costs due to their control over fuels or delivery systems. H.Q. Energy states that in 2004 it sold all of the indirect interests held in several natural gas distribution and pipeline companies through its equity interests in Noverco, Inc. In addition, no intervenors have raised barriers to entry concerns. Based on these representations, the Commission is satisfied that H.Q. Energy cannot erect barriers to entry.

²³ *Id.*

Affiliate Abuse

29. H.Q. Energy states that prior analyses and previous Commission orders in these proceedings have concluded that the energy-related ventures owned or controlled by H.Q. Energy's affiliates do not raise affiliate abuse issues,²⁴ and that the relevant facts underlying the Commission's finding remain unchanged. We note that H.Q. Energy has on file with the Commission a code of conduct which governs the relationship between it and its affiliates. In addition, no intervenors have raised affiliate abuse concerns. Based on these representations, the Commission finds that H.Q. Energy satisfies the Commission's concerns regarding affiliate abuse.

Market-Based Rate Tariff Revisions

30. H.Q. Energy, in its November 9, 2000 filing, also requested authority to engage in the sale of certain ancillary services, resell firm transmission rights and the reassignment of transmission capacity. Consistent with the Commission's precedent as identified in *FirstEnergy Operating Companies*, 111 FERC ¶ 61,032 (2005), the proposed tariff revisions to H.Q. Energy's tariff have been rejected at the time of filing as outside the scope of that compliance filing without prejudice to H.Q. Energy making a separate filing pursuant to section 205 of the Federal Power Act. Accordingly, the Commission finds that Vermont-Massachusetts' request in this regard has been addressed.

Reporting Requirements

31. 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.²⁵ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²⁶

²⁴ Notes 3 & 16, *supra*. The Commission determined that H.Q. Energy's proposed code of conduct met the Commission's requirements. *H.Q. Energy*, 81 FERC at 61,810.

²⁵ *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

(continued...)

32. H.Q. Energy 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.²⁷ 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. Accordingly, H.Q. Energy 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:

[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.

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>.

²⁶ The exact 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.

²⁷ *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).

33. H.Q. Energy 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.

The Commission orders:

(A) H.Q. Energy's updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

(B) H.Q. Energy's revised tariff sheets incorporating the market behavior rules are hereby accepted for filing, effective December 17, 2003.

(C) H.Q. Energy's next updated market power analysis is due within three years of the date of issuance of this order.

(D) H.Q. Energy is hereby directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariffs to include the change in status reporting requirement adopted in Order No. 652, as discussed in the body of this order.

(E) H.Q. Energy's revised tariff sheets to allow for the sale of certain ancillary services, the reassignment of transmission capacity, the resale of firm transmission rights, are hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.