

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

February 10, 2005

In Reply Refer To:
Elk River Windfarm LLC
Docket No. ER05-365-000

Chadbourne & Parke, LLP
Attn: Adam Wenner, Esq.
1200 New Hampshire Avenue, N.W.
Washington D.C. 20036

Dear Mr. Wenner:

1. On December 21, 2004, Elk River Windfarm LLC (Elk River) 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 It also includes the Commission's market behavior rules.² Elk River's submittal, as discussed below, satisfies the Commission's standards for market-based rate authority and is accepted for filing, effective May 1, 2005, as requested.³

¹ Elk River 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).

³ Rate Schedule FERC No. 1, Original Sheet Nos. 1-10. Waiver of section 35.3 of the Commission's regulations is granted to allow for the effective date noted above.

2. Elk River is a limited liability company organized and existing under the laws of the state of Kansas, with its principal place of business in Portland, Oregon. Elk River will begin construction of an approximately 150 MW wind power electric generation facility (the Project) in the spring of 2005 and expects the project to be placed in service by December 2005. Elk River states that neither it nor any of its affiliates owns or controls any other generation in the Southwest Power Pool (SPP) control area. Elk River states that it is engaged exclusively in the business of owning and operating the Project and selling electric energy produced by the Project at wholesale.

3. Elk River is an affiliate of PPM Energy (PPM), which is an affiliate of PacifiCorp and Scottish Power plc.

Procedural Matters

4. Notice of Elk River's December 21, 2004 filing was published in the *Federal Register*, 70 Fed. Reg. 805 (2005), with motions to intervene and protest to be filed by January 11, 2005. None were filed.

Discussion

Market-Based Rate Authorization

5. 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.⁴ As discussed below, the Commission finds that Elk River satisfies the Commission's standards for market-based rate authority.

6. In its 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. Elk River cites section 35.27 of the Commission's regulations, which provides that applicants shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity constructed after

⁴ 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).

July 9, 1996.⁵ If an applicant sites generation in an area where it or its affiliates own or control other generation assets, the applicant must address whether its new capacity, when added to existing capacity, raises generation market power concerns.⁶

7. Elk River contends that construction of the Project commenced after July 9, 1996. Elk River further states that neither it nor any of its affiliates owns or controls any other generation in the SPP control area. Accordingly, the Commission finds that Elk River satisfies the Commission's generation market power standard for the grant of market-based rate authority.

8. Elk River states that PacifiCorp owns transmission assets in the western United States and operates its transmission assets under an approved open-access transmission tariff (OATT) on file with the Commission.⁷ Based on these representations, the Commission finds that Elk River satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

9. Elk River states that it does not control, and is not affiliated with any entity that controls potential barriers to the electric power business. Elk River further states that neither Elk River nor its affiliates has the ability to site new generation plants or to block others from siting new plants. In addition, Elk River asserts that neither it nor its affiliates owns or controls any resources that could impede potential competition from accessing alternative generation suppliers. Based on these representations, the Commission is satisfied that neither Elk River nor any of its affiliates can erect barriers to entry.

10. Elk River is affiliated with PacifiCorp, which has a franchised service territory. Elk River states that its tariff prohibits it from selling power to, or purchasing power from PacifiCorp (or any other affiliated entity that has a franchised service territory) without first receiving approval from the Commission under section 205 of the Federal Power Act.⁸ Elk River also states that a code of conduct that meets the Commission's standards

⁵ 18 C.F.R. § 35.27(a) (2004). The Commission notes that it intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify section 35.27(a) of its regulations.

⁶ *AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,018 at P 69, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

⁷ *See PacifiCorp*, 98 FERC ¶ 61,224 (2002); *order on reh'g*, 99 FERC ¶ 61,259 (2002).

⁸ 16 U.S.C. § 824d (2000).

for prevention of affiliate abuse is included in Elk River's market-based rate tariff. Based on these representations, the Commission finds that Elk River satisfies the Commission's concerns with regard to affiliate abuse.

11. Elk River 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 Elk River's request.⁹

12. In addition, Elk River proposes to sell additional ancillary services 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 Elk River's request in this regard; however, this grant does not relieve Elk River of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2004).¹⁰

13. Elk River 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.¹¹ Accordingly, the Commission will grant this request.

Other Waivers, Authorizations and Reporting Requirements

14. Elk River 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

⁹ See, e.g., *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001); *Atlantic City Electric Company*, 86 FERC ¶ 61,248, *clarified*, 86 FERC ¶ 61,310 (1999); *Central Hudson Gas & Electric Corporation*, 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 See *Calhoun Power Company*, 96 FERC ¶ 61,056 (2001).

¹¹ See *Southwestern Public Service Company*, 80 FERC ¶ 61,245 (1997); *California Independent System Operator, Inc.*, 89 FERC ¶ 61,153 (1999).

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.

15. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.¹² Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Elk River to keep its accounting records in accordance with generally accepted accounting principles.

16. 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 Elk River should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, 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).

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

18. 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 Elk River. Any such person instead shall file a sworn application providing the following information:

¹² 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 at P 23-24 (October 10, 2002), FERC Stats. & Regs. ¶ 32,558 (2002).

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

19. 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 Elk River's issuances and securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

20. 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.¹³ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁴ Accordingly, Elk River must file its first Electric Quarterly Report no later than 30 days after the first quarter Elk River's rate schedule is in effect.¹⁵

21. Elk River 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. Any change in status must be filed no later than 30 days after the change in status occurs. 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

¹³ *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/Electric/eqr/eqr.htm>.

¹⁴ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

¹⁵ 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.

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.¹⁶

22. The Change in Status Final Rule 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, Elk River is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in the Change in Status Final Rule.

23. Elk River 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.

Linda Mitry,
Deputy Secretary.

¹⁶ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 (2005) (Change in Status Final Rule). This rulemaking was in Docket No. RM04-14-000.