

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

January 21, 2005

In Reply Refer To:
Diablo Winds, LLC
Docket Nos. ER05-222-000 and
ER05-222-001

FPL Energy, LLC
Attn: Mr. Joel D. Newton, Esq.
801 Pennsylvania Avenue, N.W.
Suite 2200
Washington, DC 20004

Dear Mr. Newton:

1. On November 16, 2004, as amended on November 29, 2004, Diablo Winds, LLC (Diablo), 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.¹ The tariff also includes the Commission's market behavior rules.² Diablo's submittal, as discussed below, satisfies the Commission's standards for market-based rate authority and is accepted for filing, effective December 15, 2004, as requested.³

¹ Diablo's tariff provides for the sale of certain ancillary services in the markets administered by PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc. (NYISO), ISO New England (ISO-NE), and California Independent System Operator, Inc. (CAISO). Diablo's tariff also allows for sale of certain ancillary services to third party suppliers in other markets consistent with *Avista Corp.*, 87 FERC ¶ 61,223, *order on reh'g*, 89 FERC ¶ 61,136 (1999) (*Avista*).

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 FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-6. 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.

2. Diablo states that it owns and will operate a wind-powered electric generation facility in Alameda County, California, with a nameplate capacity of up to 18 MW. Diablo will own and operate 31 Vestas-V47 turbines, and the entire output will be sold under a long-term power purchase agreement (PPA) to Pacific Gas & Electric Company (PG&E) until June 30, 2016.

3. Diablo is a direct wholly-owned subsidiary of ESI Energy, LLC, which is a direct wholly-owned subsidiary of FPL Energy, LLC (FPL Energy). FPL Energy is a direct wholly-owned merchant power subsidiary of FPL Group Capital Inc., which is a direct wholly-owned subsidiary of FPL Group, Inc. FPL Group also owns Florida Power & Light (FPL), a franchised public utility that provides wholesale and retail electric service to customers in Florida.

Procedural Matters

4. Notice of Diablo's application and supplement to its application were published in the *Federal Register*, 69 Fed. Reg. 71,028 and 69 Fed. Reg. 71,024 (2004), respectively, with comments, interventions and protests due on or before December 7 and December 9, 2004. None was 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, we conclude that Diablo satisfies the Commission's standards for market-based rate authority.

6. 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. Diablo has prepared both the

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).

pivotal supplier and the wholesale market share screen analyses for the CAISO market.⁵ The Commission has reviewed Diablo's generation market power screen analyses for the CAISO market and has determined that Diablo passes the screens in that market. Accordingly, the Commission finds that Diablo satisfies the Commission's generation market power standard for the grant of market-based rate authority.

7. Diablo states that neither it nor any of its affiliates currently owns or controls transmission or distribution facilities in the CAISO market other than the limited facilities needed to interconnect to the transmission grid. It states that its transmission-owning affiliate, FPL, has an open access transmission tariff (OATT) on file with the Commission. Further, Diablo's proposed tariff prohibits it from selling into peninsular Florida, where FPL's control area is located. Based on Diablo's representation, the Commission finds that Diablo satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

8. Diablo states that neither it nor any of its affiliates owns or controls key resources or factor inputs, such as plant sites, fuel supply or transportation facilities, that could allow Diablo to impose barriers to entry on competing power suppliers. Based on this representation, we are satisfied that neither Diablo, nor any of its affiliates, can erect barriers to entry.

9. In addition to the prohibition on sales into peninsular Florida, Diablo states that it will not make sales or purchases of energy or capacity to any affiliate with a franchised electric service territory without first receiving approval from the Commission pursuant to a separate filing under section 205 of the Federal Power Act, 16 U.S.C. § 824d (2000). Further, Diablo's proposed tariff includes a code of conduct, and the output of Diablo's facility is committed under a long-term PPA to a nonaffiliated entity. Based on this representation, we find that Diablo satisfies the Commission's concerns with regard to affiliate abuse.

10. Diablo 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

⁵ Applicants located in markets administered by an independent system operator (ISO) or a regional transmission organization (RTO) with sufficient market structure, such as PJM, ISO-NE, NYISO and CAISO, may consider the geographic region under the control of the ISO/RTO as the default relevant geographic market for purposes of completing their screen analyses. *See* April 14 Order, 107 FERC ¶ 61,018 at P 187.

Diablo's request.⁶ In addition, Diablo 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 grants Diablo's request in this regard; however, our grant does not relieve Diablo of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2004).⁷ Diablo also requests authority to engage in the sale of certain ancillary services to third party suppliers in other markets consistent with *Avista*. The Commission will grant this request.

11. Diablo also requests that the Commission grant authority to reassign transmission capacity, and to resell firm transmission rights. The Commission finds these provisions to be consistent with our requirements and grants the requests.⁸

Other Waivers, Authorizations and Reporting Requirements

12. Diablo 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) permission to make 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 liabilities.

⁶ 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).

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

⁸ See *Southwestern Public Service Company*, 80 FERC ¶ 61,245 (1997) and *California Independent System Operator, Inc.*, 89 FERC ¶ 61,153 (1999).

13. 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, we expect Diablo to keep its accounting records in accordance with generally accepted accounting principles.

14. 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 Diablo 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).

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

16. 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 Diablo. Any such person instead shall file a sworn application providing the following information:

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

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

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

18. 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.¹⁰ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹¹ Accordingly, Diablo must file its first Electric Quarterly Report no later than 30 days after the first quarter that Diablo's market-based rate tariff is in effect.¹²

19. Diablo is directed to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. These characteristics include, but are not limited to: (1) ownership of generating or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the filing that owns generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.¹³

¹⁰ *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>.

¹¹ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

¹² 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 The Commission issued a Notice of Proposed Rulemaking in Docket No. RM04-14-000 in which the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates. *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004). The change in status reporting requirement outlined herein is subject to the outcome of the rulemaking.

20. Diablo 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.