

FEDERAL ENERGY REGULATORY COMMISSION  
Washington, D.C. 20426

Issued March 3, 2005

In Reply Refer To:  
Bear Swamp Power Company, LLC  
Docket No. ER05-454-000

Patton Boggs LLP  
Attn: Jennifer Lokenvitz Schwitzer, Esq.  
2550 M Street, N.W.  
Washington D.C. 20037

Dear Ms. Schwitzer:

1. On January 14, 2005, Bear Swamp Power Company, LLC (Bear Swamp) 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).<sup>1</sup> It also includes the Commission's market behavior rules.<sup>2</sup> Bear Swamp requests waiver of the code of conduct and the restrictions on sales to affiliates. Bear Swamp's submittal satisfies the Commission's standards for market-based rate authority and is accepted for filing, effective March 15, 2005, as requested.<sup>3</sup>

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<sup>1</sup> Bear Swamp'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), and ISO New England, Inc. (ISO-NE). Bear Swamp'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*).

<sup>2</sup> *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).

<sup>3</sup> FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-4. Waiver of section 35.3 of the Commission's regulations is granted to allow for the effective date noted above.

2. Bear Swamp is a limited liability company with its principal place of business in Millinocket, Maine. Bear Swamp plans to acquire a 589 MW pumped-storage hydroelectric generating facility, and a 10-MW run-of-river hydroelectric generating facility, both located in northern Massachusetts.<sup>4</sup>

3. Bear Swamp states that it is jointly owned by Brascan Corporation, a Canadian power producer that also owns Great Lakes Hydro America (Great Lakes), and Emera, Inc., a Canadian holding company that also owns Bangor Hydro-Electric Company (Bangor Hydro). Through these two parent companies, Bear Swamp is affiliated with several generation facilities located in ISO-NE.

### **Procedural Matters**

4. Notice of Bear Swamp's January 14, 2005, Filing was published in the *Federal Register*, 70 Fed. Reg. 4,835 (2005), with motions to intervene and protests to be filed by February 4, 2005. 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.<sup>5</sup> As discussed below, the Commission finds that Bear Swamp 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. Bear Swamp has prepared both the pivotal supplier and the wholesale market share screen analyses for the ISO-NE market. The Commission has reviewed Bear Swamp's generation market power screen analyses for the ISO-NE market and has determined that Bear Swamp passes the screens

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<sup>4</sup> This is subject to the outcome of a related application under section 203 of the Federal Power Act (FPA) regarding Bear Swamp's acquisition of these facilities, which is currently pending before the Commission in Docket No. EC05-45-000.

<sup>5</sup> 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).

in that market. Accordingly, the Commission finds that Bear Swamp satisfies the Commission's generation market power standard for the grant of market-based rate authority.

7. Bear Swamp states that its affiliate, Bangor Hydro, owns transmission facilities that are under the operational control of the ISO-NE and administered under ISO-NE's open access transmission tariff (OATT) on file with the Commission.<sup>6</sup> Further, Bear Swamp states that the transmission facilities associated with affiliates of Great Lakes, Great Lake Power Limited (GLPL) and Great Lakes Power Trust (GLPT), serve exclusively intra-Canadian customers and are not directly interconnected with the United States.<sup>7</sup> In addition, Bear Swamp states that none of its other affiliates own or control transmission facilities beyond limited interconnection facilities.

8. 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 service to serve Canadian loads, it is transmission to serve United States load.<sup>8</sup> The Commission expanded its concern to include access for United States competitors into Canadian markets on a reciprocal basis.<sup>9</sup> 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.<sup>10</sup>

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<sup>6</sup> *MidContinent Area Power Pool*, 78 FERC ¶ 61,203 (1997).

<sup>7</sup> Bear Swamp states that GLPT has an OATT which was filed as part of Brascan Energy Marketing's 2001 market-based rate application. *Maclaren Energy, Inc.*, Docket Nos. ER01-2104-000 and ER01-2104-001 (August 27, 2001) (unpublished letter order). GLPL's interconnection facilities are operated by the Independent Electricity Market Operator of Ontario (IMO). See *Ontario Energy Trading International Corp.*, 103 FERC ¶ 61,044 (2003). The Commission held that the IMO's market rules provide open access transmission on a comparable, non-discriminatory basis for wheeling through and out of the Province of Ontario

<sup>8</sup> *Energy Alliance Partnership*, 73 FERC ¶ 61,019 at 61,031 (1995) (*Energy Alliance*).

<sup>9</sup> *TransAlta Enterprises Corp.*, 75 FERC ¶ 61,268 at 61,875 (1996) (*TransAlta*).

<sup>10</sup> See *British Columbia Power Exchange Corporation*, 78 FERC ¶ 61, 024 at 61,100 (1997).

9. Therefore, the Commission requires a Canadian entity seeking market-based rate authority to demonstrate that its transmission-owning affiliate offers non-discriminatory access to its transmission system that can be used by competitors of the Canadian seller to reach United States markets.<sup>11</sup> However, if Canadian transmission facilities meet the criteria for waiver of Order No. 888, such a demonstration would not be required.<sup>12</sup> The Commission set forth criteria for waiver of Order No. 888 in *Black Creek Hydro, Inc.*<sup>13</sup> The Commission clarified that it will grant requests for waiver of Order No. 888 by public utilities that can show that they own, operate or control only limited and discrete transmission facilities (facilities that do not form an integrated transmission grid), until such time as the public utility receives a request for transmission service. The Commission noted, however, that all requests for waiver of Order No. 888 that it grants are subject to the condition that the public utility receiving such waiver, should it receive a request for transmission service, must file with the Commission a *pro forma* tariff within 60 days of the date of such request and must comply with any additional requirements that are effective on the date of the request.

10. In this case, we find that the transmission tariff under which Bear Swamp's affiliate, GLPT, will provide transmission service is consistent with or superior to the *pro forma* tariff, and thus satisfies the Commission's transmission market power standard for the grant of market-based rate authority. We find that the GLPT OATT provides for service consistent with that under the *pro forma* tariff. In fact, we find that the transmission tariff under which GLPT will provide transmission service is almost identical to the Commission's *pro forma* OATT. The main difference is that because GLPT is located in Canada the tariff refers to Canadian law rather than to U.S. regulatory authority. In particular, it provides for both point-to-point and network transmission service to be available on a non-discriminatory and comparable basis, for transmission request processes (including OASIS requirements consistent with the *pro forma* OATT), and transmission curtailments consistent with the *pro forma* OATT.<sup>14</sup>

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<sup>11</sup> See *TransAlta*, 75 FERC ¶ 61,268, and *Energy Alliance*, 73 FERC ¶ 61,019.

<sup>12</sup> *Canadian Niagara Power Company*, 87 FERC ¶ 61,070 (1999) (*Canadian Niagara*).

<sup>13</sup> *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232 (1996) (*Black Creek*).

<sup>14</sup> *NorthPoint Energy Solutions, Inc.*, 109 FERC ¶ 61,178 at P 7 (2004).

11. With regard to GLPL, in *Maclaren*, the applicant represented that GLPL only owns or controls limited and discrete transmission facilities.<sup>15</sup> In particular, the applicant represented that GLPL's facilities are located in a sparsely populated part of northwestern Ontario, Canada. The applicant claimed that there is no interest in obtaining service from GLPL. The applicant also provided maps of GLPL's transmission facilities, which support the applicant's claim that GLPL's transmission facilities are "limited and discrete facilities that do not form an integrated transmission grid" under the standard set forth in *Canadian Niagara* and *Black Creek*. Based on these representations the Commission finds that Bear Swamp's affiliate, GLPL, meets the criteria set forth in *Black Creek*, and accordingly GLPL's transmission facilities would meet the criteria for waiver of Order No. 888.

12. However, the Commission notes that, in the future, wholesale power sellers (which could be potential competitors of GLPL) could locate in the service area of GLPL or its Canadian affiliates, and such competitors would need transmission service to wholesale power customers (who themselves could be either potential competitors or potential customers of GLPL) located elsewhere; these wholesale power sellers would need to use these facilities to transmit power to their wholesale customers. Accordingly, consistent with previous Commission orders, the Commission cautions GLPL that in the event that it or a Canadian affiliate denies, delays or requires unreasonable terms, conditions or rates for service over its facilities to a potential competitor, the competitor may file a complaint with this Commission that could result in the revocation of its affiliate's authority to sell power at market-based rates.<sup>16</sup>

13. Bear Swamp states that neither it nor its affiliates can erect other barriers to entry. Bear Swamp states that it is affiliated with the Maritimes and Northeast Pipelines, and this interstate pipeline is subject to the Commission's open access policies. Bear Swamp also states that it is affiliated with Emera Fuels, Inc., which sells products such as fuel oil and industrial lubricants, but does not sell those products in the United States. Bear Swamp further states that neither it nor its affiliates owns or controls new generation sites. Based on these representations, the Commission is satisfied that neither Bear Swamp nor any of its affiliates can erect barriers to entry.

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<sup>15</sup> In *Maclaren*, the applicant stated that both GLPL and GLPT meet the criterion for owning "limited and discrete" facilities under *Black Creek Hydro*. See *Maclaren Energy, Inc.*, Docket Nos. ER01-2104-000 and ER01-2104-001 (submittal on May 24, 2001, as amended July 5, 2001).

<sup>16</sup> See *Canadian Niagara*, 87 FERC ¶ 61,070.

14. Bear Swamp states that its affiliate, Bangor Hydro, no longer has a franchised electric service territory or captive customers, hence there are no affiliate abuse concerns.<sup>17</sup> Bear Swamp requests waiver of the code of conduct and restrictions on sales to Bangor Hydro. To support this request, Bear Swamp argues that, pursuant to the Maine Restructuring Act in 1999, Bangor Hydro was required to divest all its generation assets, and that retail choice has been available since 2000. Bear Swamp states that Bangor Hydro is not the standard offer service provider and is prohibited from bidding to become the standard offer service provider, although Bangor Hydro can serve retail customers if it is ordered to provide standard offer service by the Maine Public Utilities Commission (which did occur in 2000-2002). Further, Bear Swamp states that Bangor Hydro has no captive wholesale customers, serving no customers under cost-based wholesale requirements contracts.

15. The Commission has allowed sales between affiliates at market-based rates as long as it is satisfied that there are no affiliate abuse concerns. The Commission has allowed sales by a power marketer or power producer to its affiliated public utility where there are no captive wholesale customers and where retail ratepayers are protected by the availability of retail choice.<sup>18</sup> The Commission has waived the code of conduct requirement when applicants made a showing there are no captive customers, or when the Commission is satisfied that the public utility's captive wholesale and retail customers are adequately protected against affiliate abuse.<sup>19</sup> On this basis, because customers of Bangor Hydro are protected against affiliate abuse, the Commission finds that Bear Swamp satisfies the Commission's concerns with regard to affiliate abuse and has met the standard for waiver of the code of conduct requirement and the affiliate sales prohibition.<sup>20</sup>

16. Bear Swamp's proposed tariff states that it will not make sales to any affiliate with a franchised electric service territory, should it become so affiliated, except pursuant to a separate filing approved by the Commission under section 205 of the FPA.<sup>21</sup> However,

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<sup>17</sup> Bear Swamp states that since Maine has restructured, Bangor Hydro no longer has a franchised area for the sale of electric energy, as it owns no generation assets and is prohibited from serving retail customers without the consent of the Maine Public Utilities Commission.

<sup>18</sup> See, e.g., *Delmarva Power & Light Co.*, 94 FERC ¶ 61,068 (2001).

<sup>19</sup> See, e.g., *Green Power Partners I LLC*, 88 FERC ¶ 61,005 (1999); *Baltimore Gas & Electric Co.*, 91 FERC ¶ 61,270 (2000).

<sup>20</sup> See also *Duquesne Power, L.P.*, 108 FERC ¶ 61,160 (2004).

<sup>21</sup> 16 U.S.C. § 824d (2000).

the proposed tariff language does not state that Bear Swamp will not make sales to its affiliated public utility “without first receiving” Commission authorization of the transaction under section 205 of the FPA. Therefore, consistent with Commission precedent, Bear Swamp is directed to make a compliance filing within 30 days of the date of issuance of this order to revise its market-based rate tariff to include such language.<sup>22</sup>

17. Bear Swamp 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, and NYISO. Consistent with Commission precedent granting authority to sellers to engage in such transactions in those markets, the Commission will grant Bear Swamp’s request.<sup>23</sup>

18. In addition, Bear Swamp 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 Bear Swamp’s request in this regard; however, this grant does not relieve Bear Swamp of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2004).<sup>24</sup>

19. Bear Swamp 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.<sup>25</sup> Accordingly, the Commission will grant this request.

### **Other Waivers, Authorizations and Reporting Requirements**

20. Bear Swamp 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

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<sup>22</sup> See *Aquila, Inc.*, 101 FERC ¶ 61,331, at P 7-9, 12 (2002).

<sup>23</sup> 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).

<sup>24</sup> See *Calhoun Power Company*, 96 FERC ¶ 61,056 (2001).

<sup>25</sup> 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.

21. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.<sup>26</sup>

Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Bear Swamp to keep its accounting records in accordance with generally accepted accounting principles.

22. 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 Bear Swamp 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).

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

24. 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 Bear Swamp. 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

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<sup>26</sup> 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).



25. 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 Bear Swamp's issuances and securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

26. 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.<sup>27</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>28</sup> Accordingly, Bear Swamp must file its first Electric Quarterly Report no later than 30 days after the first quarter Bear Swamp's rate schedule is in effect.<sup>29</sup>

25. Bear Swamp 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.<sup>30</sup> Any change in status must be filed no later than 30 days after the change in status occurs.

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<sup>27</sup> *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/docs-filing/eqr.asp>.

<sup>28</sup> The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

<sup>29</sup> 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.

<sup>30</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 (2005) (Order No. 652).

26. 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, Bear Swamp 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.

27. Bear Swamp 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.