

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Northeast Utilities Service Company	Docket Nos. ER96-496-010 ER96-496-011 ER96-496-012
Select Energy, Inc.	ER99-14-007 ER99-14-008 ER99-14-009
Select Energy New York, Inc.	ER02-556-003 ER02-556-004
Northeast Generation Company	ER99-4463-001 ER99-4463-002 ER99-4463-003

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS

(Issued March 24, 2005)

1. In this order, the Commission accepts an updated market power analysis filed by Northeast Utilities Service Company (Northeast Utilities), on behalf of the NU Operating Companies,<sup>1</sup> Select Energy, Inc. (Select), Select Energy New York, Inc. (SENY)<sup>2</sup> and

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<sup>1</sup> The NU Operating Companies are: The Connecticut Light and Power Company (Connecticut Light and Power), Western Massachusetts Electric Company (Western Massachusetts Electric), Holyoke Water Power Company (Holyoke Water Power), Holyoke Power and Electric Company (Holyoke Power and Electric), and Public Service Company of New Hampshire.

Northeast Generation Company (NGC) (collectively, Applicants). As discussed below, the Commission concludes that Applicants satisfy 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.

### **Background**

2. On November 27, 2001, Applicants filed an updated market power analysis pursuant to the Commission's orders granting Applicants authority to sell electric energy and capacity at market-based rates.<sup>3</sup> On November 28, 2001, Applicants filed an amended updated market power analysis to correct certain typographical errors. On September 27, 2004, Applicants submitted for filing an updated market power analysis pursuant to the Commission's order issued on May 13, 2004,<sup>4</sup> and also submitted the Commission's market behavior rules.<sup>5</sup> 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.<sup>6</sup>

3. On November 18, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Applicants' submittal. On December 9, 2004, Applicants filed their response to the data request.

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<sup>2</sup> SENY states that it does not have an updated market power analysis currently pending at the Commission. However, SENY asks the Commission, on a going forward basis, to synchronize the dates on which the updated market analyses are due for all of the Applicants. We will grant SENY's request.

<sup>3</sup> See *Northeast Utilities Service Company*, 74 FERC ¶ 61,135 (1996); *Select Energy, Inc.*, 85 FERC ¶ 61,290 (1998); *Northeast Utilities Service Company*, 87 FERC ¶ 61,063 (1999); *Middletown Power LLC*, 89 FERC ¶ 61,151 (1999). The November 2001 filings were made by Northeast Utilities, Select and NGC.

<sup>4</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>5</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) (Market Behavior Rules Order).

<sup>6</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

4. Each of the Applicants is a wholly-owned subsidiary of Northeast Utilities, a registered public utility holding company under the Public Utility Holding Company Act of 1935. Applicants state that Connecticut Light and Power, Western Massachusetts Electric and Public Service Company of New Hampshire are state-regulated utilities in Connecticut, Massachusetts, and New Hampshire, respectively. The Applicants state that the NU Operating Companies have divested many of their generation assets in New England. Applicants state that Holyoke Water Power owns a single 136 MW generation asset and very limited transmission facilities. Applicants further state that Holyoke Power and Electric is a wholly-owned subsidiary of Holyoke Water Power, which owns very limited transmission facilities.

5. For the New York Independent System Operator, Inc. (NYISO) and PJM Interconnection, LLC (PJM) markets, Applicants state that Select, a wholly-owned power marketing subsidiary of NU Enterprises, Inc., serves its basic generation supply load in New Jersey under long-term contracts. Applicants state that Select does not own any generation or transmission assets in PJM. Applicants state that SENY,<sup>7</sup> a wholly-owned power marketing subsidiary of Select, has contractual rights to the output of the Fort Durum plant, a 58.7 MW coal-fired generation facility in New York.

6. Applicants state that they control a total capacity of 3,349 MW in the ISO-NE market, including 2,363 MW of owned and affiliated generation, 927 MW of purchased power, and 58.7 MW remote generation capacities located in the NYISO market.

### **Notice Of Filings And Responsive Pleadings**

7. Notice of Applicants' November 27, 2001 filing was published in the *Federal Register*, 66 Fed. Reg. 63,529 (2001), with interventions or protests due on or before December 18, 2001. Notice of Applicant's November 28, 2001 filing was published in the *Federal Register*, 66 Fed. Reg. 63,692 (2001), with interventions or protests due on or before December 19, 2001. Notices of intervention were filed by the Connecticut Department of Public Utility Control, Maine Public Utilities Commission (Maine

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<sup>7</sup> SENY succeeded to the market-based rate authorization previously granted to Plum Street Energy Marketing, Inc. in *Plum Street Energy Marketing, Inc.*, 76 FERC ¶ 61,070 (1996); *see also Niagara Mohawk Energy Marketing, Inc.*, Docket No. ER98-4527-000 (letter order dated October 9, 1998) (accepting notice of succession changing name from Plum Street Energy Marketing, Inc. to Niagara Mohawk Energy Marketing, Inc.) and *Select Energy New York, Inc.*, Docket No. ER02-556-000 (letter order dated February 11, 2002) (accepting notice of succession changing name from Niagara Mohawk Energy Marketing, Inc. to Select Energy New York, Inc.)

Commission), the Vermont Department of Public Service and the New Hampshire Public Utilities Commission (New Hampshire Commission). A motion to intervene with no substantive comments was filed by the New England Conference of Public Utilities Commissioners. Motions to intervene and protest were filed by Alternate Power Source, Inc. (Alternate Power Source) and Massachusetts Municipal Wholesale Electric Company (Massachusetts Municipal).

8. Notice of Applicants' September 27, 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 60,386 (2004), with interventions or protests due on or before October 18, 2004. None was filed.

9. Notice of Applicants' December 9, 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 76,462 (2004), with interventions or protests due on or before January 3, 2005. None was filed.

10. Massachusetts Municipal filed a protest to Applicants' November 2001 filings urging the Commission to scrutinize the application. It states that in the SMA Order,<sup>8</sup> the Commission did not propose that sales within any of the four existing Independent System Operators (ISOs) be required to meet the Commission's SMA test. As a result, Massachusetts Municipal states, Applicants' filing contains virtually no information concerning the Applicants' generation holdings. However, Massachusetts Municipal states, it is uncertain whether the SMA Order was intended to relieve applicants that have assets in the ISO regions and make sales into those markets from any obligation to submit data concerning these assets or sales prior to obtaining or renewing approval to sell power at market-based rates.

11. Massachusetts Municipal also expresses concern that Applicants may have generation market power, at least in the New England markets. It states that Select operates Northfield Mountain, a pump storage facility, which is New England's largest single unit supplier of ten minute non-spinning reserve services. As such, Massachusetts Municipal states, the manner in which this unit is bid into and made available to the New England market can have significant impacts on the price of reserve services. In addition,

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<sup>8</sup> *AEP Power Marketing, Inc.*, 97 FERC ¶ 61,219 (2001) (SMA Order), *order on reh'g*, April 14 Order, 107 FERC ¶ 61,018, *order on reh'g*, July 8 Order, 108 FERC ¶ 61,026 (2004). In the SMA Order, the Commission announced a new generation market power test, the Supply Margin Assessment (SMA), to be applied to market-based rate applications. In the April 14 Order, the Commission replaced the SMA generation market power test with two indicative screens for assessing generation market power, the pivotal supplier and wholesale share screens.

Massachusetts Municipal states that the extent to which the ISO-NE's market monitoring and mitigation regimen applies to New England's reserve markets is not addressed in Applicants' November 27, 2001 filing.

12. Alternate Power Source alleges that there is evidence that Northeast Utilities and Select have market power in the New England Power Pool (NEPOOL) and have exercised that power in attempts to increase price and to exclude competitors and that market power has not been mitigated. Specifically, Alternate Power Source contends that Northeast Utilities and Select were among a group of suppliers that were alleged to have engaged in anti-competitive conduct that caused the collapse of the Installed Capacity auction markets in New England. Moreover, Alternate Power Source alleges that Northeast Utilities conducts its power purchasing practices in a prejudicial and discriminatory manner by charging its wholesale standard offer supplier for transmission uplift, a component of regional network service under the NEPOOL open access transmission tariff (OATT), while it has not and cannot bill competitive suppliers serving load at retail a similar transmission charge. Alternate Power Source argues that the Commission should not allow those accused of anticompetitive conduct to charge market-based rates until their prior bad acts are fully investigated.

13. Massachusetts Municipal, Maine Commission and New Hampshire Commission state that the Commission should specifically condition the outcome of Applicants' updated market analysis on a requirement that Applicants comply with any new rules or policies that result from the Commission's generic rulemaking proceeding in Docket No. EL01-118 to review methods for analyzing market power.<sup>9</sup>

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<sup>9</sup> See *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 FERC ¶ 61,220 (2001) (Investigation Order). In the Investigation Order, the Commission proposed to condition all new and existing market-based rate tariffs and authorizations to include a broad prohibition against "anticompetitive behavior" and the "exercise of market power." In the Market Behavior Rules Order, 105 FERC ¶ 61,218, the Commission issued a final order, which establishes market behavior rules to govern market-based rate sellers' conduct in the wholesale market. In the Market Behavior Rules Order, the Commission requires sellers to include the market behavior rules at such time as they file any amendments to their market-based rate tariffs or (if earlier) at such time as they seek continued authorization to sell at market-based rates.

## **Discussion**

### **Procedural Matters**

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

### **Market-Based Rate Authorization**

15. 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>10</sup>

16. As discussed below, the Commission concludes that Applicants satisfy the Commission's standards for market-based rate authority.

### **Generation Market Power**

17. 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.<sup>11</sup> In their September 27, 2004 updated market analysis, as amended, Applicants have performed a generation market power analysis using the ISO-NE market. Applicants state that they pass both indicative screens in that market.

18. The Commission has determined that Applicants pass the wholesale market share screen for the ISO-NE market in each of the four seasons considered. The Commission also finds that Applicants pass the pivotal supplier screen for the ISO-NE market. We note that Applicants state that they pass the indicative screens for the NYISO market, where their affiliate, SENY, has a purchase agreement for the output of a 58.7 MW coal-fired plant (with a maximum market share of 0.2 percent). The Applicants also included this 58.7 MW as remote generation in their ISO-NE market analysis. Applicants state that SENY does not have dispatch rights for the output under the agreement but performs the scheduling function for the output of the plant. The Commission reiterates that the

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<sup>10</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).

<sup>11</sup> April 14 Order, 107 FERC ¶ 61,018 at P 71-72.

two screens should be provided for the relevant geographic markets where an applicant owns or controls any amount of capacity. However, even if the Commission were to find that SENY controls this generating capacity, the Commission recently found that an applicant with 844 MW of uncommitted capacity in the NYISO market passed the indicative screens in that market.<sup>12</sup> Thus, we find that Applicants would still pass the screen with 58.7 MW of uncommitted capacity in the NYISO market. In addition, Applicants' power purchases in PJM are committed to basic generation supply load under long-term contracts. Accordingly, the Commission finds that Applicants satisfy the Commission's generation market power standard for the grant of market-based rate authority.

19. The Commission finds that the protest filed by Massachusetts Municipal regarding the level of detail concerning the Applicant's generation holdings in Applicants' November 2001 filing is moot. We note that in the April 14 Order, the Commission abandoned the SMA screen, along with the ISO/RTO exemption, in favor of two indicative screens for assessing generation market power. For this reason, the Commission will dismiss the protest as moot.

20. The Commission will also dismiss Massachusetts Municipal's protest concerning the New England reserve markets. The instant proceeding concerns Applicants' updated market power analysis, which Applicants have submitted in support of their market-based rate authorization. The Commission's review of the updated market power analysis involves an examination of whether Applicants satisfy the Commission's standards for market-based rate authority, which address generation market power, transmission market power, other barriers to entry, and affiliate abuse/reciprocal dealing, such that Applicants may continue to make sales of energy [and capacity] at market-based rates. The examination of ancillary services markets, such as the non-spinning reserves that are the subject of Massachusetts Municipal's protest, is not part of the Commission's review of an updated market power analysis. On this basis, Massachusetts Municipal's protest is outside the scope of this proceeding. While we appreciate the concerns raised by Massachusetts Municipal, whether the Commission should expand its generation market power screens to cover generation-based ancillary services such as reserves and regulation service is more appropriately raised in the generic rulemaking proceeding in Docket No. RM04-7-000.

21. The Commission will also reject Alternate Power Source's protest. We find that Alternate Power Source has not provided sufficient support to substantiate its claims concerning the alleged anti-competitive conduct of several of the Applicants. Moreover,

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<sup>12</sup> See *TransCanada Hydro Northeast Inc.*, 110 FERC ¶ 61,103 (2005).

we note that the market design in New England has changed since this protest was filed over three years ago, with improvements such as the adoption of a day-ahead and real-time market, locational marginal pricing, mechanisms to mitigate market power, demand response programs, and a redesigned installed capacity market.<sup>13</sup> We believe these improvements should alleviate many of Alternate Power Source's concerns.

### **Transmission Market Power**

22. The ISO-NE market is a Commission-approved RTO with a Commission-approved OATT<sup>14</sup> and Commission-approved market monitoring and mitigation procedures in place.<sup>15</sup> Applicants state that the transmission they own is available for use by third parties pursuant to the NEPOOL OATT. Further, no intervenors have raised transmission market power concerns. Based on Applicants' representations, the Commission finds that Applicants satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

23. Applicants state that they reported in their November 27, 2001 market power analysis filing that neither they nor their affiliates are able to control entry barriers that could be used to block competitors. They further state that in granting Applicants market-based rate authority on three separate occasions, the Commission held that the Applicants' applications did not raise any issue with respect to barriers to entry. Applicants state that there have been no developments since the November 27, 2001 filing that would warrant a change to this conclusion. In addition, no intervenors have raised barrier to entry concerns. Based on Applicants' representations, the Commission is satisfied that Applicants cannot erect barriers to entry.

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<sup>13</sup> See *New England Power Pool*, 100 FERC ¶ 61,287, *order on reh'g*, 101 FERC ¶ 61,344 (2002), *order on reh'g*, 105 FERC ¶ 61,211 (2003).

<sup>14</sup> See *New England Power Pool*, 83 FERC ¶ 61,045 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001).

<sup>15</sup> See *ISO New England*, 106 FERC ¶ 61,280 (2004), *order on reh'g*, 109 FERC ¶ 61,147 (2004), *order on reh'g*, 110 FERC ¶ 61,111 (2005).

### **Affiliate Abuse**

24. Applicants state that they reported in their November 27, 2001 market power analysis filing that the NU Operating Companies no longer have any captive wholesale or retail customers. They state that on December 4, 2001, the Commission accepted the NU Operating Companies' filing under section 205 of the Federal Power Act<sup>16</sup> to cancel their respective codes of conduct and to remove certain restrictions on inter-affiliate transactions.<sup>17</sup> Applicants state that this approval was based on restructuring initiatives in the states served by the NU Operating Companies. They further state that none of the NU Operating Companies have any captive wholesale customers. Applicants further note that the Commission has recently adopted Order No. 2004<sup>18</sup> and states that this strengthens the Standards of Conduct governing the relationship between the Northeast Utilities' transmission system personnel and Northeast Utilities energy affiliates. In addition, no intervenors have raised affiliate abuse concerns. Based on Applicants' representations, the Commission finds that the Applicants satisfy the Commission's concerns with regard to affiliate abuse.

### **Market Behavior Rules**

25. In the Market Behavior Rules Order, the Commission directed market-based rate sellers to include as an amendment to their market-based rate tariff the market behavior rules at such time as they seek continued authorization to sell at market-based rates.<sup>19</sup> In their September 27 filing, Applicants submitted revised tariff sheets to amend their tariffs

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

<sup>17</sup> Delegation Letter Order issued in Docket No. ER02-217-000.

<sup>18</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004, 68 Fed. Reg. 69,134 (December 11, 2003), FERC Stats. & Regs. ¶ 31,155 (2003) (Order No. 2004), *order on reh'g*, Order No. 2004-A, 69 Fed. Reg. 23,562 (April 29, 2004), FERC Stats. & Regs. ¶ 31,161 (2004). *order on reh'g and clarification*, Order No. 2004-B, 69 Fed. Reg. 48,371 (August 10, 2004), FERC Stats. & Regs. ¶ 31,166 (2004), *order on reh'g and clarification*, Order No. 2004-C, 70 Fed. Reg. 284 (January 4, 2005), FERC Stats. & Regs. ¶ 31,172 (2005), *reh'g pending*.

<sup>19</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003) at Ordering Paragraph (A), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order).

to include the market behavior rules set forth in Appendix A to the Market Behavior Rules Order. The Commission accepts the revised tariff sheets for filing.<sup>20</sup>

### **Reporting Requirements**

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>21</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>22</sup>

27. Applicants 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.<sup>23</sup> 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, Applicants are directed, within 30 days

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<sup>20</sup> In light of the fact that Applicants have submitted the market behavior rules in response to the Market Behavior Rules Order, which resulted from the generic rulemaking proceeding in Docket No. EL01-118, we will dismiss the protests noted above on this issue as moot.

<sup>21</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>22</sup> 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.

<sup>23</sup> *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).

of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the following provision:

[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.

28. Applicants are directed to file an updated market 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) Applicants' updated market power analysis is hereby accepted for filing as discussed in the body of this order.

(B) Applicants' next updated market power analysis is due within three years of the date of this order as discussed in the body of this order.

(C) Applicants are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to include the change in status reporting requirement adopted in Order No. 652.

(D) Applicants' revised tariff sheets incorporating the market behavior rules are hereby accepted for filing effective December 17, 2003.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.