Accordingly, the request for rehearing is deemed denied under rule 713(f) of the Commission's Rules of Practice and Procedure.[2]

[¶ 61,019]

Energy Alliance Partnership, Docket No. ER95-1491-000

Order Denying Application for Market-Based Rates Without Prejudice

(Issued October 3, 1995)

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On August 4, 1995, Energy Alliance Partnership (Energy Alliance) filed an application for Commission authorization to transact as a power marketer at market-based rates. Energy Alliance argues, among other things, that its affiliation with a Canadian electric utility is irrelevant for purposes of determining whether it or any of its affiliates has market power in generation or transmission markets.

As explained below, we find that Energy Alliances's affiliation is not irrelevant, and we will apply the same general standards for reviewing applications to sell generation at market-based rates as apply to any other public utility. Based on the filing before us, we cannot make a finding that Energy Alliance lacks (or adequately has mitigated) market power, and thus qualifies for market-based rate authorization under our conventional standards applicable to all public utilities. Accordingly, Energy Alliance either may re-file its request for market-based rates with adequate support to show that it and its affiliates lack (or have mitigated) market power or, alternatively, it can file for authorization to transact on a cost basis.

Background

Description of Applicant and its Affiliates

Energy Alliance states that it will be a Delaware general partnership with its principal place of business in Pittsburgh, Pennsylvania. Energy Alliance intends to operate as a marketer and broker of electric power and also will arrange customer services in other related areas such as transmission, fuels conversion, consulting services and emissions allowance trading. In acting as a marketer, Energy Alliance intends to take title to power and will be a public utility subject to the Commission's jurisdiction. In acting as a broker, Energy Alliance intends to bring buyers and sellers together but will not actually take title to or sell power.

Subsidiaries of Consolidated Natural Gas Company (Consolidated), Hydro-Quebec and Noverco Inc. (Noverco) each will hold a one-third general partnership interest in Energy Alliance.

Consolidated is an integrated natural gas holding company involved in the buying and selling of natural gas as well as the ownership of several local gas distribution utilities and interstate natural gas pipelines. The pipelines owned by Consolidated are open-access carriers. Consolidated will hold its interest in Energy Alliance through CNG Energy Arbitrage Corporation, a corporation formed under the laws of Delaware as a subsidiary of CNG Energy Services Corporation, a Delaware corporation wholly owned by Consolidated. Other than an interest in Lakewood Cogeneration, L.P. and certain other qualifying facilities (QFs), neither Consolidated nor any of its affiliates own any electric transmission or generation facilities.

H.Q. Energy Services (U.S.) Inc., a Delaware corporation which is wholly owned by Services d'Energie HQ Inc., a wholly owned subsidiary of Hydro-Quebec, also will hold a one-third general partnership interest in Energy Alliance. Hydro-Quebec is a Canadian electric utility company wholly owned by the government of the Province of Quebec, Canada. Neither Hydro-Quebec nor any of its affiliates own any electric transmission or generation facilities in the United States.

Noverco Energy Services (U.S.) Inc., a Delaware corporation which is wholly owned by Noverco, a Canadian holding company headquartered in Montreal, Canada, will hold the remaining one-third general partnership interest in Energy Alliance. Noverco is the individual owner of Vermont Gas System, Inc., a gas utility company. Neither Noverco nor any of it affiliates own any electric transmission or generation facilities in the United States.

Energy Alliance's Proposed Market-Based Sales Tariff

Energy Alliance filed a tariff under which it proposes to sell electricity at market-based

[2] 18 C.F.R. § 385.713(f) (1995).

rates. In support of this request, Energy Alliance states that it will sell electric energy and natural gas to wholesale customers to the extent permitted without becoming an electric utility company or a gas utility company. Energy Alliance states that no other partners or affiliates of Energy Alliance own any generation in the United States. Energy Alliance further states that neither Energy Alliance nor any of its affiliates owns or controls any transmission facilities in the United States or has a franchised service territory in the United States.

Energy Alliance states that neither it nor any of its affiliates has generation dominance in any United States market. Energy Alliance notes that while Consolidated owns interests in generating facilities in the United States, all of which are QFs or exempt wholesale generators (EWGs), the entire capacity of these facilities is committed to purchasers under long-term contracts.[1] Moreover, Energy Alliance states that any sales by Energy Alliance will be made at arm's-length to non-affiliated purchasers who determine that such power is more economic than their alternative sources of supply.

Energy Alliance states that neither it nor any of its affiliates has transmission market power in any relevant market in the United States. Energy Alliance explains that it does not own, operate or control electric power transmission facilities in the United States. Energy Alliance argues that the extensive transmission system owned and operated by Hydro-Quebec in Canada is irrelevant to the question of whether Energy Alliance or any of its affiliates possesses transmission market power in the United States. Energy Alliance explains that it will not act as Hydro-Quebec's agent nor market Hydro-Quebec electricity. Energy Alliance states that executives and employees of HQ Energy Services (U.S.) Inc. will be independent from Hydro-Quebec and deal with Hydro-Quebec only on an arm's-length basis. Energy Alliance also states that to the extent Hydro-Quebec or other Canadian utilities sell power to Energy Alliance, transmission, interconnection and other services necessary to deliver power across Canada and into the United States will be provided through negotiated transmission agreements developed consistent with Canadian law.

Certain of Energy Alliance's affiliates are involved in various gas ventures. Energy Alliance states that both Consolidated's affiliates and Noverco's affiliate are involved in local gas distribution activities in the United States. Therefore, Energy Alliance states that neither it nor any of its subsidiaries or affiliates controls any other inputs to generation or has the potential to erect or otherwise control other barriers to entry.

Energy Alliance recognizes that there is a significant concern regarding the possibility of abusive affiliate dealing. Energy Alliance states that its proposed marketing activities do not pose any potential for abusive affiliate dealings. Energy Alliance explains that it is not: (1) affiliated with any United States electric utility from which profits could be diverted; (2) affiliated with any electric utility in the United States that could provide it with services on a preferential basis; and (3) affiliated with any electric utility in the United States that could refuse to compete for business with Energy Alliance. Energy Alliance states that it is not affiliated with any entity that sells electricity to retail customers in the United States or that provides transmission services for electricity in bulk power markets in the United States. Energy Alliance states that Hydro-Quebec, the affiliate with a captive service territory, does not serve any retail customers in the United States.

Energy Alliance seeks the same relaxed regulatory treatment previously granted to other power marketers.[2] This relief, according to Energy Alliance, consists of:

(i) waiver of parts 41, 101 and 141 of the Commission's accounting and periodic reporting regulations;

(ii) waiver of subparts B and C of Part 35 of the Commission's filing regulations;

(iii) permission to file an abbreviated statement with respect to Parts 45 and 46 of Commission's regulations (concerning interlocking directorates); and

(iv) blanket approval under Part 34 for all future issuances of securities and assumptions of liabilities, subject to objection by any interested party.

Energy Alliance also requests that the Commission disclaim jurisdiction over its brokering and risk management transactions.[3]

[1] Energy Alliance also notes that none of the QFs or EWGs in which affiliates of Energy Alliance own interests have sufficient capacity, individually or in the aggregate, to enable Energy Alliance to exercise market power. Energy Alliance agrees to file a notice of change in status at such time as any of such capacity is no longer committed under long-term power sales contracts.

[2] In this regard, Energy Alliance cites the waivers and authorizations granted marketers in *Citizens Power & Light Company*, 48 FERC ¶ 61,210 (1989); *National Electric Associates Limited Partnership*, 50 FERC ¶ 61,378 (1990); and *Chicago Energy Exchange of Chicago, Inc.*, 51 FERC ¶ 61,054 (1990).

[3] The Commission has determined in other cases that brokering is not jurisdictional and that it will

Notice of Filing and Interventions

Notice of Energy Alliance's filing was published in the *Federal Register*, 60 Fed. Reg. 44331 (1995), with comments, protests and motions to intervene due on or before August 30, 1995. On August 29, 1995, Ontario Hydro filed a motion to intervene raising no substantive issues.

Discussion

Pursuant to rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1995), the timely, unopposed motion to intervene of Ontario Hydro serves to make it a party to this proceeding.

In *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 (1994) (*Heartland*), and subsequent cases, the Commission has discussed in detail the general standards under which it reviews applications for Commission authorization to sell at market-based rates.[4] The Commission allows sales at market-based rates if the seller (and each of its affiliates) does not have, or has adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. In addition, the Commission considers whether there is evidence of affiliate abuse or reciprocal dealing.

Below, we review Energy Alliance's request for market-based rate authorization in light of each of these standards. We conclude that Energy Alliance has failed to meet two of the Commission's criteria for supporting market-based rates: lack of market power in generation and transmission. Accordingly, Energy Alliance may re-file its request for market-based rates with adequate support to show that it and its affiliates lack or have mitigated market power or, alternatively, it may file a request for cost-based rates.

Generation Dominance

Energy Alliance states that its affiliate, Consolidated, owns interests in QFs and EWGs in the United States which have a total generation capacity of 437 MW. Citing *Enron Power Marketing, Inc.* (*Enron*), 65 FERC ¶ 61,305 (1993), *order on clarification and reh'g*, 66 FERC ¶ 61,244 (1994), Energy Alliance contends that it does not have any generation dominance because the entire capacity of these generation facilities is committed to purchasers under long-term contracts. Energy Alliance asserts that, because Hydro-Quebec's generation facilities are located in Canada, they are irrelevant to the Commission's determination of generation market power.

In *Heartland*, the Commission required that an affiliated power marketer demonstrate that neither it nor any of its affiliates that owns generation is dominant in the generation market. The fact that one of Energy Alliance's parents is located in Canada does not provide a basis for exemption from the *Heartland* standard, applicable to all public utilities. Those resources are available for sale in the United States and can impact Energy Alliance's ability to exercise market power. Energy Alliance has not filed a market analysis based on Hydro Quebec's generating resources to support its position that its filing does not raise generation dominance concerns. Therefore, its request fails to meet the Commission's generation dominance criterion.

Transmission Market Power

Energy Alliance argues that an open-access transmission tariff is not necessary for Hydro Quebec because its transmission facilities are located in Canada. In support, Energy Alliance explains that Hydro-Quebec's facilities are beyond the scope of the Commission's jurisdiction and the Commission cannot—or at least should not—do indirectly (through market-based rate conditioning) what it cannot do directly. Energy Alliance argues that because Hydro-Quebec's monopoly in Quebec is comprehensive, there are no utilities in Quebec that would request transmission service in Quebec. Energy Alliance states that, to the extent non-Quebec utilities seek transmission service, they would do so by way of negotiated transmission agreements consistent with Canadian law.

We disagree that Hydro-Quebec's facilities are irrelevant to our analysis. The fact that these transmission facilities are located in Canada does not diminish the possibility that Energy Alliance's competitors may require transmission service from Hydro-Quebec to reach United States markets. The Commission's concern is not transmission service to serve Canadian loads—it is transmission to serve United States loads. Entities may wish to locate in Canada, but sell to United States utilities, or entities may wish to market Canadian power in the United States, and they may

(Footnote Continued)

defer judgement on its jurisdiction over risk management activities, Citizens Power & Light Company, 48 FERC ¶ 61,210 (1989), and Morgan Stanley Capital Group, Inc. (*Morgan Stanley*), 69 FERC ¶ 61,175 (1994), *order on reh'g*, 72 FERC ¶ 61,082 (1995). However, in *Morgan Stanley*, the Commission emphasized that entities seeking disclaimers of jurisdiction over their specific activities need to file a petition for declaratory order, accompanied by an appropriate filing fee.

[4] *See, e.g., Maine Public Service Company*, 71 FERC ¶ 61,249 (1995), *reh'g pending*; *Kentucky Utilities Company*, 71 FERC ¶ 61,250 (1995), *reh'g pending*.

require Hydro Quebec's transmission service in order to do so.

For this reason, we find that Energy Alliance's request also has failed to meet the Commission's transmission market power criterion. We are respectful of the fact that we do not have jurisdiction over Hydro-Quebec and are amenable to a variety of approaches to deal with this problem. However, in order to meet our concern, Energy Alliance must demonstrate that Hydro-Quebec offers non-discriminatory wholesale access to its transmission system that can be used by competitors of Energy Alliance.

Barriers to Entry

With respect to barriers to entry (other than transmission which is discussed above), one of Energy Alliance's general partners, Consolidated, owns an interstate pipeline and several local natural gas distribution companies, while another of its partners, Noverco, owns a local natural gas distribution company. The Commission has granted market rate authority when the affiliates are gas suppliers. Consistent with our order in *Enron*, 65 FERC at p. 62,405, Consolidated's interstate natural gas transportation activities do not raise any concerns because interstate natural gas pipelines are subject to the Commission's open-access requirements. Furthermore, consistent with *Louisville Gas & Electric Company*, 62 FERC ¶ 61,016, at p. 61,150 (1993), the Commission informs Energy Alliance that if any of its competitors complain that any of Energy Alliance's affiliates has denied, delayed, or otherwise required unreasonable terms, conditions or rates for gas service to a potential electric competitor, the Commission will consider revoking any market-rate authority Energy Alliance subsequently may be granted.

Affiliate Abuse

Energy Alliance states that its filing raises no concerns about self-dealing or affiliate abuse because: (1) Energy Alliance is not affiliated with an electric utility in the United States; and (2) Energy Alliance has adopted the following procedures:

(1) When Energy Alliance deals with Hydro-Quebec, it will deal only at the United States/Canadian border.

(2) If Energy Alliance purchases power from Hydro-Quebec, the purchase price will be at the same price at which Hydro-Quebec sells to nonaffiliated entities.

(3) Neither Energy Alliance not any of its partners is permitted to act as a representative or agent of Hydro-Quebec.

(4) No exclusivity in business dealings will exist between Hydro-Quebec and Energy Alliance.

(5) Energy Alliance has no contractual commitments to or obligations to purchase from Hydro-Quebec.

Energy Alliance adds that the Commission's reporting requirements will present information to monitor affiliate abuse and that nothing more is needed where interests of foreign sovereignty and comity are present, as here.

As to purchases and sales of power between the power marketer and its utility affiliates, the Commission stated in *Heartland* that, in exercising its review of such jurisdictional power sales, it will require separate filing and review of the rates under section 205 of the FPA. Because Hydro-Quebec is outside of the Commission's jurisdiction, however, this statement would not apply to Hydro-Quebec's sales of power to Energy Alliance. Moreover, Energy Alliance's sales of power to Hydro-Quebec would be in foreign commerce and therefore not subject to our jurisdiction. However, the Commission is concerned that the affiliated public utility and power marketer will share market information. Should Energy Alliance decide to refile its request for market-based rates with additional support in response to our market power concerns, discussed above, it should also address these concerns for affiliate abuse.

Waivers, Authorizations and Disclaimers

In light of this disposition, we have no need to act at this time on Energy Alliance's request for various waivers, pre-approvals, and authorizations granted to other entities that have received Commission approval to transact at market-based rates.

Conclusion

Employing conventional standards for market-based rate authorization, applicable to all public utilities, we deny Energy Alliance's application for market-based rates. We clarify, however, that our denial of Energy Alliance's request is without prejudice to Energy Alliance's refiling a revised application making the necessary demonstration discussed herein or refiling its tariff and justifying its proposed rates on a cost basis. See *Hermiston Generating Company, L.P.*, 69 FERC ¶ 61,035 (1994), *reh'g denied*, 72 FERC ¶ 61,071 (1995).

The Commission orders:

Energy Alliance's application to sell power at market-based rates is hereby denied without prejudice, as discussed in the body of this order.

Commissioner Massey *concurred* with a separate statement attached.

MASSEY, Commissioner, concurring:

Today's order finds that Energy Alliance Partnership has not yet met our requirements for market-based rates. I agree with the order's conclusion and, so far as it goes, its analysis. I write separately to expand on the order's discussion of transmission market power.

The order says that Energy Alliance's competitors may want to use Hydro-Quebec's transmission facilities to deliver power to U.S. buyers. The order says that, to mitigate this market power, Energy Alliance "must demonstrate that Hydro-Quebec offers non-discriminatory wholesale access to its transmission system that can be used by competitors of Energy Alliance."

In my view, the transmission access offered by Hydro-Quebec must meet the Commission's "comparability" standard. In other words, competitors seeking to supply U.S. markets must be offered "access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system."[1]

The Commission has ruled that market-based rates are permissible only if transmission market power has been adequately mitigated.[2] A seller seeking market-based rates must demonstrate that "the seller (and each of its affiliates) does not have, or has adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry."[3]

The Commission has also ruled that mitigation of transmission market power requires an offer of comparable transmission services. In *Heartland*, we stated:

> . . . for all future cases involving blanket approval of market-based rates an offer of comparable transmission services will be required before the Commission will be able to find that transmission market power has been adequately mitigated.[4]

Based on these requirements, I believe that Energy Alliance's request for market-based rates can be approved only if Hydro-Quebec offers comparable transmission service to suppliers wanting to use Hydro-Quebec's facilities to deliver power to buyers in U.S. markets.[5] Anything less would allow Energy Alliance: (1) to sell at market-based rates without adequately mitigating its market power; or (2) to mitigate its market power in a way we have ruled inadequate for every other public utility seller. I believe either result would be unsound policy and could be found unlawful.

With this amplification, I support today's order.

[¶ 61,020]

Florida Gas Transmission Company, Docket No. RP95-439-000

Letter Order

(Issued October 3, 1995)

By Direction of the Commission: Lois D. Cashell, Secretary.

For good cause shown, waiver of the thirty-day notice requirement is granted, and the referenced tariff sheet is accepted effective October 1, 1995, as proposed. For the reasons discussed below, the objections of Florida Cities are denied.

The above-referenced tariff sheet modifies the deadline for nominations for receipt points on Southern Natural Gas Company's (Southern) system. Specifically, the tariff change will require Florida Gas Transmission Company's (FGT) shippers choosing to utilize receipt points on Southern's system to submit nominations to FGT by 9:00 A.M. Central Time, as opposed to the 10:00 A.M. Central Time deadline that will remain in effect for all other transportation on FGT's physical system.

---

[1] *American Electric Power Service Corporation*, 67 FERC 61,168, at p. 61,490 (1994).

[2] *E.g., Public Service Company of Indiana, Inc.*, Opinion No. 349, 51 FERC 61,367, at pp. 62,226-27 (evidence of lack of market power is "[e]ssential"), *order on reh'g*, Opinion No. 349-A, 52 FERC 61,260 (1990), *clarified and modified on other grounds*, 53 FERC 61,131 (1990), *appeal dismissed, Northern Indiana Public Service Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1993).

[3] *Heartland Energy Services, Inc.*, 68 FERC 61,223, at p. 62,020 (1994).

[4] *Id.*

[5] The majority's order states that we "are amenable to a variety of approaches" for mitigating transmission market power in this case. I note as an example that, in Southwest Regional Transmission Association, 69 FERC 61,100, at ppp. 61,397-98 (1994), the Commission required *all* members of a regional transmission group to offer comparable transmission service by tariff at least to each other, but required only the jurisdictional members to file the tariff with the Commission.

UNITED STATES OF AMERICA
79 FERC 61,152 (1997)
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

H.Q. Energy Services (U.S.) Inc.) Docket No. ER97-851-000

ORDER DIRECTING FURTHER INFORMATION AND ANALYSIS AND DEFERRING ACTION ON MARKET-BASED RATES

(Issued May 9, 1997)

In this proceeding H.Q. Energy Services (U.S.) Inc. (H.Q. Energy), a wholly-owned subsidiary of Hydro-Quebec, applied to the Commission for market-based rate authority. As discussed below, the Commission does not have sufficient information to complete its analysis of H.Q. Energy s request. We find that H.Q. Energy has satisfied all but one of the Commission s requirements for market-based rates. However, we are unable to conclude at this time that H.Q. Energy has demonstrated that Hydro-Quebec, its Canadian utility affiliate, lacks generation market power. Accordingly, we will defer action on H.Q. Energy s request for market-based rates and direct H.Q. Energy to provide further information and analysis concerning generation market power consistent with the Commission s guidance in New York State Electric & Gas Corporation, 78 FERC 61,309 (1997) (NYSEG), which was issued after H.Q. Energy completed its application.

Background

On December 18, 1996, as amended on December 19, H.Q. Energy filed an application (December Application) to sell power at market-based rates. On March 11, 1997, H.Q. Energy filed a supplemental petition (March Supplement), which substantially amends its December Application in response to the Commission s decision in British Columbia Power Exchange Corporation, 78 FERC 61,024 (1997) (Powerex).

According to its application, H.Q. Energy is a wholly-owned subsidiary, incorporated in the State of Delaware, of Hydro-Quebec, the utility for the Canadian province of Quebec. After Commission approval of its application for market-based rates, H.Q. Energy intends to engage in various wholesale power marketing activities in the United States. H.Q. Energy does not own any electric generation or transmission facilities, and none of its affiliates owns any generation or transmission facilities that are located in the United States. H.Q. Energy s application includes a proposed code of conduct that H.Q. Energy suggests is

consistent with the standards established by the Commission in the OASIS Rule. 1/

H.Q. Energy s March Supplement includes revised transmission tariffs for Hydro-Quebec and its affiliate Cedar Rapids Transmission Company Ltd. (Cedar Rapids). 2/ H.Q. Energy also discusses changes in the Quebec regulatory regime. In legislation entitled An Act respecting the Regie de l energie (Regie Act), the Province of Quebec created a new regulatory body, the Regie, with functions, powers and procedures similar to those of this Commission.

Other salient aspects of H.Q. Energy s application, including the transmission tariffs proposed for its transmission-owning utility affiliate, its generation market power study and its proposed code of conduct, are described in further detail below.

Notices of H.Q. Energy s filings were published in the Federal Register, 3/ with comments, protests and motions to intervene due on or before March 27, 1997.

In response to H.Q. Energy s December Application, Enron Power Marketing, Inc. (Enron) filed a timely motion to intervene and protest on January 3, 1997, raising no substantive issues. On January 15, 1997, the following entities timely filed the following pleadings: Niagara Mohawk Power Company (Niagara

1/ Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 Fed. Reg. 21,737 (1996), FERC Stats. & Regs. 31,035 (1996), order on reh'g, Order No. 889-A, 62 Fed. Reg. 12,484 (1997), FERC Stats. & Regs. 31,049 (1997), reh g pending (OASIS Rule).

2/ H.Q. Energy explains that Cedar Rapids owns and operates transmission facilities in Quebec and in the Province of Ontario. For convenience of reference, we generally will refer to Cedar Rapids and Hydro-Quebec collectively as Hydro-Quebec when discussing the transmission tariffs and transmission market power issues.

/ 62 Fed. Reg. 1112, 62 Fed. Reg. 13,605 (1997). Comments, protests and motions to intervene in response to H.Q. Energy s December Application were due January 15, 1997. As noted below, several intervenors filed pleadings after that date but before March 27, 1997, the deadline for responses to the March Supplement. As a result, all such pleadings are timely filed.

Mohawk), motion to intervene and protest; Plum Street Energy Marketing, Inc. (Plum Street), motion to intervene; New York State Electric & Gas Corporation (NYSEG), motion to intervene; Newfoundland and Labrador Hydro (Newfoundland Hydro), motion to intervene; Electric Clearinghouse, Inc., motion to intervene and protest; and Enron, protest. Those interventions of Plum Street, NYSEG and Newfoundland Hydro raise no substantive issues.

Also in response to the December Application, the following entities filed the following pleadings on the specified dates: 4/ the Grand Council of Crees and the New England Coalition for Energy Efficiency and the Environment (collectively, the Crees), motion for extension of time to file comments and intervention, filed January 21, 1997; Vermont Public Power Supply Authority (Vermont Public Power), motion to intervene, filed January 22, 1997; TransCanada Energy Limited, motion to intervene, filed January 24, 1997; Indeck Capital, Inc. and Indeck Energy Services, Inc. (collectively, Indeck), motion to intervene, filed January 30, 1997; Central Vermont Public Service Corporation (Central Vermont), motion to intervene, filed January 31, 1997; and The Utility-Trade Corp. (Utility-Trade), motion to intervene, 5/ filed February 4, 1997. Those interventions of Indeck, Central Vermont and Utility-Trade raise no substantive issues. 6/

Some of the issues raised by intervenors in their responses to the December Application were rendered moot by modifications included in the March Supplement. We will not address such issues or further describe intervenors arguments in connection therewith.

4/ See supra note 2 regarding the timeliness of these pleadings.

5/ Utility-Trade styled its pleading a notice of intervention. Under the Commission s Rules of Practice and Procedure, however, only the Secretary of Energy and state commissions are permitted to file notices of intervention to achieve intervenor status. See 18 C.F.R. 385.214(a) (1996). Accordingly, we will regard Utility-Trade s pleading as a motion to intervene.

6/ In a letter filed January 17, 1997, H.Q. Energy requested that the Commission defer action on the December Application, pending the anticipated legislative action in the Province of Quebec and possible amendment of the application. In addition to the above-listed pleadings, the Crees filed, on February 24, 1997, a motion to delay filing additional pleadings until H.Q. Energy amended the December Application. The new comment period established after the March Supplement renders the Crees motion moot.

In response to H.Q. Energy s March Supplement, the following entities timely filed the following pleadings on the specified dates: the Crees, motion to file additional pleadings and comments, filed March 21, 1997; Mouvement Au Courant, motion to intervene, filed March 26, 1997; Niagara Mohawk, supplemental protest, filed March 27, 1997; Newfoundland Hydro, extension of time to file protest, 7/ filed March 27, 1997; Burlington Electric Department, motion to intervene, filed March 27, 1997; and Indeck, motion to intervene, raising no substantive issues, filed March 27, 1997.

Also in response to the March Supplement, the following entities filed the following pleadings on the specified dates: the Crees, comments and intervention, filed March 28, 1997, as corrected April 1, 1997; CNG Energy Services Corporation (CNG Energy), motion to intervene out of time, raising no substantive issues, filed April 9, 1997; Newfoundland Hydro, comments, filed April 10, 1997; Consolidated Edison Company of New York (ConEd), motion to intervene out of time in support of H.Q. Energy s application, raising no substantive issues, filed April 17, 1997; and Mouvement Au Courant, supplement to motion to intervene, filed April 30, 1997.

On April 11, 1997, H.Q. Energy filed a response to various motions to intervene and protests. In addition to addressing substantive issues raised by intervenors, H.Q. Energy opposes the motions to intervene of the Crees and of Mouvement Au Courant, on the alleged grounds that their interests relate exclusively to matters of Quebec policy and law. On April 28, 1997, H.Q. Energy filed a response to Newfoundland Hydro s comments.

To the extent that intervenors or H.Q. Energy s responses raises issues that require resolution in this order, their arguments are described below.

Discussion

A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 8/ the timely, unopposed motions to intervene serve to make the movants parties to this proceeding. Additionally, given the early stage of this proceeding and the absence of undue prejudice or delay, we will grant the unopposed motions for late intervention of CNG Energy and ConEd. We also

7/ We will treat Newfoundland Hydro s pleading as a motion to file out of time.

8/ 18 C.F.R. 385.214 (1996).

will accept the late-filed comments of Newfoundland Hydro, the filing of which H.Q. Energy does not oppose. Moreover, notwithstanding the opposition of H.Q. Energy, we will grant intervenor status to the Crees and to Mouvement Au Courant and will accept their respective late-filed pleadings, as we find that their interests may not be adequately represented by other parties to this proceeding. We will also accept H.Q. Energy s responses. Given the unusual nature and complexity of the case, involving Canadian affiliates, and the evolving regulatory regime in Quebec, these pleadings have aided us in understanding the issues.

B. Market-Based Rates

We generally have allowed 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. In order to demonstrate the absence or mitigation of market power, a transmission-owning public utility must have on file with the Commission an open-access transmission tariff for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing. 9/

As we discuss below, we find that H.Q. Energy meets all but one of the criteria for granting market-based rates. Because, however, H.Q. Energy in preparing its generation market power analysis did not have the benefit of the guidance set forth in NYSEG, we cannot conclude on the basis of the information and analysis before us that H.Q. Energy has demonstrated that its affiliate Hydro-Quebec lacks generation market power in United States markets. Accordingly, we will direct H.Q. Energy to submit additional information and analysis, consistent with NYSEG, on generation market power. In the meantime, we will defer action on H.Q. Energy s request for market-based rates, pending receipt of such additional information and analysis.

1. Transmission Market Power

In the case of a power marketer that is affiliated with a transmission-owning United States utility, mitigating transmission market power requires the transmission-owning utility affiliate to have on file with the Commission an open access transmission tariff that conforms to the pro forma tariff

9/ E.g., Progress Power Marketing, Inc., 76 FERC 61,155 at 61,919 (1996); Northwest Power Marketing Company, L.L.C., 75 FERC 61,281 at 61,889 (1996). Accord, Heartland Energy Services, Inc., 68 FERC 61,223 at 62,060-63 (1994) (Heartland).

contained in the Open Access Rule (as modified on rehearing). 10/ In this case, the transmission-owning utility affiliate is Canadian.

In prior market-based rate cases involving power marketer affiliates of Canadian utilities, the Commission has applied the same general standards that we use for reviewing requests for market-based rates by power marketers affiliated with United States utilities. 11/ In Energy Alliance, for example, we stated that the marketer must be able to show that its transmission-owning utility affiliate offers non-discriminatory access to its transmission system that can be used by competitors of the power marketer to reach the United States. We added, however, that we would consider a variety of approaches when dealing with the market power of foreign utility affiliates of United States marketers. 12/ In Powerex, although we rejected the marketer s application for failure to demonstrate mitigation of transmission market power, we emphasized that the Commission, while wishing to assure reciprocal service into and out of Canada when Canadian entities seek access to United States markets, does not intend to open intra-Canadian electric markets by imposing open access tariffs for transactions wholly within Canada. Moreover, the Commission stated that it would determine on a case-by-case basis what tariffs, other than the Open Access Rule pro forma tariff, would satisfy our concerns, i.e., be consistent with our comparability principles. 13/

In this case, H.Q. Energy has submitted proposed transmission tariffs under which Hydro-Quebec will provide transmission service that are virtually identical to the Open

10/ See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. 31,036 (1996), order on reh g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. 31,048 (1997), reh g pending (Open Access Rule).

11/ The cases include: Energy Alliance Partnership, 73 FERC 61,019 (1995) (Energy Alliance); TransAlta Enterprises Corporation, 75 FERC 61,268 (1996) (TransAlta); Powerex; and Ontario Hydro Interconnected Markets Inc., 78 FERC 61,369 (1997), reh g pending (Ontario Hydro).

12/ 73 FERC at 61,030-31. Accord, TransAlta, 75 FERC at 61,875-76.

13/ See Powerex, 78 FERC at 61,100.

Access Rule pro forma tariff. The main difference is that while the pro forma tariff refers to the Commission as the applicable regulatory agency, these tariffs refer to the Regie. 14/ Similarly, the proposed tariffs substitute Canadian law for United States law -- e.g., Canadian commercial law in lieu of the Uniform Commercial Code. H.Q. Energy states that the transmission rates were developed using the Commission s standard average cost, rolled-in methods. While there are separate tariffs and charges for Hydro-Quebec and Cedar Rapids, customers using both services will pay only the Hydro-Quebec transmission charge.

The Crees argue that the proposed transmission tariffs are not equivalent to the Commission s pro forma tariff because they will be subject to the regulatory oversight of the Regie rather than this Commission. They complain that the Regie is not an adequate substitute for the Commission because it is appointed by the same government that owns Hydro-Quebec and because its decisions are not subject to judicial review. We disagree with the Crees assumption that a foreign entity must submit to the Commission s jurisdiction for transmission services provided in foreign countries. The Commission s jurisdiction in this proceeding extends only to H.Q. Energy s jurisdictional power sales in the United States. As a condition of approving those sales, the Commission simply evaluates the transmission arrangements that are available in Canada (under the jurisdiction of Canadian governments and regulatory agencies) against the standards that the Commission requires for open access transmission services under our jurisdiction. Here, the terms and conditions of transmission service are identical to the Commission s pro forma tariff in all material respects.

The Crees also object to the use of a postage stamp rate in the proposed transmission tariffs. They argue that a postage stamp rate is discriminatory when the transmission grid extends over a large area. The Crees suggest that lower rates for shorter distances, or rates reflecting a zonal approach, would be more appropriate. The Crees also argue that use of the firm rate as the ceiling for the nonfirm rate is unreasonable. We disagree. The rates at issue here reflect rate designs previously approved by the Commission for jurisdictional transmission services, including in the Open Access Rule pro

14/ The Regie Act provides that the Regie 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.

forma tariffs. 15/ Moreover, Hydro-Quebec and Cedar Rapids will obtain transmission service for their own wholesale power sales under the proposed tariffs.

We conclude, therefore, notwithstanding the Crees arguments, that Hydro-Quebec has mitigated its transmission market power adequately to support authorization of market-based rates for H.Q. Energy s United States wholesale sales.

2. Generation Market Power

The Commission's generation dominance analysis assumes that the seller, and its affiliates owning, operating or controlling transmission facilities, have satisfactory open access transmission available. As discussed above, H.Q. Energy has demonstrated compliance with that requirement. We find, however, as discussed below, that it has not provided sufficient information to demonstrate that its utility affiliate lacks generation market power.

While H.Q. Energy in its generation market analysis defines the relevant markets as those utilities with which Hydro-Quebec and Cedar Rapids are directly interconnected, it does not compute generation market shares using the Commission s hub-and-spoke method, which is the method that the Commission usually employs in market-based rate cases. 16/ Instead, H.Q. Energy analyzes the amount of customer load that could be served by each interconnected utility (including Hydro-Quebec), using the size of each customer s interconnections with potential suppliers as a proxy for load. H.Q. Energy contends that its analysis shows market shares below 20 percent, which do not exceed levels that the Commission previously has found acceptable. 17/

As noted above, H.Q. Energy completed its application prior to the issuance of NYSEG. Thus H.Q. Energy prepared its generation market power analysis without the benefit of our discussion in NYSEG of why a similar approach to analyzing generation market power is insufficient for purposes of our market-based rate requirements. We explained in NYSEG that an analysis designed around the single factor of interconnection

15/ See Open Access Rule, FERC Stats. & Regs. 31,036 at 31,650, 31,668.

16/ See NYSEG, 78 FERC at 62,237-38 & n.5.

17/ See, e.g., Southwestern Public Service Company, 72 FERC 61,208 at 61,966-67 (1995), reh g pending; Louisville Gas and Electric Company, 62 FERC 61,016 at 61,146 (1993) (Louisville).

capacity is so selective and incomplete as to provide no basis upon which to draw conclusions about market power. 18/ The Commission also stated that interconnection capacity is not irrelevant to market power issues and it is one of the factors that will be considered in the market screen analysis now being used for mergers. The Commission directed that any proposed substitute to the traditional hub-and-spoke analysis must fully address all the competition factors considered under the market power analysis in the [Commission s] merger policy statement. 19/

Accordingly, we will defer action on H.Q. Energy s market-based rate application until such time as H.Q. Energy provides further information and analysis concerning generation market power consistent with the discussion above and with our discussion in NYSEG. 20/

3. Other Barriers to Entry/Reciprocal Dealing

Intervenors raise a number of issues regarding barriers to entry and affiliate abuse. Even though we are deferring action on H.Q. Energy s market-based rate application at this time, we nonetheless will address these matters here in order to give guidance to the parties in the event that H.Q. Energy supplements its application with a revised generation market power analysis, as this order permits.

With regard to potential barriers to entry and reciprocal dealing concerns, we note that Hydro-Quebec wholly owns Green Mountain Energy Partners, an energy service company that intends to sell electricity and natural gas at retail to United States customers. Additionally, Hydro-Quebec holds a substantial interest in Noverco, Inc., which in turn holds interests in the main natural gas distributor in the Province of Quebec and in a natural gas distributor in Vermont.

Were we to accept H.Q. Energy s application for market-based rates after submission of the additional generation market

18/ See 78 FERC at 62,328-29.

19/ Id. at 62,329 n.7. See Inquiry Concerning the Commission s Merger Policy Under the Federal Power Act, Order No 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs. 31,044 (1996). H.Q. Energy must address both physical and economic limitations on the definitions of the relevant product and geographic markets.

20/ We will provide notice and an opportunity for comments on the supplement.

power information and thereafter should any of H.Q. Energy s affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor of H.Q. Energy in bulk power markets, then that electric competitor could file a complaint with the Commission that could result in the suspension of H.Q. Energy s authority to sell power at market-based rates. 21/ With that safeguard, we are satisfied that other barriers to entry and reciprocal dealing considerations are not of concern here.

4. Affiliate Abuse

We find that, with the modification discussed below to H.Q. Energy s proposed code of conduct, H.Q. Energy satisfies the Commission s requirements designed to prevent affiliate abuse in market-based rate applications by power marketers that are affiliated with utilities. 22/ H.Q. Energy s proposed code of conduct is virtually identical to those required of power marketers affiliated with United States public utilities, except that there is no prohibition on the sharing of market information beyond that imposed under the OASIS Rule. Consistent with the Commission s action in other cases involving power marketer affiliates of Canadian utilities, H.Q. Energy also does not include a prohibition on affiliate sales to Hydro-Quebec absent a filing under section 205 of the Federal Power Act, because such sales are not subject to the Commission s jurisdiction. 23/

The Crees argue that the Commission should extend the prohibition on affiliate sales to those that do not serve captive customers because American ratepayers who have chosen to become [H.Q. Energy s] retail customers deserve and require the same protections as those who have had no choice. We disagree. The Crees argument misapprehends the purpose of the restriction imposed on jurisdictional affiliate sales. It is the lack of choice that creates the concern -- customers with no options are captive and cannot protect themselves by turning to other suppliers. Those who are not captive can protect themselves by exercising their power of choice.

The Crees also complain that H.Q. Energy s proposed code of conduct cannot be relied upon because the affiliates are Canadian entities that will be regulated by Canadian bodies and that the code does not appear to extend to affiliates doing business in the United States. Neither of these allegations causes us

21/ See, e.g., Louisville, 62 FERC at 61,148.

22/ See, e.g., Heartland, 68 FERC at 62,060-63.

23/ See, e.g., TransAlta, 75 FERC at 61,876.

concern. The code of conduct will be included as part of H.Q. Energy s rate schedule on file with this Commission, and any violations of the code can be reported to the Commission. Also, the code of conduct applies to all affiliates of Hydro-Quebec, without limitation. It does not exclude affiliates doing business in the United States, as the Crees mistakenly allege.

Finally, while the proposed code of conduct, as noted above, does not prohibit sharing market information beyond the OASIS Rule requirements, H.Q. Energy, in response to Niagara Mohawk s protest, agreed to revise the code of conduct in that regard. With this modification, which should be submitted along with the previously-discussed additional generation market power information, H.Q. Energy s code of conduct meets the Commission s requirements. In these circumstances, we are satisfied that there are no concerns of affiliate abuse here.

C. Waivers and Authorizations

H.Q. Energy, in its application, requests the same waivers and blanket authorizations as those afforded to other power marketers. Because we are deferring action on H.Q. Energy s application for market-based rates, there is no need to address the requested waivers and authorizations at this time.

D. Other Issues

The Crees complain that, while the Regie Act recognizes, for the first time, a market for wholesale energy competition in Quebec, Canadian wholesale purchasers must seek government approval prior to making purchases from suppliers other than Hydro-Quebec, and the Regie Act does not expressly recognize the authority of any utility other than Hydro-Quebec to act as a power marketer in Quebec. The Crees are concerned, therefore, that the Regie Act in practice may not lead to a competitive market. The Crees ask the Commission to condition approval of H.Q. Energy s application on amendments to Canadian laws to remove the requirement for Canadian government approval to obtain new suppliers and to recognize power marketers within Quebec on terms similar to those imposed by the Commission. To the extent the Crees seek our interference with trade that takes place wholly within Canada, we cannot do so. The market for power sales that take place wholly within Canada is beyond the scope both of this proceeding and of our jurisdiction.

We note that in Ontario Hydro, 78 FERC at 62,529, the Commission stated that it seeks to assure reciprocal service into and out of Canada when Canadian entities seek access to United States markets. We believe that United States sellers should be able to sell to wholesale purchasers within Canada.

However, we also believe the Crees concerns are premature at this time.

Conclusion

We note that with the exception of generation market power, H.Q. Energy has satisfied all our requirements for market-based rates. While we express no opinion on the ultimate resolution of the generation market power issue, we note that H.Q. Energy, and, for that matter, Hydro-Quebec, can utilize the open access tariffs of United States public utilities since the reciprocity condition is at this point fully satisfied. Thus, assuming an adequate showing can be made in its supplemental filing on generation market power, H.Q. Energy will be able to sell at market-based rates. Until that time, it would be able to transact at cost-based rates for the resale of power purchased either from Hydro-Quebec or from non-affiliates.

The Commission orders:

(A) The motions for late intervention of CNG Energy and ConEd are hereby granted.

(B) The late-filed comments of Newfoundland Hydro are hereby accepted.

(C) The motions to intervene of the Crees and Mouvement Au Courant are hereby granted, and their respective late-filed pleadings are hereby accepted.

(D) H.Q. Energy s responses are hereby accepted.

(E) Action on H.Q. Energy s application for market-based rates, and related waivers and authorizations, is hereby deferred, and H.Q. Energy is hereby directed to provide additional information and analysis concerning generation market power and to amend its proposed code of conduct, as discussed in the body of this order.

By the Commission. Commissioners Bailey and Santa concurred with separate statements to be issued later.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

May 15, 1997

H.Q. Energy Services (U.S.) Inc.) Docket No. ER97-851-000

TO ALL PARTIES:

Attached is Commissioner Santa s statement to the order issued May 9, 1997, in the above-referenced proceeding.

Lois D. Cashell,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

H.Q. Energy Services (U.S.) Inc.) Docket No. ER97-851-000

(Issued May 15, 1997)

Donald F. SANTA, Jr., Commissioner, concurring:

I support the Commission s order deferring action on H.Q. Energy s request for market-based rate authority pending the applicant s resubmittal of information and analysis concerning generation market power.

I am concerned, however, by the inference that, even if H.Q. Energy satisfies the Commission either that it lacks market power in generation, or else that it has adequately mitigated such market power, the Commission still would consider denying H.Q. Energy market-based rate authority on the basis that law and regulation in the Province of Quebec did not provide adequate access to the intra-provincial wholesale power market. This possibility is signaled by the Commission s equivocal response to the Crees request that the Commission condition approval of H.Q. Energy s application on amendments to Canadian law.

According to the Crees, the law within the Province of Quebec requires Canadian wholesale purchasers to obtain government approval prior to purchasing from suppliers other than Hydro-Quebec. In addition, Canadian law does not expressly recognize the authority of any utility other than Hydro-Quebec to act as a power marketer in Quebec. The Crees complain that these provisions will hinder the realization of a fully competitive wholesale market in Quebec. On this basis, the Crees ask that approval of H.Q. Energy s application be conditioned on the elimination of these requirements.

The Commission responds to the Crees as follows:

To the extent the Crees seek our interference with trade that takes place wholly within Canada, we cannot do so. The market power for sales that take place wholly within Canada is beyond the scope of both this proceeding and of our jurisdiction.

We note that in Ontario Hydro, 78 FERC at 62,529, the

conditioning access to U.S. bulk power markets, the Commission can leverage Canadian lawmakers, regulators, and publicly-owned utilities to open their market to wholesale competition. Clearly, the ability to set the terms and conditions for access to the vast U.S. market gives the Commission considerable leverage over how potential entrants order their business.

Rather, the question is whether it is within the appropriate sphere of the Commission s authority to be concerned with economic policy issues outside the United States borders. In my opinion, unless there exists a nexus between the Commission s policy to encourage competition in bulk power markets in the United States and the conditions placed on extraterritorial utilities affiliated with power marketers seeking market-based rate approval, it is not the Commission s business to be concerned with the competitiveness of the bulk power market outside the United States.

Donald F. Santa, Jr.
Commissioner

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426 79 FERC 61,217

May 21, 1997

H.Q. Energy Services (U.S.) Inc. Docket No. ER97-851-000

TO ALL PARTIES:

Attached is Commissioner Bailey s statement to the order issued May 9, 1997, in the above-referenced proceeding.

Lois D. Cashell,
Secretary.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

H.Q. Energy Services (U.S.) Inc.) Docket No. ER97-851-000
(Issued May 21, 1997)

BAILEY, Commissioner, concurring:

I support the outcome of this order but wish to highlight several issues that require further explanation from my point of view. Those issues are the detailed meaning of reciprocity as well as specific language in this order that refers to our expectations regarding Canadian markets.

Before addressing these issues I want to indicate my support for this order s application of the concept of reciprocity as part of the Commission s policy for open transmission access. We have applied reciprocity to this case and found that the H.Q. tariffs satisfy the transmission reciprocity requirements. Where this request fails is in the showing of the lack of generation market power. I also want to indicate my support for this order in that it assures H.Q. Energy that it will be able to sell power in the U.S. at cost-based rates. This will allow U.S. citizens to continue to benefit from the low cost power supplied by Hydro Quebec.

In this order the Commission had to address the Crees concerns that the H.Q. transmission tariffs are not the same as the pro forma tariffs because the Crees are subject to the provincial government and not to this Commission. Thus, they are not assured the ability to purchase from suppliers despite the presence of the transmission tariff. In the order we say that, We believe that U.S. sellers should be able to sell to wholesale purchasers within Canada. I agree with this belief because I believe that competitive wholesale markets are best suited to serve the economic interests of consumers wherever they are, but there are limits to our ability and our responsibility to impose this belief on others beyond the Commission s jurisdiction.

Given the Commission s jurisdictional limits, reciprocity is necessary to assure fair access requirements for those entities that seek access to markets that are within the Commission s jurisdiction. With reciprocity we are assured that all entities play by the same access rules. But, we can not and do not use reciprocity to achieve goals beyond the reach of the Commission. I take this opportunity in my concurrence to explain my views on the limits of reciprocity.

This Commission developed and adopted the concept of reciprocity in Order No. 888 and affirmed it in Order No. 888A. Order No.888, 61 Fed Reg.21,540 (1996), FERC Stats. & Regs. 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. 31,048 (1997), reh'g pending. Reciprocity in Order No. 888 was explained to insure that any public utility that offers non-discriminatory open access transmission for the benefit of customers should be able to obtain the same non-discriminatory access in return. (underlining added) But, the Commission acknowledged that tax-exempt benefits afforded to certain entities such as municipal utilities might be endangered under such a policy. Hence the Commission concluded that, ...we must ensure that the reciprocity requirement will not be used to defeat tax-exempt financing authorized by Congress. Therefore, we clarify that reciprocal service will not be required if providing such service would jeopardize the tax-exempt status of the transmission customer s (or its corporate affiliates) bonds used to finance such transmission facilities.

This waiver provision spells out two important points for the future reciprocity deliberations. First, we envision reciprocity to only apply to transmission services as is indicated by the underlining. It does not extend to other assurances of market access. Second, we are willing to waive reciprocity when it would result in violation of a requirement from some other governmental entity.

In the H.Q. Energy case and in all similar situations involving foreign entities, I believe this means that we can only insist that the affiliated foreign entity that owns transmission, as a condition on market-based rate approval, provide transmission service. They do not have to guarantee that wholesale purchasers be able to use that service if there is some other applicable restriction. This is analogous to the situation of many retail customers in the United States. We have said that if retail customers become eligible for transmission access through some state ordered action or the voluntary arrangement of a utility then those retail customers are able to use the pro forma tariffs we ordered in Order 888. But, we do not require that retail customers be able to use the transmission tariffs, that is a decision beyond our jurisdiction.

We have developed our reciprocity position regarding Canadian entities in several cases. First, in Energy Alliance Partnership, 73 FERC 61,019 (1995), we said that non-discriminatory access to transmission must be available to competitors to reach U.S. Markets. Then we expanded that interpretation of reciprocity in TransAlta Enterprises Corporation, 75 FERC 61,268 (1996) (Transalta), (which was referenced in the Powerex order cited by the Commission in this

H.Q. Energy case) to include access for United States competitors into Canada on a reciprocal basis.

In Transalta, the Commission said, All potential users of the Alberta transmission system (affiliated or not) are subject to the same rates, terms, and condition and have access to the Alberta system to reach loads in the United States. Indeed, TransAlta s application does not indicate any limitation on the ability of a power seller in the United States to use the Alberta pool and transmission grid to reach potential markets in Canada. We view the expansive scope of the Alberta arrangements, allowing for power sales from Canada into the United States and vice versa, as a positive factor in our assessment of TransAlta s application for market-based rates. (Underlining added) In other words, reciprocity refers to use of the transmission system to reach potential markets. There is no guarantee that reciprocal transmission access results in a customer on the other end.

In addition, while not yet tested, we have received assurances that our views on reciprocity with Canadian entities are consistent with the North American Free Trade Agreement (NAFTA). A more expansive approach to reciprocity, as suggested by the Crees, may violate NAFTA. If parties want to continue to pursue this more expansive approach, we will need to engage those entities best able to interpret NAFTA for electric markets.

With this further explanation, I am able to fully support the order. I do not believe the order is vague. But, given the importance of electric trade between the United States and Canada and the recurring nature of these issues, I thought it prudent to err on the side of more explanation rather than less.

Vicky A. Bailey
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, and William L. Massey.

H.Q. Energy Services (U.S.) Inc.) Docket No. ER97-851-001

ORDER ACCEPTING FOR FILING PROPOSED MARKET-BASED RATES

(Issued November 12, 1997)

In a prior order in this proceeding, 1/ we found that H.Q. Energy Services (U.S.) Inc. (H.Q. Energy) had satisfied all of the Commission's requirements for market-based rates except for demonstrating that its Canadian utility affiliate, Hydro-Quebec, lacks generation market power. We deferred action on H.Q. Energy's request for market-based rates and directed H.Q. Energy to provide further information and analysis concerning generation market power. On July 22, 1997, H.Q. Energy filed a supplement to its application (July Supplement) in response to the Commission's May 9 Order.

In this order, as discussed below, we find that H.Q. Energy now has adequately supported its market-based rate application. Accordingly, we will accept for filing, without suspension or hearing, H.Q. Energy's proposed market-based rates.

Background

The July Supplement includes two generation market power analyses. The first is a traditional hub-and-spoke analysis. The second is an alternative analysis addressing the competition factors considered under the competitive analysis screen in the Commission's merger policy statement. As the May 9 Order noted, the Commission directed in New York State Electric & Gas Corporation, 78 FERC ¶ 61,309 (1997), that any proposed substitute to a traditional hub-and-spoke analysis must address all of the competition factors. 2/

1/ H.Q. Energy Services (U.S.) Inc., 79 FERC ¶ 61,152 (1997) (May 9 Order).

2/ Id. at 61,653. See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs. ¶ 31,044 (1996), reconsid. denied, Order No. 592-A, 79 FERC ¶ 61,321 (continued...)

Notice of H.Q. Energy's supplemental filing was published in the Federal Register, 3/ with comments, protests and motions to intervene due on or before August 15, 1997.

The following entities filed the following timely pleadings: Vermont Department of Public Service, motion to intervene; Polsky Energy Corporation (Polsky), motion to intervene and protest; Mouvement Au Courant, motion to intervene; Niagara Mohawk Power Corporation (Niagara Mohawk), comments on July Supplement; and Vermont Public Power Supply Authority and Burlington Electric Department (collectively, Vermont Intervenors), protest.

The following entities filed the following untimely pleadings on the specified dates: the Grand Council of Crees and the New England Coalition for Energy Efficiency and the Environment (collectively, the Crees), motion to file late comments and protest, filed August 20, 1997 (Crees Comments); and Tractebel Energy Marketing, Inc. (Tractebel), motion for late intervention, filed September 10, 1997.

On September 9, 1997, H.Q. Energy filed a response to the filings of Polsky, Mouvement Au Courant, Niagara Mohawk, Vermont Intervenors and the Crees (H.Q. Energy Response). Additionally, the Crees and Mouvement Au Courant filed various supplementary pleadings, and H.Q. Energy filed various supplementary responses (collectively, Supplementary Pleadings).

To the extent that intervenors or H.Q. Energy's responses raise issues that require resolution in this order, their arguments are described below.

Discussion

A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 4/ the timely, unopposed motions to intervene serve to make the movants parties to this proceeding. Additionally, given its interests and the absence of undue prejudice or delay, we will grant the unopposed motion for late intervention of Tractebel. We also will accept the late-filed Crees Comments and the H.Q. Energy Response, which have aided us

---

2/ (...continued) (1997).

3/ 62 Fed. Reg. 42,541 (1997).

4/ 18 C.F.R. § 385.214 (1997).

in understanding the issues. We will reject, however, all of the Supplementary Pleadings. 5/

B. Market-Based Rates

As noted above, the May 9 Order found that H.Q. Energy had met all of the criteria for granting market-based rates 6/ except that concerning generation market power. In this order, we will not discuss the other, previously-satisfied criteria except to the extent that intervenors in their responses to the July Supplement raise new issues. As we explain below, we find that H.Q. Energy's market-based rate application, as supplemented, now meets all of the criteria. Accordingly, we will accept the proposed market-based rates for filing, without suspension or hearing, and grant waiver of notice, as requested, to allow the rates to become effective on July 23, 1997.

1. Generation Market Power

H.Q. Energy's previous filings in this proceeding did not include a traditional hub-and-spoke analysis. The July Supplement includes both a traditional hub-and-spoke analysis and a proposed substitute that derives from the competitive analysis screen used for mergers. In this case, given our disposition of H.Q. Energy's application, we need not consider, and hence do not address the merits of, its proffered alternative market power analysis. 7/

H.Q. Energy's traditional hub-and-spoke analysis evaluates 13 markets, which include all United States utilities with which Hydro-Quebec is directly interconnected. According to H.Q. Energy's analysis, Hydro-Quebec's market shares in the 13 markets range from 27.8 to 35 percent of the installed capacity and from 31.8 to 38 percent of the uncommitted capacity. These market

---

5/ We note that the Supplementary Pleadings, as well as the timely-filed or otherwise accepted pleadings of intervenors, address primarily issues that are not relevant to our disposition of H.Q. Energy's application, because either they are outside the scope of this proceeding (e.g., involving environmental issues or internal Canadian matters) or they relate to H.Q. Energy's proposed alternative generation market power analysis (which, as we explain below, we need not consider in this order).

6/ See 79 FERC at 61,651 (setting forth general criteria for granting market-based rate authority).

7/ Thus we also need not, and do not, address the various issues that intervenors raise regarding the alternative analysis.

shares are higher than those in previously accepted market-based rate applications, and therefore the Commission has analyzed whether other factors are present in this case that nonetheless would provide a basis on which to accept H.Q. Energy's application.

We find that there are several such factors present here. First, the generation owner, Hydro-Quebec, is a Canadian utility that is directly interconnected with a number of United States utilities and already is selling its power at the Canadian-United States border at rates that are not subject to this Commission's regulation. Rejecting H.Q. Energy's application because of Hydro-Quebec's market shares would not prevent those sales. Allowing H.Q. Energy to transact at market-based rates, on the other hand, will allow purchasers of Hydro-Quebec resources to take delivery at somewhere other than the Canadian border at market-based rates. This also may facilitate purchases of Hydro-Quebec resources by customers not directly interconnected with Hydro-Quebec. Second, unlike the situation involving applicants that have domestic transmission-owning affiliates, we need not be concerned here about issues of market power over transmission-dependent customers. Any wholesale customer that is currently, or later becomes, transmission-dependent upon Hydro-Quebec is or will be located within Canada. Finally, we note that Hydro-Quebec, after the passage of legislation by the Province of Quebec, substantially restructured its operations and, among other things, adopted open-access transmission tariffs. 8/ These developments may, for example, facilitate the introduction into United States markets of otherwise-unavailable power from Canadian sources or assist United States suppliers in reaching new Canadian customers.

Accordingly, given the circumstances presented here, we find that we are able to accept H.Q. Energy's market-based rate proposal. However, we caution that our decision is based on the particular facts of this case and should not be interpreted in any way as indicating a change in the market shares that would be acceptable in other market-based rate cases or in merger cases. Moreover, given the market shares presented, we intend to carefully monitor H.Q. Energy's quarterly reports.

2. Other Barriers to Entry/Reciprocal Dealing

Vermont Intervenors allege that Vermont Gas Systems (Vermont Gas), an affiliate of H.Q. Energy, has refused to provide requested firm natural gas transportation service to the McNeil Generating Station (McNeil). H.Q. Energy responds that Vermont Gas currently does not provide firm transportation services to

---

8/ See May 9 Order, 79 FERC at 61,650, 61,652-53 (describing Quebec legislation and Hydro-Quebec open-access tariffs).

any customer. H.Q. Energy adds that providing firm transportation for McNeil depends upon an expansion of capacity and notes that Vermont Gas has informed Vermont Intervenors that it is willing to provide firm transportation service given sufficient time to install the required facilities. We conclude, therefore, that Vermont Intervenors' concerns are premature, because it does not appear at this time that the requested service in fact has been denied or offered on unreasonable terms.

Should, however, H.Q. Energy or any of its affiliates, including Vermont Gas, in the future deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor of H.Q. Energy in bulk power markets, then that electric competitor may file a complaint with the Commission that could result in the suspension of H.Q. Energy's authority to sell power at market-based rates. 9/

With that safeguard, we are satisfied that other barriers to entry and reciprocal dealing considerations are not of concern here.

3. Affiliate Abuse

The May 9 Order noted that H.Q. Energy had agreed to modify its proposed code of conduct in response to comments by Niagara Mohawk. 10/ In the July Supplement, H.Q. Energy urges that its proposed code of conduct be accepted without modification. Specifically, H.Q. Energy argues that no additional restrictions on the sharing of market information between it and Hydro-Quebec are necessary, because any such provisions would be for the benefit of Canadian ratepayers, whose protection is not this Commission's responsibility. On further consideration, we conclude that, notwithstanding Niagara Mohawk's comments, no modifications to H.Q. Energy's proposed code of conduct are

---

9/ See, e.g., Louisville Gas & Electric Co., 62 FERC ¶ 61,016 at 61,148 (1993).

10/ 79 FERC at 61,654.

required. 11/ Accordingly, we are satisfied that there are no concerns of affiliate abuse here.

C. Waivers, Authorizations and Reporting Requirements

H.Q. Energy requests the following authorizations and waivers of various Commission regulations consistent with those granted to other power marketers with market-based rate authorization: (1) waiver of the filing requirements of Subparts B and C of Part 35, except sections 35.12(a), 35.13(b), 35.15 and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101, and 141; (3) abbreviated filings with respect to interlocking directorates under Part 45; and (4) blanket authorization for issuances of securities and assumptions of liabilities pursuant to section 204 of the Federal Power Act (FPA), 16 U.S.C. § 824c (1994). We will grant the requested waivers and authorizations to the extent granted to other power marketers. 12/

Consistent with previous Commission decisions, we will require H.Q. Energy to file quarterly reports detailing the purchase and sale transactions undertaken in the prior quarter. This requirement is necessary to ensure that contracts relating to rates and services are on file as required by section 205(c) of the FPA, 16 U.S.C. § 824d(c) (1994), and to allow the Commission to evaluate the reasonableness of the charges and to provide for ongoing monitoring of the marketer's ability to exercise market power. 13/ As noted below, however, we will grant H.Q. Energy's request and require H.Q. Energy to report only those transactions that result in delivery of electricity to customers in the United States, and not sales to customers located in Canada.

11/ See British Columbia Power Exchange Corporation, 80 FERC ¶ 61,343 at 62,140 (1997) (Powerex) (noting that affiliate abuse concerns that arise in the context of captive Canadian ratepayers are beyond our jurisdiction). To the extent that Niagara Mohawk's comments on the July Supplement advocate revision of the Commission's generally-applicable requirements designed to prevent affiliate abuse in market-based rate applications by power marketers that are affiliated with utilities, this proceeding is not the appropriate forum for addressing such concerns.

12/ See, e.g., USGen Power Services, L.P., 73 FERC ¶ 61,302 at 61,847 (1995).

13/ See, e.g., Heartland Energy Services, Inc., 68 FERC ¶ 61,223 at 62,065-66 (1994).

We also will direct H.Q. Energy 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 include, but are not limited to: (1) ownership of generation 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. 14/ Alternatively, H.Q. Energy may elect to report such changes in conjunction with the updated market analysis that it will be required to file every three years. 15/

Additionally, consistent with our disposition of similar requests in Powerex, 80 FERC at 62,140-41, we will not require H.Q. Energy to file for Commission approval under section 205 of the FPA before selling power to or purchasing power from Hydro-Quebec or any other Canadian affiliate. We will grant H.Q. Energy's request that the requirements of section 203 of the FPA be limited to disposal by H.Q. Energy of jurisdictional facilities located within the United States with a value in excess of $50,000. We will grant H.Q. Energy's request regarding annual charges to the following extent: the Commission's annual charges to H.Q. Energy will be based on sales under the instant rate schedule, i.e., sales at wholesale in interstate commerce. Additionally, as stated above, H.Q. Energy will not be required to report on a quarterly basis sales in foreign commerce or within Canada.

Finally, as explained above, we will grant waiver of the 60-day prior notice requirement, 18 C.F.R. § 35.3(a) (1997), as requested by H.Q. Energy, to allow the proposed market-based rate tariff to become effective on July 23, 1997 (one day after the July Supplement was filed). 16/

14/ See, e.g., Morgan Stanley Capital Group, Inc., 69 FERC ¶ 61,175 at 61,695 (1994), order on reh'g, 72 FERC ¶ 61,082 (1995); InterCoast Power Marketing Co., 68 FERC ¶ 61,248 at 62,134, clarified on other grounds, 68 FERC ¶ 61,324 (1994).

15/ We reserve the right to require such an analysis at any time. See, e.g., Southern Company Services, Inc., 75 FERC ¶ 61,130 at 61,441-42 n.14, clarified on other grounds, 75 FERC ¶ 61,353 (1996).

16/ See, e.g., Central Hudson Gas & Electric Corp., 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

The Commission orders:

(A) The motion for late intervention of Tractebel is hereby granted.

(B) The late-filed Crees Comments and the H.Q. Energy Response are hereby accepted.

(C) The Supplemental Pleadings are hereby rejected.

(D) H.Q. Energy's market-based rate application is hereby accepted for filing, to become effective on July 23, 1997.

(E) H.Q. Energy's request for waiver of the 60-day prior notice requirement is hereby granted.

(F) H.Q. Energy's request for waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted.

(G) Within 30 days after the date of 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 H.Q. Energy should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., 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.

(H) Absent a request to be heard within the period set forth in Ordering Paragraph (G) above, H.Q. Energy is hereby authorized to issue securities and assume obligations and 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 H.Q. Energy, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(I) Until further order of this Commission, the full requirements of Part 45 of the Commission's regulations, except as noted, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving H.Q. Energy. 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.

(J) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of H.Q. Energy's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

(K) H.Q. Energy's request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted.

(L) H.Q. Energy is hereby directed to conform to the filing and reporting requirements specified in this order, including reporting only those transactions that result in delivery of electricity to customers in the United States. The first quarterly report of transactions undertaken by H.Q. Energy will be due within 30 days after the end of the calendar quarter ending December 31, 1997.

(M) H.Q. Energy is hereby directed to file an updated market analysis within three years after the date of issuance of this order, and every three years thereafter.

(N) H.Q. Energy is hereby 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. Alternatively, as discussed in the body of this order, H.Q. Energy may elect to report any such changes every three years with the updated market analysis filed pursuant to Ordering Paragraph (M) above. H.Q. Energy shall notify the Commission of which option it elects in the first quarterly report filed pursuant to Ordering Paragraph (L) above.

(O) H.Q. Energy is hereby informed of the following rate schedule designation: H.Q. Energy Services (U.S.) Inc., Rate Schedule FERC No. 1.

By the Commission.

(S E A L)

Lois D. Cashell

Lois D. Cashell,
Secretary.

82 FERC 61,234 (1998)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hebert, Jr.

H.Q. Energy Services (U.S.) Inc.) Docket No. ER97-851-002

ORDER DENYING REHEARING AND ORDER AUTHORIZING ISSUANCES OF SECURITIES AND ASSUMPTIONS OF LIABILITIES

(Issued March 11, 1998)

Introduction

The Grand Council of the Crees (of Quebec) and the New England Coalition for Energy Efficiency and the Environment (collectively, the Crees) have filed a joint request for rehearing of the Commission's order issued in this proceeding on November 12, 1997. 1/ In addition, the Vermont Public Power Supply Authority and Burlington Electric Department (collectively, Vermont Intervenors) have filed a motion to intervene and protest to the blanket approval of issuances of securities and assumptions of liabilities authorized in the November 12 order. As discussed below, we will deny the request for rehearing and authorize the issuance of securities and the assumption of liabilities.

Background

By order issued May 9, 1997, the Commission determined that H.Q. Energy Services (U.S.) Inc. (H.Q. Energy) had satisfied all of the Commission's criteria for market-based rates except for demonstrating that it and its Canadian utility affiliate, Hydro-Quebec, lack generation market power. 2/ Accordingly, the Commission directed H.Q. Energy to submit additional information and analysis on generation market power. H.Q. Energy subsequently provided such information in response to the Commission's May 9 order.

By order issued November 12, 1997, the Commission determined that H.Q. Energy had adequately supported its market-based rate

1/ H.Q. Energy Services (U.S.) Inc., 81 FERC 61,184 (1997).

2/ H.Q. Energy Services (U.S.) Inc., 79 FERC 61,152 (1997).

application and accepted for filing H.Q. Energy's proposed market-based rates. 3/ Although the Commission found that H.Q. Energy's market shares were higher than those in previously accepted market-based rate applications, the Commission analyzed whether other factors provided a basis on which to accept H.Q. Energy's application. The Commission found that there were several such factors present.

> First, the generation owner, Hydro-Quebec, is a Canadian utility that is directly interconnected with a number of United States utilities and already is selling its power at the Canadian-United States border at rates that are not subject to this Commission's regulation. Rejecting H.Q. Energy's application because of Hydro-Quebec's market shares would not prevent those sales. Allowing H.Q. Energy to transact at market-based rates, on the other hand, will allow purchasers of Hydro-Quebec resources to take delivery at somewhere other than the Canadian border at market-based rates. This also may facilitate purchases of Hydro-Quebec resources by customers not directly interconnected with Hydro-Quebec. Second, unlike the situation involving applicants that have domestic transmission-owning affiliates, we need not be concerned here about issues of market power over transmission-dependent customers. Any wholesale customer that is currently, or later becomes, transmission-dependent upon Hydro-Quebec is or will be located within Canada. Finally, we note that Hydro-Quebec, . . . substantially restructured its operations, and, among other things, adopted open-access transmission tariffs. These developments may, for example, facilitate the introduction into United States markets of otherwise-unavailable power from Canadian sources or assist United States suppliers in reaching new Canadian customers.

81 FERC at 61,810.

The Commission also provided, in the November 12 order, that any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by H.Q. Energy should file a motion to intervene or protest within 30 days after the date of issuance of the order. 4/ Absent a request to be heard within that period, H.Q. Energy would be authorized to issue securities and assume obligations

3/ 81 FERC at 61,808.

4/ Id. at 61,812.

and liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person. 5/

The Crees seek rehearing of the November 12 order. The Crees argue that the Commission erred in finding that H.Q. Energy's market-based rates are just and reasonable, given H.Q. Energy's market shares. Specifically, the Crees argue that the Commission's rationale for approving the market-based rates is flawed because: (1) the expansion of existing border-sales by H.Q. Energy does not justify overlooking H.Q. Energy's large market share; (2) transmission-dependent wholesale customers of Hydro-Quebec will not necessarily be located entirely within Canada; and (3) the approval of H.Q. Energy's market-based rate application will not facilitate introduction of Canadian power into United States markets. The Crees also argue that the Commission erred in its analysis of Hydro-Quebec's open access transmission tariffs. Finally, the Crees contend that the Commission ignored H.Q. Energy's affiliates and potential environmental harm.

Vermont Intervenors protest the Commission's blanket approval of the issuance of securities and the assumption of liabilities by H.Q. Energy. Vermont Intervenors contend that, given the market power concerns that are present in this case, the Commission should not pre-approve the financing of acquisitions of generating resources by H.Q. Energy. Accordingly, Vermont Intervenors request a trial-type, evidentiary hearing to examine whether an issuance of securities or assumption of liability undertaken by H.Q. Energy will be consistent with the public interest.

Discussion

A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 6/ Vermont Intervenors' timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. The Crees' Request For Rehearing

The Crees' primary argument is that the Commission cannot find that H.Q. Energy's market-based rates are just and reasonable, given H.Q. Energy's market shares. We disagree. We noted in the November 12 order that, under H.Q. Energy's market power analysis, Hydro-Quebec's market shares in 13 relevant markets ranged from 27.8 to 35 percent of the installed capacity

5/ Id.

6/ 18 C.F.R. 385.214 (1997).

and from 31.8 to 38 percent of the uncommitted capacity. We acknowledged that these market shares exceeded levels that the Commission has previously found acceptable. 7/ However, the Commission previously has explained that the 20 percent market share figure it has typically used in analyzing generation dominance is merely a benchmark rather than an absolute bright line, and that other factors must be considered. 8/ Given the circumstances presented in this proceeding, the Commission found that, on balance, H.Q. Energy met the Commission's generation dominance criteria for market-based rates. We disagree with the Crees' contention that this rationale is flawed.

The Crees argue that the potential expansion of existing cross border-sales does not justify overlooking H.Q. Energy's market shares. Contrary to the Crees' contention, the Commission did not overlook H.Q. Energy's market shares. Instead, the Commission cautioned that our decision was based on the particular facts of this case. In finding that market-base rate authorization was appropriate in this case, the Commission expressly recognized H.Q. Energy's market shares, but we also pointed out that one of several benefits which would mitigate H.Q. Energy's market shares is the opportunity for customers who desire to purchase Hydro-Quebec resources to take delivery at somewhere other than the Canadian border, as well as to facilitate purchases of Hydro-Quebec resources by customers not directly interconnected with Hydro-Quebec. 9/ We continue to believe that approval of H.Q. Energy's market-based rates will provide improved access and increased opportunities to purchase Hydro-Quebec power for United States customers who may not have had such ready access and such opportunities in the past.

7/ See, e.g., Southwestern Public Service Company, 72 FERC 61,208 at 61,966-67 (1995) (SPS), reh'g pending; Louisville Gas & Electric Company, 62 FERC 61,016 at 61,146 (1993).

8/ See, e.g., USGen Power Services, L.P., 73 FERC 61,302 at 61,844-45 (1995); SPS, 72 FERC 61,208 at 61,966-67; Southern Company Services, Inc., 72 FERC 61,324 at 62,406 (1995), order on reh'g, 74 FERC 61,141 (1996).

9/ We also noted that, even if we were to refuse to grant H.Q. Energy market-based rate authorization, we could not stop Hydro-Quebec from selling to United States customers at rates that were not subject to cost-based rate regulation but were instead market-based. The seller, Hydro-Quebec, is a Canadian utility and its power sales at the Canadian-United States border are not within our jurisdiction under sections 205 and 206 of the Federal Power Act. See 16 U.S.C. 824d, e (1994); see also 16 U.S.C. 824 (1994).

In the November 12 order, we also determined that we did not need to be concerned about issues of generation dominance as to transmission-dependent customers, because any wholesale customer that is currently, or later becomes, transmission-dependent upon Hydro-Quebec is currently or will be located within Canada. The Crees respond that, regardless of its present lack of ownership of United States transmission lines, Hydro-Quebec may in the future obtain contractual control of transmission lines and United States customers thus may become transmission-dependent on Hydro-Quebec. The Crees's concern is premature. The Crees do not allege that, at present, Hydro-Quebec owns or controls any United States transmission lines. Thus, it presently has no transmission-dependent United States customers. Any transmission dependent customers it may have are instead located solely within Canada, and are outside our concern. In any event, H.Q. Energy was directed in the November 12 order either 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 (expressly including, for example, ownership of transmission facilities); or alternatively, to report such changes in conjunction with the updated market analysis it is required to file every three years.

We also disagree with the Crees' argument that the approval of H.Q. Energy's market-based rate application will not facilitate introduction of Canadian power into United States markets, except to increase H.Q. Energy's United States sales. We continue to believe, as we explained in the November 12 order, that the adoption by Hydro-Quebec of open access transmission tariffs and the approval of market-based rates for H.Q. Energy will facilitate the introduction into United States markets of otherwise-unavailable power from Canadian sources and assist United States suppliers in reaching new Canadian customers.

With regard to the Crees' arguments relating to our treatment of Hydro Quebec's open access transmission tariffs, we note that these arguments previously had been raised and rejected. In the May 9 order, the Commission addressed the Crees' arguments concerning Hydro Quebec's open access transmission tariffs and concluded that the terms and conditions of transmission service provided were identical to the Commission's pro forma tariff in all material respects. 10/ The Crees did not seek rehearing of that order. Accordingly, the Crees may not at this point in time, on rehearing of the November 12 order, seek what can best be characterized as an out-of-time request for rehearing of the earlier May 9, order, 11/ or

10/ 79 FERC at 61,652-53.

11/ See, e.g., Century Power Corporation, 56 FERC 61,087 at (continued...)

alternatively make an impermissible collateral attack on the Commission's earlier May 9 order. 12/ In any event, the Crees have not made any new arguments or restated the arguments in any more compelling manner that would persuade us to change our prior determination.

The Crees also reiterate on rehearing that the Commission erred in its consideration of H.Q. Energy's affiliates -- particularly its natural gas affiliates. Contrary to the Crees' argument, the Commission addressed issues regarding barriers to entry and affiliate abuse. The Commission determined in the May 9 order, and reaffirmed in the November 12 order, that should any of H.Q. Energy's affiliates (including natural gas affiliates) deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor of H.Q. Energy in bulk power markets, then that electric competitor could file a complaint with the Commission that could result in the suspension of H.Q. Energy's authority to sell power at market-based rates. 13/ With that safeguard, we believe the Crees' concerns are adequately addressed.

Finally, the Crees assert that the Commission ignored evidence of significant environmental harm. In the November 12 order, the Commission declined to address issues outside the scope of this proceeding -- including environmental issues. 14/

The Crees' request for rehearing presents no basis to modify our earlier determination.

C. Blanket Approval of Issuances of Securities

In this order, notwithstanding the Vermont Intervenors' opposition, the Commission will grant the blanket approval for issuances of securities or assumptions of liabilities by H.Q. Energy. Section 204 of the Federal Power Act provides that requests for authority to issue securities and assume obligations

11/(...continued)
61,301 (1991); Borough of Weatherly, Pennsylvania, 32 FERC 61,398 at 61,892 (1985).

12/ See, e.g., City of Hamilton, et al., v. Kentucky Power Company, et al., 72 FERC 61,158 at 61,786 (1995); Public Service Company of Colorado, 63 FERC 61,253 at 62,695 (1993); Kanawha Valley Power Company, 56 FERC 61,202 at 61,821 (1991).

13/ 79 FERC at 61,654; accord, 81 FERC at 61,184.

14/ 81 FERC at 61,809 n.5.

or liabilities shall be granted if the Commission finds that such issuance or assumption:

> (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, . . . is necessary or appropriate for or consistent with proper performance by the applicant of service as a public utility and . . . will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes.

16 U.S.C. 824c(a) (1994). H.Q. Energy is a public utility subject to our jurisdiction. The Commission concludes that H.Q. Energy, like other power marketers, 15/ has demonstrated that it has met the requirements for blanket approval. The issuances and assumptions would be for a lawful object within H.Q. Energy's corporate purposes: to further H.Q. Energy's engaging in wholesale power marketing activities in the United States. They would be, moreover, "necessary, appropriate for, or consistent with" H.Q. Energy's proper performance as a public utility; they will aid H.Q. Energy in engaging in various wholesale power marketing activities in the United States. Finally, we conclude that the issuances and assumptions will not impair H.Q. Energy's ability to provide service. 16/

Vermont Intervenors contend that, given the market power concerns that are present in this case, the Commission should not pre-approve the financing of acquisitions of generating resources by H.Q. Energy. According to Vermont Intervenors, H.Q. Energy will likely need to finance an acquisition of generation and H.Q. Energy should be required, in a trial-type, evidentiary hearing, to demonstrate that any issuances of securities or assumptions of liabilities that are undertaken are consistent with the public interest.

Vermont Intervenors' concerns regarding the impact, if any, of issuances and assumptions that may be undertaken as a result of potential future generation acquisitions are vague and entirely speculative. Vermont Intervenors merely question what may occur in the future, e.g., whether H.Q. Energy will acquire

15/ See e.g., British Columbia Power Exchange Corporation, 80 FERC 61,343 at 62,140-41 (1997); Trans Alta Enterprises Corporation, 75 FERC 61,268 at 61,876 & n.7 (1996); Enserch Energy Services, Inc. 82 FERC 61,066 at ___ (1998); COM/Energy Marketing, Inc. 81 FERC 61,378 at 62,771 (1997).

16/ See, e.g., Baltimore Gas and Electric Company, 69 FERC 61,134 at 61,492 (1994), reh'g denied, 70 FERC 61,102 (1995).

generation, and whether H.Q. Energy will require financing. Since Vermont Intervenors cannot make any substantiated claims that H.Q. Energy will seek to acquire generation resources in the future, or that any such H.Q. Energy future generation acquisitions will necessarily result in issuances of securities or assumptions of liabilities (let alone that any such issuances or assumptions will harm Vermont Intervenors), we see no basis for setting this matter for a trial-type, evidentiary hearing. 17/ Accordingly, we are not persuaded that any action other than a grant of authorization is warranted. In any event, we note that in the November 12 order we reserved the right to modify our determination and require a further showing that the public interest would not be adversely affected by continued authorization of H.Q. Energy's issuances of securities and assumptions of liabilities, 18/ and we reaffirm that reservation of rights here. Accordingly, Vermont Intervenors may renew their concerns at a later date.

The Commission orders:

(A) The Crees' request for rehearing is hereby denied.

(B) H.Q. Energy is hereby authorized to issue securities and assume obligations and 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 H.Q. Energy, compatible with the public interest, and reasonably necessary or appropriate for such purposes, as discussed in the body of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

17/ See Consumers Power Company, 53 FERC 61,444, reh'g denied, 54 FERC 61,323 at 62,028-29 (1991), aff'd sub nom. Michigan Public Power Agency v. FERC, 963 F.2d 1574 (D.C. Cir. 1992). See also Citizens Utilities Company, 61 FERC 61,364 at 62,454 (1992).

18/ See 81 FERC at 61,812.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 1999 Decided January 11, 2000

No. 98-1280

The Grand Council of the Crees (of Quebec)
and
New England Coalition for Energy Efficiency and the Environment,
Petitioners

v.

Federal Energy Regulatory Commission,
Respondent

Hydro-Quebec
and
H.Q. Energy Services (U.S.) Inc.,
Intervenors

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

William Andrew Nelson argued the cause for petitioners. With him on the briefs were James A. Dumont, Leonard A. Busby, and Howard J. Bashman.

Larry D. Gasteiger, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were Jay L. Witkin, Solicitor, and John H. Conway, Deputy Solicitor.

Pierre F. de Ravel d'Esclapon was on the brief for intervenor H.Q. Energy Services (U.S.) Inc. in support of respondent.

Before: Edwards, Chief Judge, Williams and Rogers, Circuit Judges.

Opinion for the Court filed by Circuit Judge Williams.

Williams, Circuit Judge: H.Q. Energy Services (U.S.) Inc. ("H.Q. Energy") is a wholly owned subsidiary of Hydro-Quebec, an electric utility that owns and controls facilities for the generation, transmission and distribution of electric power in Quebec. In November 1997 the Federal Energy Regulatory Commission authorized H.Q. Energy to sell power within the United States at market-based rates rather than under the traditional cost-based rate ceilings. H.Q. Energy Services (U.S.) Inc., 81 FERC p 61,184 (1997) ("Order"). Petitioners, the Grand Council of the Crees (of Quebec) (the "Grand Council" or the "Crees") and the New England Coalition for Energy Efficiency and the Environment (the "Coalition"), sought rehearing; they argued mainly that H.Q. Energy and Hydro-Quebec had market power in the generation and transmission of electricity in the United States--market power that was insufficiently mitigated to permit the approval. The Commission denied the petition for rehearing, 82 FERC p 61,234 (1998) ("Rehearing Order"), and the Crees and the Coalition petitioned for review here. We dismiss the petitioners' appeal for want of standing.

* * *

Pursuant to s 205(c) of the Federal Power Act ("FPA"), 16 U.S.C. s 824d(c) (1994), a power marketer that seeks to

engage in electricity sales under the jurisdiction of the Federal Energy Regulatory Commission must place its rate schedule on file with the Commission. H.Q. Energy requested the Commission to accept for filing a rate schedule authorizing it to sell power at market-based rates.

In reviewing such applications, the Commission demands that the power marketer establish that it, and its affiliates, either do not have, or have adequately mitigated, market power in both generation and transmission. The applicant must also establish that it cannot erect barriers to entry, and that there is no evidence of other behavior perceived as anticompetitive, such as affiliate abuse or reciprocal dealing. See H.Q. Energy Services (U.S.) Inc., 79 FERC p 61,152 at 61,651 (1997).

In response to H.Q. Energy's application, several entities, including the Grand Council and the Coalition, moved to intervene. The Grand Council is a political and governmental entity, representing about 10,000 indigenous people of Northern Quebec. The Coalition is "an association of American consumers, customers, birders, recreational canoeists, energy activists and environmental organizations which has actively intervened in regulatory proceedings in Vermont since 1989."

The Commission initially addressed the issue of transmission, finding H.Q. Energy's market power adequately mitigated. 79 FERC at 61,653. Its approach was substantially similar to that which it applies to utilities owning transmission facilities within the United States, namely a requirement that the firm file an open access tariff, with adjustments to account for the different national context. Id. at 61,652. Here it found that H.Q. Energy mitigated adequately by submitting proposed transmission tariffs, to be enforced by Quebec's regulatory body, the Regie de l'energie, instead of FERC, and with Canadian rather than U.S. commercial law providing the relevant background rules. The Commission also found that H.Q. Energy satisfied its other requirements for market-based rates except for failing to provide the proper analysis of market power in generation.

H.Q. Energy then made a supplemental filing on generation. The Commission found that the firm's market shares, in the thirteen United States markets analyzed, would range from 27.8% to 35% of installed capacity, and from 31.8% to 38% of uncommitted capacity. 81 FERC p 61,184 (1997). These figures exceeded those of all applications for market-based rates that the Commission had previously accepted. But the Commission identified three factors that in its view adequately reduced the attendant risks. See id. at 61,810. In light of our holding on standing we need not explore these. In their petition for review, petitioners challenge the Commission's reasoning, and also allege that the Commission's failure to prepare an environmental impact statement was contrary to its duty under the National Environmental Policy Act ("NEPA").

* * *

Petitioners have failed to demonstrate standing to raise their claims. Although the claims arise under different statutes--and we address their standing to bring each claim in turn--they nevertheless both rest primarily on an allegation of environmental harm. The Grand Council alleges that the Commission's license will "devastate the lives, environment, culture and economy of the Crees." The Crees' reasoning is that H.Q. Energy's license to sell power at market-based rates will lead to an increase in Hydro-Quebec's exports, which will in turn lead to the construction of new hydro-electric facilities, which "will destroy fish and wildlife upon which Cree fishermen, trappers and hunters depend." The Coalition alleges an environmental harm one step further removed in the causal and geographic chain: many species of migratory birds that are found in New York and New England during parts of the year rely on the habitat of Northern Quebec; these birds, including one species that has been classified as endangered, are threatened by development of hydro-electric projects in that region.

We first consider petitioners' claims under the FPA. Although there are very serious doubts whether petitioners

have satisfied Article III standing, their more straightforward deficiency is in "prudential standing." Article III standing must be established before any decision is made on the merits. See Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1012 (1998). Under the Supreme Court's recent pronouncement in Ruhrgas AG v. Marathon Oil Co., 119 S. Ct. 1563 (1999), however, it is entirely proper to consider whether there is prudential standing while leaving the question of constitutional standing in doubt, as there is no mandated "sequencing of jurisdictional issues." Id. at 1570 ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits."). (We return to this issue later, when our reasoning on the substance of prudential standing has been made clear.)

To establish prudential standing, plaintiffs generally must show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). Because prudential standing is an invention of the courts, Congress has the power to dispense with the requirement by statute. See Bennett v. Spear, 520 U.S. 154, 163 (1997) ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated.").

Petitioners argue that here Congress has dispensed with prudential standing by providing that "[a]ny person ... aggrieved by an order issued by the Commission in a proceeding under this chapter" may apply to have the order reheard, 16 U.S.C. s 825l(a). Petitioners rely on FEC v. Akins, 118 S. Ct. 1777 (1998), in which the Court stated: "History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly--beyond the common law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." Id. at 1783. But the purpose of this pronouncement was evidently only to recognize "person aggrieved" as a congressional means of dispensing with traditional requirements of "legal right," see, e.g., Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940), for the Court went

on to cite standard applications of the "aggrieved" language to allow standing for competitors, see Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), or for obviously intended beneficiaries, see Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (allowing listeners standing to object to licensing of firm that regularly broadcast programs promoting racial segregation); Associated Indus. of New York State v. Ickes, 134 F.2d 694 (2d Cir. 1943) (allowing consumers standing to challenge order that fixes prices and prevents competition among sellers).

Petitioners also rely upon Bennett v. Spear, 520 U.S. 154 (1997), in which the Court, construing the Endangered Species Act of 1973 ("ESA"), expressed a "readiness to take the term 'any person' at face value." See id. at 164-65 (finding that the citizen-suit provision allowing that "any person may commence a civil suit" "negate[d] the zone-of-interests test (or, perhaps more accurately, expand[ed] the zone of interests)"). But the Court in Bennett emphasized the breadth of the ESA's "any person" formula compared to other "more restrictive formulations" that Congress had employed (rather like the "aggrieved" person language here), id. at 164-65, pointing to such statutes as the Clean Water Act, 33 U.S.C. s 1365(g) (defining "citizen" for purposes of the citizen-suit provision in s 1365(a) as "[any person] having an interest which is or may be adversely affected"), and the Ocean Thermal Energy Conversion Act, 42 U.S.C. s 9124(a) (providing that "any person having a valid legal interest which is or may be adversely affected may commence a civil action"). In addition, the Bennett Court noted that the subject matter of the ESA was the environment, "a matter in which it is common to think all persons have an interest," 520 U.S. at 165; this cannot be said of the FPA, even if environmental concerns played a role in motivating Congress to enact some of its portions.

Petitioners argue that even if the statute imposes prudential standing requirements, the harms they allege clearly fall

within the statute's zone-of-interests. The "zone" test is "not meant to be especially demanding," Clarke v. Securities Indus. Assoc., 479 U.S. 388, 399 (1987); in fact, a plaintiff who is not itself the subject of the agency action is outside the zone of interests only if its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Id. Petitioners rely on the Second Circuit's holding in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 616 (2d Cir. 1965), that "to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under s 313(b)." But the substantive authority exercised by the Commission and under review in Scenic Hudson was quite different, and seemed to invite environmental considerations. It had promulgated an order licensing the construction of a pumped storage hydroelectric plant under FPA s 10, 16 U.S.C. s 803(a), which requires that to be approved a project must be "best adapted to a comprehensive plan for improving or developing a waterway or waterways" for uses including "interstate or foreign commerce" as well as "other beneficial public uses, including recreational purposes." The court interpreted "recreational purposes" to encompass "the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites." Scenic Hudson, 354 F.2d at 614.

The order at issue in this case, however, merely allows H.Q. Energy to broker energy at market-based rather than cost-based rates. Although the Second Circuit found that environmental concerns motivated Congress in enacting the FPA, and are "undoubtedly" within the zone of interests protected when the agency acts to authorize construction, id., the agency here acts only in its ratemaking capacity. And as the Supreme Court has said, "the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question ..., but by reference to

the particular provision of law upon which the plaintiff relies." Bennett v. Spear, 520 U.S. at 175-76; see also Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990) ("[T]he plaintiff must establish that the injury he complains of ... falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."). Congress's purposes in enacting the overall statutory scheme are relevant only insofar as they may help reveal its purpose in enacting the particular provision. See Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1998). We thus focus on the provision under which the Commission acted here, s 205(a) of the Federal Power Act, which controls the Commission in its exercise of ratemaking authority:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable....

16 U.S.C. s 824d(a).

In interpreting the statutory provision, "just and reasonable," the Supreme Court has emphasized that "the Commission [is] not bound to the use of any single formula or combination of formulae in determining rates." FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944). But the Court has articulated the interests that must be protected through such a determination: "[T]he fixing of 'just and reasonable' rates[ ] involves a balancing of the investor and the consumer interests." Id. at 603. Both interests are economic and tied directly to the transaction regulated: "the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated," id., while there is a "consumer interest in being charged non-exploitative rates." Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1178 (D.C. Cir. 1987). Where (as here) the grant of ratemaking authority stems from congressional concern over market power (which justifies the agency's relaxing its grip when

such power is absent), see, e.g., Tejas Power Corp. v. FERC, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment."), the object may be stated as to set "prices equal to those that the firm would set if it did not have monopoly power; that is, to replicate a 'competitive price.' " Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein & Matthew L. Spitzer, Administrative Law & Regulatory Policy 228 (4th ed. 1999). Unsurprisingly, the Supreme Court has never indicated that the discretion of an agency setting "just and reasonable" rates for sale of a simple, fungible product or service should, or even could, encompass considerations of environmental impact (except, of course, as the need to meet environmental requirements may affect the firm's costs).

Following the judicial lead, the Commission has affirmatively forsworn environmental considerations. In PSI Energy, Inc., 55 FERC p 61,254 (1991), it reviewed an interconnection agreement and rates to be charged thereunder. Certain petitioners raised various "siting, health, safety, environmental [and] archaeological problems" associated with the line through which the power would flow, but the Commission said that such factors were "beyond the Commission's authority to consider under sections 205 and 206 of the Federal Power Act." Id. at 61,811. "In a case such as this one, the Commission's authority is limited to review of the rates, terms and conditions of jurisdictional agreements to ensure that they are just and reasonable and not unduly discriminatory or preferential." Id.; see also Monongahela Power Co., 39 FERC p 61,350 at 62,096 (1987) ("Congress has not granted the Commission authority to reject rate filings on environmental grounds.").

The Commission's understanding of its duty under s 205(a) leads us toward a resolution of the zone-of-interests test. The test embraces interests " 'arguably ... to be protected' by the statutory provision at issue," National Credit Union

Admin. v. First Nat'l Bank & Trust Co., 118 S. Ct. 927, 935 (1998) (quoting Data Processing, 397 U.S. at 153), which in turn is inherently linked to the question of what interests the statute actually protects. Thus, if the Commission's view of s 205(a) is valid, it would appear that persons asserting interests excluded under that view could be "arguably" within the requisite zone only if those interests were so congruent with actually protected interests as to make their possessors "suitable challenger[s]" of the agency's purported exercise of its authority. Mova Pharmaceutical Corp., 140 F.3d at 1075. Thus, the petitioners are outside the relevant zone of interests if (1) FERC's refusal to consider environmental issues under s 205(a) is valid, and (2) environmental interests are not "congruent" with the issues that are pertinent under s 205(a).

FERC's exclusion of environmental claims is valid. In the face of congressional silence we defer to an agency's reasonable interpretation of statutes it is charged with administering. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 (1984). Although rates have environmental consequences (increases in the price of electricity, for instance, may at the margin lead to substitution of fuel oil), it seems pointless to weave such issues into setting "just and reasonable" rates for electric power. The environmental issues posed by construction and operation of energy facilities will invariably be reviewed under other provisions; if those reviews (or other forces such as liability risks or firm commitment to environmental quality) cause the utility to incur costs, such costs would feed into the Commission's normal rate calculation. See Iroquois Gas Transmission System, L.P. v. FERC, 145 F.3d 398 (D.C. Cir. 1998) (remanding to the Commission for a finding whether utility's legal defense costs resulting from a federal investigation into environmental violations were "prudently incurred," and thus could be included within the rate base); cf. NAACP v. Federal Power Commission, 425 U.S. 662, 668 (1976) (finding that the Federal Power Commission was authorized to exclude from rates those costs that result from discriminatory practices of regulatees, just like "any other illegal, duplicative, or unnecessary labor costs"). Be-

yond that, additional focus on environmental elements would seem to complicate an already complex process, with little or no offsetting benefit to the public. So, at least, FERC could reasonably decide.

Petitioners driven by environmental interests might still be "suitable challengers" if their interests were "congruent" with the pertinent interests. But ratemaking under s 205(a) is, as our cases have made clear, an effort to balance the interests of power consumers and producers. Environmental interests appear orthogonal to both. Thus litigation by persons whose interests are such is "more likely to frustrate than to further ... statutory objectives," Mova Pharmaceutical Corp., 140 F.3d at 1075, and they are not the appropriate parties to "police the interests that the statute protects," id. Hence we find that the environmental interests of the petitioners are insufficient to afford them prudential standing to press their claims under s 205(a) of the FPA.1

For the Coalition, environmental impacts are not the sole basis for asserting claims that the Commission misapplied s 205(a). Its members, residents of New York and Vermont, are also power consumers. (The Coalition does not say that they buy power originating with H.Q. Energy or Hydro-Quebec, a possible deficiency in their Article III standing.) But the Coalition does not claim that FERC's Order will directly injure them as power buyers, as might be the case in the normal interstate transaction. Even without the marketing order Hydro-Quebec is entitled to sell into border

---

1 We do not consider the further question whether environmental injuries experienced abroad by foreign nationals (e.g., the Crees) are ever within the zone of interests of federal statutes. Compare Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991) (finding that Canadian workers, affected by the loss of sales due to the EPA's ban on asbestos, pursuant to the Toxic Substances Control Act, did not have standing to challenge the action because of the Act's "national emphasis").

states--as it concededly has been doing--without any subjection to FERC ratemaking. See Rehearing Order, 82 FERC at 61,898 n.9. Rather, the Coalition argues only that the Order will preempt state regulation of which its members have hitherto been beneficiaries. Vermont, for instance, currently subjects all significant wholesale purchases of out-of-state power by Vermont utilities to a prudency determination. See 30 Vt. Stat. Ann. tit. 30, s 248(a)(1) (1998).

The Coalition's fear that such state regulation would be preempted is unfounded. The Federal Power Act explicitly provides that state regulation of energy sold between a state and a foreign country is only preempted when it conflicts with the Commission's statutory requirements relating to the export of energy. See 16 U.S.C. s 824a(f). State regulation of imports does not present such a conflict, and therefore would not be preempted by the Order at issue here. Thus, this additional interest does not even constitute an "injury-in-fact," necessary for Article III standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

* * *

We now turn to petitioners' NEPA claim. Their alleged injury, once again, is to their environmental interests; the Commission's failure to perform an environmental assessment made its grant of the Order more probable, thus increasing the likelihood of their suffering the environmental injuries that they claim. See Lujan, 504 U.S. at 572-73 nn.7 & 8. Once again we find that petitioners have not demonstrated prudential standing.

This of course turns on the purposes of the provision that petitioners invoke--NEPA's requirement that agencies include an environmental impact statement ("EIS") with every "major Federal action[ ] significantly affecting the quality of the human environment." NEPA s 102(2)(C), 42 U.S.C. s 4332(2)(C). The requirement is said to serve at least two congressional purposes. First, it ensures that the agency will have access to "detailed information concerning significant environmental impacts." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). Second, it serves the "informational role" of assuring the public "that the agency

'has indeed considered environmental concerns in its decision-making process,' " id. (quoting Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 97 (1983)) and, "perhaps more significantly, provid[ing] a springboard for public comment." Id.

Looked at broadly, the EIS requirement obviously seeks to protect environmental interests. United States v. Students Challenging Regulatory Agency Procedures ("SCRAP"), 412 U.S. 669, 686 n.13 (1973). Much as in the case at hand, petitioners in SCRAP challenged a ratemaking on the basis that the agency did not prepare an EIS, and the Court found prudential standing. Id. The case was decided, however, prior to several cases making clear that s 102(2)(C) is a purely procedural requirement that "does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed--rather than unwise--agency action." Robertson, 490 U.S. at 333; see also Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 228 (1980) (holding that the agency merely had to "consider[ ] the environmental consequences of its decision" but that "NEPA requires no more"); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

Because s 102(2)(C) does not impose any additional substantive requirements on FERC, but merely serves to ensure that FERC consider those environmental concerns that it is already authorized to consider, the zone-of-interests of the EIS requirement can be examined only in conjunction with the relevant substantive provision. Because we have decided that the Commission properly does not consider environmental concerns in the exercise of its ratemaking authority under FPA s 205, NEPA's procedural requirements (if they even apply to FERC's ratemaking decisions, which we do not decide) do not further petitioners' environmental interests in this instance. Accordingly, given the absence of any allegation by petitioners of an "informational injury," compare FEC v. Akins, 118 S. Ct. at 1786, they are not "suitable challengers" of FERC's failure to prepare an EIS. Mova Pharmaceutical Corp., 140 F.3d at 1075. We thus find that the petitioners' environmental interests are not within

s 102(2)(C)'s NEPA's zone-of-interests as applied to FPA s 205.

We stress that although our decision here has involved an interpretation of FPA s 205(a) and NEPA s 102(2)(C), we do not purport to decide the merits of the case--in particular petitioners' claim that FERC violated NEPA by refusing to perform an environmental assessment and, in the alternative, that even if FERC's regulation, 18 CFR s 380.4(a)(15) (1996), provides a valid categorical exclusion for all electric rate filings pursuant to FPA s 205, the agency cannot rely on this justification without having invoked it during the proceedings. To the extent that we have broached merits issues concomitant to resolving prudential standing, Steel Co. clearly contemplates that courts may do so even before resolving Article III standing. It explicitly notes that "a statutory standing question can be given priority over an Article III question," 118 S. Ct. at 1013-14 n.2, and even justifies the occasional deciding of merits questions before statutory standing questions on precisely the grounds that the two may overlap:

> The question whether this plaintiff has a cause of action under the statute, and the question whether any plaintiff has a cause of action under the statute are closely connected--indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two.

Id. Unlike the "doctrine" or practice of "hypothetical jurisdiction," which Steel Co. emphatically rejected, such treatments of prudential standing do not carry a risk of plunging a court into issuing advisory opinions. Id. at 1016; see also United States ex rel. Long v. SCS Business & Technical

Institute, Inc., 173 F.3d 890, 896 (D.C. Cir. 1999), modifying, 173 F.3d 870 (D.C. Cir. 1999).

Accordingly, the petition is

Dismissed.